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OF
LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

DOWN.—See note 1.

DOWRY.—In the civil law and that of *Louisiana*, “the effects which the wife brings to the husband to support the expenses of marriage.”²

DRAFT.—An order for the payment of money drawn by one person on another.³

The act or fact of drawing money by a depositor from the funds of a bank.⁴ An allowance to a merchant in laying a duty when it is ascertained by weight, to insure good weight to him.⁵

1. **Keep Down the Interest.**—“The expression, ‘keeping down interest,’ is familiar in legal instruments, and means the payment of interest periodically as it becomes due, and not the payment of all arrears of interest which may have become due on any security from the time when it was executed.” Where a turnpike act directed that moneys received should be applied first “in keeping down the interest of the principal moneys,” and in repairing the turnpike, and “lastly, in repaying the principal moneys,” the payment of interest was a legitimate appropriation of the funds, though the road was out of repair, but not so the payment of the arrears of interest, which must be provided for in the same way as the payment of the principal. *The Queen v. Hutchinson*, 4 El. & Bl. 200.

Knock Down.—“In common parlance and in the language of the auction-room, property is understood to be ‘struck off’ or ‘knocked down’ when the auctioneer, by the fall of his hammer or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his

bid, according to the terms of the sale.” *Sherwood v. Reade*, 7 Hill (N. Y.), 439.

2. *Buard v. De Russy*, 6 Rob. (La.) 111; *Gates v. Legendre*, 10 Rob. (La.) 74; *De Young v. De Young*, 6 La. Ann. 786.

It “is that which the wife gives the husband on account of marriage, and is a sort of donation made with a view to his maintenance and to the support of the marriage.” *Cutter v. Waddingham*, 22 Mo. 254.

3. *Bouv. Law Dict.*; *Prehm v. State* (Neb.), 36 N. W. Rep. 295. It is *nomen generalissimum*, including all such orders. *Wildes v. Savage*, 1 Story (C. C.), 22; *Rapalje & L. Law Dict.*

It is used as a synonym of bill of exchange. *Cole v. Dalton*, 6 Daly (N. Y.), 484.

4. *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314.

5. *Napier v. Barney*, 5 Blatchf. (C. C.) 191. It is to compensate for any loss that may occur from the handling of the scales in the weighing, so that when weighed the second time the article will hold out good weight.

DRAINS AND SEWERS. (See also WATER AND WATER-COURSES.)

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1. **Definition.**—The word “drain” has no technical or exact meaning.¹ As generally understood, it means any artificial channel or trench through which water or sewage is caused to flow from one point to another. As generally used and understood in law, the term “sewers” has reference to the underground canal or passage by means of which cities are drained and the filth and refuse liquids are carried to the sea, river, or other place of reception.²

2. **Public Drains—Legislative Power Concerning.**—A. GENERALLY.—Laws pertaining to the drainage of lands, and having in view either the preservation of the public health or the reclamation of lands, have been enacted in perhaps every State in the Union, and when brought before the courts have very generally been upheld.³ The objects contemplated by legislation of this character fall unquestionably within the range of legitimate legislative action; and when the courts have interfered and pronounced unconstitutional a drainage act, it has been usually because of the omission of provisions deemed necessary for the proper protection of those who are subjected to the operation of the law.

Sometimes the objection is made that the act authorizes an appropriation of land for the purpose without just compensation

1. *Goldthwait v. Inhabitants of East Bridgewater*, 5 Gray (Mass.), 61.

Webster defines it as “that by means of which anything is drained; a channel; a trench; a watercourse; a sewer; a sink.”

2. A sewer is defined by Callis (*Callis Sewers*, 54) as “a fresh-water trench compassed in on both sides with a bank, and is a small current or little river.” While Webster says it is “a drain or passage to convey off water and filth underground; a subterraneous canal, particularly in cities.”

In *Bennett v. New Bedford*, 110 Mass. 433, it was held that the word “sewer” in the city charter may apply to an underground structure for conducting the waters

of a natural stream, as well as to one used exclusively for the surface flow.

3. *Donnelly v. Decker*, 58 Wis. 461; s. c., 46 Am. Rep. 637; *Hagar v. Reclamation District 108*, 111 U. S. 701; *Shelley v. St. Charles Co.*, 17 Fed. Rep. 909; *Wurts v. Hoagland et al.*, 114 U. S. 606; *Reeves v. Treasurer Wood Co.*, 8 Ohio St. 333; *Davidson v. Board of Admrs. New Orleans*, 6 Otto (U. S.), 97; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Coomes v. Burt*, 22 Pick. (Mass.) 422; *French v. Kirkland*, 1 Paige (N. Y.), 117; *Seely v. Sebastian*, 4 Or. 25; *O'Reiley v. Kankakee Val. Draining Co.*, 32 Ind. 169; *Hagar v. Supervisors of Yolo Co.*, 47 Cal. 222; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Blake v. People*, 109 Ill. 504.

being made ; but perhaps the cause most frequently assigned for disputing the constitutionality is that the assessments for the cost are not restricted to the amount of the special benefits to be derived from the proposed work.¹

1. In *Tide Water Co. v. Coster*, 3 C. E. Greene (N. J.), 518; s. c., 90 Am. Dec. 634, the act in question created a corporation to assist in draining the tide-water marshes adjoining Newark Bay, and provided for an appointment by a justice of the supreme court of three commissioners, who were empowered to contract with the Tide Water Co. for the performance of the work; and the act provided also that the funds necessary to pay this contract price should be raised by said commissioners by assessing upon the "lands so reclaimed a just proportion of the contract price, and of the expense of said commission."

The act was held unconstitutional because it did not restrict the assessments to the value of the benefits conferred upon the land-owners. Beasley, C. J., in rendering the opinion of the court, says: "That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated is to reclaim and bring into use a tract of land covering about one fourth of the county of Hudson and several thousand acres in the county of Union. . . . It is difficult from the great expense to build roads across it. . . . To remove these evils and to make this vast region fit for habitation and use seems to me plainly within the legitimate province of legislation; and to effect such ends I see no reason to doubt that both the prerogatives of taxation and of eminent domain may be resorted to. . . . I have no difficulty, therefore, in concluding that the legislature was fully authorized to adopt measures to accomplish the general design embraced in this act. . . . It is one of the legislative prerogatives to decide the important question whether an enterprise or scheme of improvement be of such public utility as to justify a resort for its furtherance to the exercise of the power of taxation or eminent domain. . . .

"But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: no provision is made for the indemnification of the owner of the land subjected to the operation of this law in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lands,

whether such expense falls below or rises above the increase in value which may accrue to the land by reason of such drainage. In other words, the cost of the enterprise is to be imposed as a burden on the lands, even though a full equivalent in the way of improvement shall not be given the land-owner. Now, therefore, it seems to me obvious that if this scheme be carried into effect, in the event of an excess of expenses over benefits private property *pro tanto* will be taken for public use without compensation. Where lands are improved by legislative action on the ground of public utility, the cost of such improvement, it has frequently been held, may to a certain degree be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage."

The validity of an act authorizing commissioners to enter upon and appropriate lands of individuals for the purpose of draining a swamp came in question in a New York court. *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166. The particular provisions are not given, but the objection was made that it was a violation of the constitutional inhibition against taking private property, because, first, it is not taken for a public use; and, second, because no just compensation is provided for the parties whose property is taken. The first objection the court refused to sustain, but the second was held to be well taken, and on that ground the act was declared void. In the opinion by Bacon, J., it is said: "In the case of draining an extensive swamp, we can readily conceive that the public health may be favorably affected throughout a wide region within and bordering upon the district where the work is carried on; and it surely is for the public benefit that a large tract of land should be reclaimed from the condition of a useless morass and added to the agricultural resources of the State. . . . I shall find no difficulty in maintaining it as the lawful exercise of the right of eminent domain, and holding that the taking of the lands of these plaintiffs, so far as it was necessary to enter upon and appropriate them for the purpose intended in this case, was and is a lawful taking of the same for public use. . . .

"By the third section it is made the duty of the commissioners to assess the costs and expenses of the survey and the cutting

of the ditches, and to apportion the amount among the several owners of the lands to be drained, according to the number of acres respectively owned by each. This provision, it will be seen, devolves the whole expenses upon the parties owning the land to be drained, and that not in the ratio of relative benefits, but simply upon a property basis, and by an equal assessment upon every acre throughout the swamp. The rule is highly objectionable in respect to the mode of providing for the expenses, but is probably within the scope of the legislative discretion, as one form of the exercise of the taxing power. . . .

"The effect of the provision is to make the damages or compensation to be collected and payable precisely as the expenses are, to wit, by assessing the same upon the owners of the land according to the number of acres owned by each. . . . By the operation of this section the owner not only loses his land, but is compelled to pay a portion of the very damages he has sustained by such loss, and the other consequential injuries he may have suffered thereby. It is incredible that every owner of land in the swamp will suffer equal injury and receive equal benefit from the work in question. This clearly is no just compensation, but a most inequitable distribution of the burthens, which ought to be in some proximate proportion to the benefit."

In *Cypress Pond Draining Co. v. Hooper et al.*, 2 Metc. (Ky.) 350, the act in question created the corporation, and authorized it to drain and keep drained the lands within certain described boundaries, at the costs of the owners of the lands within such boundary, and to collect a tax on each acre, not exceeding twenty-five cents per acre, for ten years. The corporate boundary contains 14,621 acres owned by 68 persons; 34 of these, owning 5975 acres, had no agency in the passage of the act and no notice of the application therefor, gave no assent to its provisions, and a very small portion of whose lands, if any, will be benefited or improved in value by the proposed draining; and they file a petition in equity, in which they sought to enjoin the company from enforcing the tax. *Held*, that as to them the act was unconstitutional, inoperative, and void. Duvall, J., in the opinion, after holding the corporation strictly a private one, and that its objects and purposes do not even partake of a public nature, but are confined exclusively to the private interests of the persons subjected to its operation, says: "It is clear that upon the facts established by the proof, that the operation and effect of the act incorporating this company, or

whatever may have been the object of those who procured its passage, is to appropriate the property of the appellees without their consent to the use of other private individuals merely; that a burthen has been imposed upon the appellees without any view to their interest in the objects to be accomplished by it; that it was a case of palpable and flagrant inequality in the burthen as imposed upon the persons and property included within the corporate boundary, and that the appellees are subjected to a local burthen for the private benefit of others, and for purposes in which they have no appreciable interest, and to which they are therefore not justly bound to contribute."

In a recent case in *Iowa*, *Fleming v. Hall*, 35 N. W. Rep. 673, the supreme court of that State refused to sustain an act which provided that "whenever any person shall desire to construct any tile or other underground drain through the land of another, and he shall be unable to agree with the owner or owners of such land as to the same," certain "trustees may fix the point or points of entrance and exit or outlet of said . . . drain on said land, the general course and size and depth of the same, . . . what compensation, if any, shall be made therefor; . . . and said finding [by the trustees] shall be final, except as to the amount of damages, if any such shall be awarded."

While conceding the right of the legislature to provide generally for the drainage of lands, the court pronounced this particular act unconstitutional, on the ground that it authorized the taking of private property without due process of law—a taking of private property for a private purpose without the consent of the owner.

Particular stress was laid upon the fact that the act authorized the trustees to appropriate land for the right of way without any showing beyond the mere desire of a single individual. Seevers, J., in rendering the decision, says: "If lands are swamp, marsh, or wet, disease may be engendered; the public health may require that they should be drained if necessary, and such drain may be constructed through the lands of others. Such a statute has been in force in this State for several years. . . . It may be further conceded, for the purpose of this case, that if the land is swamp, marsh, or wet, and the proper cultivation requires, it may be drained through the lands of others, provided compensation is made for the damages sustained. There are well-considered cases which hold that this may be constitutionally done when there are large tracts of such land; and

possibly it is within the discretion of the legislature to determine the size or extent of the tracts that may be so drained, and that such determination is conclusive. It will be observed the statute in question does not contemplate lands which are swamp or wet, but that any person who may desire to do so may, by pursuing the statutory mode, be authorized to construct a drain through the land of another. He is not required to establish that what he desires is reasonable or proper, or that his lands are swamp or wet. . . . It is true the trustees are required to determine, it may be assumed, whether the drain shall be constructed; but it does not in terms so provide. Conceding this, however. . . . The statute, therefore, provides that the trustees have the power to finally determine that one person may lawfully enter on the land of another, and dig up the soil, lay a drain, and perpetually maintain it. It would seem, therefore, that the plaintiff has been deprived of a right to use his property as he deems best, and that a burden is cast upon him without a trial by jury, to which he is entitled by the constitution."

A dissenting opinion by Beck, J., maintains that the land is not taken; that the surface of the land may be disturbed in the construction, but when complete, the drain in no way interferes with the use of the land by the owner; and he further argues that if it is taken, it is taken for a public use.

A statute somewhat similar was upheld by the supreme court of Oregon, *Seely v. Sebastian*, 4 Or. 25. It provided that "any person whose land is so situated that it requires draining, and when any person or persons owning lands adjacent thereto object to ditches being dug or cut on their land, may make application in writing to the county court of his county . . . for the right of way, etc., and privilege to cut a ditch," etc. Replying to the objection that it provides for taking private property for private and not for public use, the court says: "We think there is nothing in this point. By public use is meant for the use of many, or where the public is interested."

A *Nebraska* act providing that "any number of persons not less than three, being owners of land wet or liable to be overflowed," may organize a company for the purpose of draining the same; and providing further for the appointment of three appraisers, who shall assess the benefits along the line of the drain, and authorizing the company to appropriate any land necessary for the right of way,—was held invalid, because it was said to authorize an entry upon lands and construction of

drains whenever the private interests of the corporation require it, and without reference to the public welfare. *Jenal v. Green Island Drain Co.*, 12 Neb. 163.

The supreme court of New Jersey—*Kean v. Driggs Draining Co.*, 45 N. J. 91—pronounced a drainage act unconstitutional, on the ground, first, that it committed to a private corporation which the act created the right to elect whether it would drain lands without the consent of the land-owners and at their expense; second, that the enterprise was in the nature of a private venture for private emolument, and would not justify the exercise of the State's right of taxation or eminent domain; third, because the act does not restrict the aggregate of the assessments which are to be levied on the land-owners to the amount of benefit to be conferred by the proposed work. In the opinion it is said: "The distinction is clearly drawn between meadow drainage for the exclusive benefit of the owners, to be done at their sole expense, and drainage undertaken by the public primarily as a matter of public concern, in which case the assessment upon land-owners must be limited to benefits imparted.

"The act which gives rise to this contention differs from the meadow act in the material respect, that there the work is promoted exclusively for the benefit of the land-owners, and cannot be undertaken except upon application of some of the land-owners to be affected by it. Here an artificial person created by the act, having no interest in the scheme other than what it can make out of its execution, is vested with full power to initiate the proceedings without the consent of those most deeply concerned in it. It is an intervention by the State through the exercise of its power to tax, and its eminent domain, to be justified only by public necessity or convenience."

In *Lee v. Ruggles*, 62 Ill. 427, a drainage assessment was held to be illegal under the act of 1859, for the reason that a sufficient sum was required to be levied upon the lands to complete their drainage, not exceeding fifty, forty, and thirty cents per acre, in respective classes, without any regard to whether the lands were benefited to the extent of the tax or not.

In *People v. Parks*, 58 Cal. 624, an act to promote drainage was held to be imperfectly framed, and void. Also in *Doane v. Weil*, 58 Cal. 334.

Secs. 4282 and 4307 of the R. S. of 1881 (Indiana) was pronounced unconstitutional in *Tyler, etc., v. State ex rel. Wilson*, 83 Ind. 563; and *Campbell v. Dwiggins*, 83 Ind. 473.

The authority of the legislature to enact these drainage laws, so called, is by some courts said to be derived from the police power of the State.¹ Others have upheld them as a valid exercise of the eminent domain;² while others still maintain that they should be tested by the rules and principles governing the exercise of the taxing power.³

B. UNDER THE POLICE POWER.—Whether in exercising this power for this purpose the legislature may impose upon the owners of lands supposed to be benefited by the drainage the entire cost of the same, without regard as to whether such cost exceeds or falls short of the benefits conferred, is not clear. It is well settled that

The New Jersey Drainage Act of 1871 was so amended in 1874 as to authorize the commissioners before the completion of the work to assess the expenses for drainage on the lands benefited or intended to be benefited.

An objection was made by certain land-owners to the assessments made upon their lands under this amendment, and from the testimony it was doubtful whether their lands would be appreciably benefited by the contemplated scheme for drainage. The court held that while the original act was a scheme for the public good, and the rights of eminent domain and taxation might be employed in the execution of its purpose, yet special assessments upon the lands of individuals for drainage under this supplement could be made only where the benefit is actually received or demonstrably certain; and where it is shown that the intended benefits are speculative and doubtful, the lands of objectors could not be assessed.

In *Matter of Drainage along Pequest River*, 39 N. J. L. (10 Vroom), 433, in the opinion by Scudder, J., it is said: "That the legislature has the power to enforce the improvement of such lands, not for the advantage of the owners only, but for sanitary ends, and for the public good, in adding to the area of tillable and productive soil, is well established. . . . That the legislature have the right to determine the public utility of such schemes, and in their execution to employ the right of eminent domain and of taxation, was expressly decided in *Tide Water Co. v. Coster*. The act of March 8th, 1871, was approved in its general principles in *Matter of Drainage of Lands in Lower Chatham*, 6 Vroom (N. J.), 497. . . . The radical defect of this section in my judgment is that land-owners may be assessed for intended benefits which will never be realized. The work may never be completed, or if completed may not benefit their lands. The result may be that they will be compelled to pay for the experiment of the projectors, and

for speculative or visionary benefits. .

It has been settled that special assessments for improvements must not exceed the benefits conferred. And where there are no benefits there can be no special assessments. Mere speculative benefits are not, in reality, benefits. . . . The consequence may be that these objectors will be compelled to pay for expenses incurred against their will where no benefits are received. The projectors of this drainage have no right to impose this burden on the land-owners. A contribution toward the expenses of draining these meadows can only be legally demanded where the benefit is actually received or demonstrably certain. . . . But as the assessment made under the second section of the supplement of 1874 may result in taking private property without compensation, it is void, and the assessments made against these objectors by its authority is set aside."

1. "The citations we have made clearly derive the authority from the power existing in the legislative department commonly called the police power." *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Donnelly v. Decker*, 58 Wis. 461; s. c., 46 Am. Rep. 637.

2. "The power of the legislature to enact these drainage acts has been put by some courts on what is said to be the more economical management of property of persons whose lands adjoin, or which for some reason can be better managed and improved by some joint operation. . . . We do not wish to rest on such a proposition. It is better, we think, to place it on the right to take private property for public use, making due compensation therefor, and to declare that to take for the maintenance and promotion of the public health is a public purpose." *Matters of Ryers et al.*, 72 N. Y. 1; *Hartwell v. Armstrong*, 19 Barb. N. Y. 166.

3. *Reeves v. Treasurer*, 8 Ohio St. 333; *French v. Kirkland*, 1 Paige (N. Y.), 117.

under the taxing power the authority of the legislature to levy special assessments for this purpose is limited not only to the property which is actually benefited by the drainage, but also to the extent of such benefits; and if the legislature attempts to go beyond this, under its power of police, it would seem to be such an unnecessary and unreasonable exercise of the power as would justify the interference of the court. A distinction is made, however, between an exaction demanded under the police power and one made under the taxing power, though the proceedings may be the same in the two cases.⁴

Without a statutory enactment the owner of such lands is under no obligation to drain them, no matter how injurious to others his neglect to do so may be. The reason is said to be that this is not in the legal sense a nuisance. Before it can become a legal nuisance, the act of man must have contributed to its existence. The moment, however, anything is done by the owner which increases or varies the injurious effects, there is then a legal nuisance upon his premises which exists by his wrong, and which he may be compelled to abate.⁵

Again, it is said by Judge Cooley: "If these may be drained at

4. Cooley on Taxation, p. 396.

Chapter 54 of the R. S. of *Wisconsin* provides for the construction of drains on the application of six or more freeholders, one of whom shall be the owner of land through which the proposed drain must be cut, when in the judgment of the town supervisors they are demanded by or will conduce to the public health or welfare; and further provides for the payment of the damages sustained by the owners of the land across which they are constructed; and that the whole cost of such construction, including such damages, shall be assessed upon the lands directly benefited thereby.

This was upheld as a valid exercise of the police power, on the ground of the preservation of the public health. It will be noticed that the whole cost of such drainage; under this act, is to be apportioned upon the several tracts of land benefited in proportion to the benefits to be derived; and it was said in the opinion by Orton, J.: "The tax or assessment, whatever it may be called, beyond the actual benefits, is arbitrary, and according to the rule of uniformity is unequal, as it ought to be borne by all citizens of the town alike: because beyond the actual benefits, any other person in the town receives a corresponding benefit, and is justly liable to bear his proportion of such tax. . . . It may be that such legislation merely to protect the public health and prevent a public nuisance would not be sustained to place the whole burthen of drainage upon the owners of such

lands, irrespective of special private benefits to each one, by reclaiming his lands and making them more valuable for use and enjoyment. This question we need not decide in this case, for both objects concur in this act. To protect the public health and prevent public nuisances, this legislative interference with private property may be justified, and the assessment to cover the cost of such works may properly be made on the lands proportionably benefited and improved thereby. This would not take such legislation from the police power, and refer it to the power of making improvements for the public use, but it would be sustained solely by the police power, and the doctrine of just compensation and uniform taxation would have no constitutional application. . . . It would seem to be most reasonable that the owner of the lands drained and reclaimed should be assessed to the full extent, at least, of his special benefits; for he has received an exact equivalent and a full pecuniary consideration therefor, and for that which is in excess of such benefits should be paid, on the ground that it was his duty to remove such an obvious cause of malarial disease, and prevent a public nuisance." *Donnelly v. Decker*, 58 Wis. 461-466 and 472, 473; s. c., 46 Am. Rep. 637.

5. *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Reeves v. Treasurer*, 8 Ohio St. 333; *People ex rel. Butler v. Supervisors Saginaw Co.*, 26 Mich. 22.

the expense of the owner, by special tax, there can be no doubt of the right of the State to make it his duty to drain them, as a matter of police regulation, the State coming forward to perform the duty at his expense in case of its not being suitably or expeditiously performed."¹ But the courts have repeatedly interfered in behalf of owners of lands against which special assessments were levied in excess of the benefits that would be conferred upon such lands by the expenditure contemplated, and declared such assessments invalid.²

In some of the States there are statutes authorizing a designated number of the owners in severalty of adjacent swamp or overflowed lands to institute proceedings whereby the whole tract may be drained and the expense thereof assessed upon all the proprietors in proportion to the benefits received. These enactments have often been upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property.³

1. Cooley on Taxation, 402.

"Among others, it has been plainly urged that as a sanitary regulation, and under the power to abate nuisances, the corporation might require every citizen to drain his own lot, or in case of neglect exact a penalty." *State v. City Council of Charleston*, 12 Rich. (S. Car.) 782.

2. *Tide Water Co. v. Coster*, 3 C. E. Greene (N. J.), 518; *Cypress Pond Draining Co. v. Hooper et al.*, 2 Metc. (Ky.) 350; *Kean v. Driggs Draining Co.*, 45 N. J. L. 91; *City of Chicago v. Larned*, 34 Ill. 203; *Harward et al. v. St. Clair Draining Co.* 51 Ill. 130; In *Matter of Draining along Pequest River*, 39 N. J. L. (to Vroom) 433; In *Matter of Canal Street*, 11 Wend. (N. Y.) 154.

"If there be such a flagrant and palpable departure from equity in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are therefore not bound to contribute,—it is no matter in what form the power is exercised,—whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes,—it must be regarded as coming within the prohibition of the constitutional design to protect private rights against aggression however made, and whether under color of recognized power or not." *Morford v. Unger*, 3 Iowa, 82.

"There can never be any necessity under the police power, or the law of necessity, to permanently appropriate land to the public use without compensa-

tion. It may temporarily be interfered with or appropriated; necessity may justify so much; but when the necessity passes away the right ceases. To illustrate: A pond of stagnant water may endanger the health of the neighborhood, and the public may cause it to be drained at once, and for that purpose may dig the necessary drains, and the land may be interfered with for that purpose, under the police power, without compensation." In *Matter of Petition of Cheesebrough*, 78 N. Y. 238.

An *Indiana* act provides that if the estimated cost shall exceed the benefits the work shall not be further prosecuted. *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

3. *Coomes v. Burt*, 22 Pick. (Mass.) 422; *Phillips v. Wickham*, 1 Paige (N. Y.), 590; *French v. Kirkland*, 1 Paige (N. Y.), 117; *O'Reiley v. Draining Co.*, 32 Ind. 169; *Sherman v. Tobey*, 3 Allen (Mass.), 7; *Blake v. People*, 109 Ill. 504.

"Laws for the drainage of or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed not under the taxing but the police power of the government. *State v. Newark*, 3 Dutch. (N. J.) 185.

In *Tide Water Co. v. Costar*, 3 C. E. Greene (N. J.), 54, it is said by Chancellor Zabriskie: "But there is another branch of legislative power that may be appealed to as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regu-

The authority of the legislature to enact such a law is said to be derived from the police power, but it seems that in order to justify the exercise of this power it must be invoked or put in motion in this class of cases by the owners of the land to be benefited, and not by strangers. The object is to enable parties having a common interest in the improvement of lands held by them in several-

lations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulation, the building of party-walls, making and maintaining partition fences and ditches, constructing ditches and sewers for the draining of uplands and marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated of by all jurists and writers upon law through the civilized world.

. . . The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land.

. . . The principle of them all is to make an improvement common to all concerned, at the common expense of all. And to effect this object the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. . . . To effect such common drainage, power was given in some cases to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the constitution."

Ch. J. Beasley, delivering the opinion in the court of errors, said: "But the regulation established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning walls and partition fences. The statute of New Jersey of 1871 provides for the draining of any tract of low, wet, or marshy land, upon proceedings instituted by at least five owners in severalty, and not objected to by the owners of the greater part of the tract, and for the assessment by commissioners, after notice and hearing, of the expenses upon all the owners." In *Wurts v. Hoagland*, 114 U. S. Rep. 606, it was held that this statute does not deprive owners of prop-

erty without due process of law. In the opinion by Mr. Justice Gray, after reviewing the cases, it is said: "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense." *Tide Water Co. v. Costar*, 18 N. J. Eq. 518.

And in *California* (Political Code, § 3446, *et seq.*) it is provided that the holders representing one half or more of any swamp, overflowed, salt, marsh, or tide lands susceptible of one mode of reclamation may form reclamation districts, and proceed to reclaim them at the expense of the parties benefited, and they were held not to be in contravention of constitutional restraints. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701.

The *Indiana* act of 1869 authorizes not less than three owners of low, wet, or overflowed lands to organize a company for the purpose of draining, reclaiming, and protecting such lands. "But in making a drain to reclaim swamp lands, all whose lands are affected must be regarded as having a common interest, and one through whose land the drain must of necessity pass could not object that his land was not of itself noxious to the public health. If such an objection can be made, it must go further and aver that the drain in its general purpose would not benefit the public." *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

ty to make such improvement at the common expense of all concerned and thereby save useless expense, and the burden to be imposed upon the several owners must be limited to the actual cost of the improvement, and if the act permitted anything more to be levied it could not be sustained.¹

C. UNDER THE TAXING POWER.—The taxing power of the State—within which it is conceded is included special assessments or assessments for local improvements—can only be employed where public considerations are involved. One of the first requisites of lawful taxation is that the purpose for which contributions are demanded shall be public in its nature.² The duty to determine in the first instance whether a particular purpose is or is not one which so far concerns the public as to justify the exercise of this power, rests with the legislature; but this legislative determination is not absolutely conclusive. The question must finally rest with the courts.³

In order to justify the interference of the court, however, it is said that the absence of all possible public interest in the purpose contemplated must be so clear and palpable as to be immediately perceptible to every mind at the first blush.⁴ It is not doubted that the preservation of the public health is a public purpose of prime importance; but whether the mere reclamation of lands and their consequent improvement, where sanitary considerations are in no wise involved, is a purpose sufficiently public to justify the exercise of this power, is a question upon which the courts are not in exact harmony.⁵

1. In *New Jersey* the court refused to sustain an act which created a private corporation and authorized it to reclaim and drain all or any portion of wet or overflowed lands and tide-water marshes in certain specified counties of that State, without the owners' consent, but at their expense. The scheme of reclamation was said to be a private enterprise for private gain, and could not be justified. *Kean v. Driggs Draining Co.*, 45 N. J. L. 91; *Costar v. Tide Water Co.*, 18 N. J. Eq. 54; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Belknap v. Belknap*, 2 Johns. Ch. (N. Y.) 463.

2. "The legislature cannot authorize a tax to be levied upon any portion of the public for the construction on private property of a drain in which the public are not concerned. Even the owner of the land benefited cannot be taxed to improve it unless public considerations are involved, but must be left to improve it or not as he may choose." *People v. Supervisors of Saginaw*, 26 Mich. 22; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Loan Association v. Topeka*, 20 Wall. (U. S.) 655.

"The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute." Dixon, C. J., in *Broadhead v. City of Milwaukee*, 19 Wis. 658; *Reeves v. Treasurer*, 8 Ohio St. 333; *Cole v. La Grange*, 113 U. S. 1; *Sharpless v. Mayor, etc.*, 21 Penn. St. 147.

3. *Tide Water Co. v. Coster*, 3 C. E. Greene (N. J.), 518; s. c., 90 Am. Dec. 634; *Matter of Drainage along Pequest river*, 39 N. J. L. (10 Vroom) 433.

4. *Broadhead v. City of Milwaukee*, 19 Wis. 658; *Booth v. Town of Woodbury*, 32 Conn. 118.

"It is undoubtedly the duty of the legislature, which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use; and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent." *Loan Assoc. v. Topeka*, 20 Wall. (U. S.) 655.

5. In passing upon the *Wisconsin* act hereinbefore alluded to, the court says: "It requires but a casual examination of

these provisions for the draining of the swamp and overflowed lands of the State to be apparent that such ditching and draining are for no public use whatever, in the legal meaning of the term. The primary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners, and for their use alone. It enhances their value, intrinsic and in market. This is the only object which concerns their use, and that use is strictly private. The other object, and the only one mentioned in the law, is that such ditching, draining, and enlargement of drains will conduce to the public health or welfare. . . . This legislation may readily be referred to this power (police power) by providing for the public health. If it were not for this obvious and clearly expressed purpose of the law, it could not be endured for a moment, because it would provide for a despotic and most unwarrantable interference with private property for strictly private purposes and use, in which neither the people of the State, nor the State itself, nor the public, have any interest whatever. If these lands are to be reclaimed by some work or method of improvement which might be used by the public, such as a canal for carrying purposes, then the combination of the two objects of reclaiming the land and making such facility of transportation would bring the enterprise within the principles of eminent domain and taxation." Justice Taylor dissents from this view, and in a separate opinion maintains that the purpose is public, and the act should be upheld as an exercise of the eminent domain. *Donnelly v. Decker*, 58 Wis. 461. And see *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, where an act was pronounced unconstitutional on the ground that it authorized the taking of private property for private use. Also *Fleming v. Hull* (Iowa), 35 N. W. Rep. 673; *Jenal v. Green Island Drain Co.*, 12 Neb. 163.

It is said by Judge Cooley (Cooley on Taxation, 424): "Where any considerable tract of land, owned by different persons, is in a condition precluding cultivation by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement, and the consequent advancement of the general interest of the locality, as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect

lands from falling into a like condition of uselessness." The majority of the adjudged cases are in accord with this view.

"There are well-considered cases which hold that this may be constitutionally done when there are large tracts of such lands, and possibly it is within the discretion of the legislature to determine the size or extent of the tracts that may be so drained, and such determination is conclusive." *Fleming v. Hull* (Iowa), 35 N. W. Rep. 673.

The power to levy assessments for the mere purpose of reclaiming large bodies of lands, is assumed by Chancellor Walworth in *French v. Kirkland*, 1 Paige (N. Y.), 117, and in *Phillips v. Wickham*, 1 Paige (N. Y.), 590.

The statute which came in question in *People v. Nearing*, 27 N. Y. 306, appears to have had no reference to the public health.

In *Hagar v. Supervisors of Yolo*, 47 Cal. 222, it is said by Crockett, J., in sustaining assessments for this purpose: "But we need not rest our decision on the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this State may justly be regarded as a public improvement of great magnitude and of the utmost importance to the community. If left wholly to individual enterprise, it would probably never be accomplished; and in inaugurating so great a work the legislature has pursued substantially the same system adopted in other States for the reclamation of similar lands, to wit, by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited. This plan has been adopted in the States of Louisiana, Mississippi, and Arkansas, to prevent the annual overflow of the Mississippi by means of levees or embankments, constructed at the expense of the adjacent property. The black swamp in Ohio has been wholly or partially reclaimed by the same method. A large body of land in Missouri is protected from inundation by similar means. In Massachusetts and Connecticut, swamps and lowlands are drained by means of assessments on property benefited. And in New Jersey the salt marshes have been reclaimed in the same way. In this State, the city of Sacramento, including the ground on which the capitol stands, has been protected from inundation by means of levees, erected at the expense of the inhabitants, in the shape of a tax on the

(1) *Special Assessments*.—The expense of drainage is usually provided for by special assessments, but it is for the legislature to prescribe the way in which to meet the expense, whether by general taxation or by laying the burden upon the district specially benefited by the expenditure.¹ In the absence of special constitutional restrictions it may direct the cost to be paid out of funds raised by special assessments levied upon the property or districts pecially benefited, in proportion to the amount of such benefit, or upon abutting owners or by general taxation.² But whatever be the basis of the taxation the requirement that it shall be uniform is universal. It applies as much to those local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established.³

property within the district benefited. In none of these States, so far as we are aware, has the power of the legislature to cause such improvements to be made ever been denied; nor do we see any tenable ground on which it can be questioned." And see *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Davidson v. Board of Adm'rs New Orleans*, 6 Otto (U. S.), 97; *Town of Macon v. Patty*, 57 Miss. 378; s. c., 34 Am. Rep. 451.

"We can see, in the act in question, nothing objectionable in the fact that the township trustees shall have power to act upon the application of a single party, nor in the fact that they may locate the proposed ditch upon lands held by two owners only. All public improvement must originate in individual action; and two persons only may be proprietors of vast tracts of land, or if the tracts be small they may be so situate relatively, or they may be characterized by such peculiarities, as to render their drainage a very proper matter of public concern." *Reeves v. Treasurer*, 8 Ohio St. 333; *State v. City of Newark*, 3 Dutch. (N. J.) 185; *Ross v. Davis*, 97 Ind. 79; *Meranda v. Spurlin*, 100 Ind. 380; *Sessions v. Crunkilton*, 20 Ohio St. 349.

1. *Hagar v. Reclamation District No. 108*, 111 U. S. 701.

2. *Cooley on Taxation*, pages 101, 402, 423; *Cooley's Const. Lim.* 635, 636-7; *Dillon on Municip. Corp.* §§ 752-3, 808.

Special assessments are special, and local impositions upon property in the immediate vicinity of an improvement for public welfare which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure. *Reeves v. Treasurer*, 8 Ohio St. 333.

Assessments, although resting upon the taxing power, were intended to describe a distinct and well-known mode of laying a local burden upon particular property, with reference to peculiar and special benefits derived to such property from the expenditure of the money. *Sessions v. Crunkilton*, 20 Ohio St. 349. They are made upon the assumption that a portion of the community, or the property lying within a certain district, is to be specially and peculiarly benefited by the contemplated expenditure of public funds. *Tide Water Co. v. Coster*, 3 C. E. Greene (N. J.), 518; s. c., 90 Am. Dec. 634.

3. *Cooley's Const. Lim.* 620.

"The terms 'tax' and 'assessments,' both, I think, when applied to property, and especially to lands, always include the idea of some ratio or rule of apportionment, so that of the whole sum to be raised the part paid by one piece of property shall bear some known relation to, or be affected by, that paid by another." *Christiency, J., in Woodbridge v. Detroit*, 3 Mich. 274.

All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefits received. Absolute equality in imposing them may not be reached; only an approximate to it may be attainable. *Hagar v. Reclamation Dist. 108*, 111 U. S. 701.

A special taxing district of part of a township may be created for drainage purposes. *Lydecker v. Englewood Drain, etc.*, 41 N. J. L. 154. But there should be uniformity in the manner of the assessments, and approximate equality in the amount of exaction within the district; and to this end all the objects of taxation within the district should be embraced. *Cooley's Const. Lim.* 622.

The special benefits from the enhancement of values must accrue mainly to the owners of lands that are drained, and to the extent of such benefits special contributions may justly be demanded of such landowners.¹ They can only be upheld where the special benefits a lot would derive from the improvement are assessed to it, and the residue of the cost must be paid by equal and uniform taxation.²

The legislature may also provide for an apportionment of the expense between the county at large and the owners of the property specially benefited. *Shelley v. St. Charles Co.*, 17 Fed. Rep. 909.

1. Cooley on Taxation, chap. xx.

2. *City of Chicago v. Larned*, 34 Ill. 203; *Harward et al. v. St. Clair Drainage Co.*, 51 Ill. 130.

The power to levy such charges is necessarily limited to property which is actually benefited, and to the extent of the benefits received. The very moment such charges exceed the benefits received, they cease to be an equivalent for the benefits, and become a taking without compensation.

In *Illinois*, by a constitutional provision adopted in 1878, power is given the legislature to "provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct, . . . by special assessments on property benefited thereby;" and in *Huston v. Clark et al.*, 112 Ill. 344, it was held that in this there is no limitation upon the legislature as to the mode of forming such districts, or as to the agencies or instrumentalities to be used in their creation.

Where special drainage assessments are levied, not upon the valuation of the lands assessed, nor confined to the special benefits conferred by the proposed improvement for which they were authorized, it will be a violation of the principles of equality and uniformity required by the constitution, and the taxes will be illegal. *Lee v. Ruggles*, 62 Ill. 428.

Owners of lands cannot be included in such special assessments whose lands would not be benefited or improved in value by the proposed drainage. As to them the act would be unconstitutional. *Cypress Pond Draining Co. v. Hooper*, 2 Metc. (Ky.) 350.

The power to determine when a special assessment should be made, and on what basis it shall be apportioned, is confined to the legislature. Cooley on Taxation, chap. xx.

In the assessment of benefits in drainage proceedings, the land-owner should not be charged with general benefits which accrue to him as a member of the community, but only with such as are special. Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value. Where the construction of a large ditch enables property-owners to carry their lateral ditches into it, and thus secure good drainage without encroaching upon the rights of others, there is a special benefit. *Lipes v. Hand*, 104 Ind. 503.

The legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way. *People v. Parks*, 58 Cal. 624.

Under the *Illinois* drainage act of 1879, the commissioners can apportion only that sum among the several tracts of land in the district, as they may be severally benefited, and in no case can the sum assessed against any one tract exceed the benefits it will receive. *Huston v. Clark et al.*, 112 Ill. 344.

The power to lay assessments upon private property for special improvements is an extraordinary one, existing only by virtue of a clear and express legislative grant. *Leeds v. City of Richmond*, 102 Ind. 372.

For a well-considered case on the subject of special assessments, see *Town of Macon v. Patty*, 57 Miss. 378; s. c., 34 Am. Rep. 451.

Under the constitution of *Illinois* the right to levy taxes cannot be delegated to private corporations. The drainage commissioners, constituted a body corporate by act of February 15, 1855, with authority to drain certain wet lands in Cook County, are a private corporation, and cannot levy taxes upon the property of persons who are not members of it. *Hessler v. Drainage Commissioners*, 1 Am. Cor. Cases, 467; *Blake v. People*, 109 Ill. 504.

(D) UNDER EMINENT DOMAIN.—To effect the drainage of large tracts of land and thereby make them fit for habitation and use, is a purpose sufficiently public to justify the exercise of both the eminent domain and the power of taxation.¹ The public use or benefit which justifies an appropriation for this purpose consists in the indirect advantage to the community, derived from the increase of the productive capacity of the soil and the promotion of the agricultural interests of the owners of the lands.²

To authorize the exercise of this power it is not requisite that the use and benefit to be derived shall be universal, nor, in the largest sense, even general. Though confined to a particular district, it may still be public. And though some parties are more benefited than others, this forms no objection to the use, if the public interest and convenience are thereby subserved.³

1. *Tide Water Co. v. Coster*, 3 C. E. Greene (N. J.), 518; s. c., 90 Am. Dec. 631; *Matter of Drainage*, 35 N. J. L. 497; *Matter of Drainage along Pequest River*, 39 N. J. L. (10 Vroom) 433; *Sherman v. Tobey*, 3 Allen (Mass.), 7.

2. *Bigelow, J., in Talbot v. Hudson*, 16 Gray (Mass.), 417.

3. *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *Beekman v. S. S. R. Co.*, 3 Paige Ch. (N. Y.) 45; s. c., 22 Am. Dec. 679.

"By the public use is meant for the use of many or where the public is interested." *Seely v. Sebastian*, 4 Oregon, 25. "And it is not essential that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the purpose for which the property is appropriated." *Talbot v. Hudson*, 16 Gray (Mass.), 417.

An act authorizing commissioners to enter upon and appropriate the lands of individuals for the purpose of draining a swamp, is a lawful exercise of the right of eminent domain; and the taking of such lands so far as necessary is a lawful taking for public use. But there is an important condition connected with the exercise of the power, viz., the necessity of providing a just compensation to the owner; and it must be in truth just, or, in other words, adequate and compensatory. *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166.

Entering upon and occupying lands for the purpose of constructing a drain is a taking of land for a public purpose, and an act authorizing such a taking is so far void unless it provides for the payment of a just compensation. *People v. Nearing*, 27 N. Y. 306; *People v. Haines*, 49

N. Y. 587; *Matter of Petition of Cheesbrough*, 78 N. Y. 232.

Lands cannot be permanently appropriated for drains for the benefit of other lands, under the police power or otherwise, without compensation being made to the owner. *Matter of Cheesbrough*, 78 N. Y. 232.

The right of the State to condemn lands for drains rests upon the same foundation as its right in cases of public roads, mills, forts, lighthouses, etc. *Norfleet v. Cromwell*, 70 N. Car. 634; s. c., 16 Am. Rep. 787.

The elements which give public character to the work, and bring the proceedings within the limits of the power of eminent domain, are, that the drain will be of public utility, will benefit highways, or improve the public health. *Anderson v. Baker*, 98 Ind. 587.

The New York Drainage Act of 1869 is placed on the right to take private property for public use, and it is sustained solely on the ground that it has for its purpose the preservation of the public health. *Matter of Ryers et al.*, 72 N. Y. 1.

If land is swamp, marsh, or wet, and the proper cultivation requires, it may be drained through the lands of others provided compensation is made; but the legislature may not authorize a tile or other underground drain to be laid through the lands of others upon the mere showing that a person desires it. *Fleming v. Hall* (Iowa), 35 N. W. R. 673. *Beck, J.*, dissenting, argues that the land is not taken in such case; that the surface is merely interfered with until the drain is constructed, and the owner is only temporarily deprived of the use or possession of his land; and, further, that if it may be said to be taken by the person construct-

3. Private Drains.—It is well settled that the owner of low, wet, or marshy lands is under no obligation to drain them of water collected there naturally, however injurious to others his neglect to do so may be; and the reason is said to be that this is not in a legal sense a nuisance.¹

The distinction is made between natural and artificial causes of injury, and in order to constitute a nuisance which the law can take cognizance of, and compel the owner of the premises on which it exists to abate, the act of man must have contributed to its existence. If the owner of such lands desires to reclaim them by drainage, he may construct artificial drains for the purpose, but in so doing he may not increase the flow of water upon the lands of an adjoining owner; nor will he be permitted to discharge such water upon the lands of adjoining owners in any different manner than it would naturally have flowed. The owner of the soil upon which surface waters stand, or through which they soak, has the right to lead them off in such direction and in such quantity as he sees fit, taking care only that he does not injure his neighbor by discharging them upon him in an unusual quantity or at an unusual place, and has the right at his pleasure to change the direction of the drainage.²

He has an unqualified right to drain for agricultural purposes the surface water, that is, water flowing in no regular and definite channel; and is not liable to an action by the lower proprietor for so draining it as to prevent any portion of those waters from reaching the land of the lower owner.³

When such waters have ceased to spread and diffuse over the surface or percolate through the soil; when they have lost their casual and vagrant character, and have reached and come to rest in

ing a tile drain, "in that this manner of improving lands develops the agricultural resources of the State, the great source and wealth of our people, upon which depends, in a very great measure, our prosperity,—it is a public purpose for which private property may be appropriated. While but an individual in a single case may reap the benefits which come from the profits of the improvement of his land, the whole State is indirectly benefited thereby. . . . I am clear in the opinion that, if it may be said that the lands involved in this case may be taken, it is for a public purpose, which authorizes the exercise, on the part of the State, of the right of eminent domain. . . . Wet lands not only retard cultivation, but are the certain sources of malaria, the prolific parent of disease. This is a fact known to all men in all ages, which the law presumes without proof, and of which the court will take judicial notice as a matter of common knowledge which nobody questions. It is not denied, but admitted,

that the promotion of public health and the prevention of disease is a public purpose, authorizing the exercise of the right of eminent domain. Drainage tends to remove disease and attendant evils. It is therefore a public purpose; and the legislature, in enacting the statute in question, so regarded it, and authorized the construction of tile and other underground drains as a public purpose." See *Seely v. Sebastian*, 4 Oreg. 25; dissenting opinion of Taylor, J., in *Donnelly v. Decker*, 58 Wis. 461.

1. *Hartwell v. Armstrong*, 19 Barb. (N. Y.), 166; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Reeves v. Treasurer*, 8 Ohio St. 333; *People ex rel. Butler v. Supervisors of Saginaw*, 26 Mich. 22.

2. *Curtiss v. Ayrault*, 47 N. Y. 73.

3. *Rawstron v. Taylor*, 11 Exch. 369; *Chatfield v. Wilson*, 28 Vt. 49; *Livingston v. McDonald*, 21 Iowa, 140; s. c., 89 Am. Dec. 563; *Schaefer v. Marthaler*, 34 Minn. 487; s. c., 57 Am. Rep. 73.

a permanent mass or body, in a natural receptacle or reservoir, not spreading over or soaking into the soil, forming mere bog or marsh,—they cannot then be regarded as surface waters, any more than they can be after they have entered into a stream; and where a lake formed by surface water is situate on the lands of different owners, neither can drain it without the consent of the other.¹

An owner of land has no right, by means of drains, to collect in one channel waters which would otherwise remain stagnant, or evaporate, or gradually flow off, and discharge them in a mass upon his neighbor.²

The owner of upper ground has no right to construct a drain by which the flow of water is diverted from its natural channel and a new channel made on lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the rush upon the lower fields.³

1. *Schaefer v. Marthaler*, 34 Minn. 487; s. c., 57 Am. Rep. 73.

2. *Martin v. Jett*, 12 La. 501; *Merritt v. Parker*, 1 Cox, 460; s. c., 32 Am. Dec. 120; *Gillham v. Madison Co. R. Co.*, 49 Ill. 486; *Lattimore v. Davis*, 14 La. 161; s. c., 33 Am. Dec. 581.

And where such owner has upon his lands a marshy sink or basin of water, from which in times of high water a portion overflows and runs through a natural channel upon the lands of another, while the remaining portion has no natural outlet, but continues in the basin until it evaporates, he cannot lawfully conduct such remaining portion out of the basin by means of artificial drains constructed along the natural channel so as to cause it to flow upon the lands of the lower proprietor. *Buler v. Peck*, 16 Ohio St. 335; s. c., 88 Am. Dec. 452; *Crabtree v. Baker*, 75 Ala. 91; s. c., 51 Am. Rep. 424.

And the fact that the water does no appreciable or actual injury to the owner of the lower lands is immaterial. The law implies nominal damages from the invasion of a right, and every use may be deemed adverse which tends in any degree to impose a servitude or burden upon the estate of another. *White v. Chapin*, 12 Allen (Mass.), 516.

In a well-considered case by the supreme court of Iowa it was held that if an underground drain made by the defendant, which terminated at the surface within sixty feet of the plaintiff's line, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from that in which it would naturally have flowed, to his injury, the defendant would be liable for the damage, even though the

drain was constructed by the defendant in the course of the ordinary use and improvement of his farm. *Livingston v. McDonald*, 21 Iowa, 160; s. c., 89 Am. Dec. 563.

A municipal corporation has no greater right in the construction and regulation of its streets to collect surface water in an artificial channel and discharge it in a body on the land of a citizen than a private individual has. *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135; *O'Brien v. St. Paul*, 25 Minn. 333; s. c., 33 Am. Rep. 470; *Noonan v. City of Albany*, 79 N. Y. 470; s. c., 35 Am. Rep. 543; *Gillison v. City of Charleston*, 16 W. Va. 282; *Beach v. Elmira*, 22 Hun (N. Y.), 158; *Winn v. Village of Rutland*, 52 Vt. 481.

3. *Martin v. Riddle*, 26 Pa. St. 415; *Ogburn v. Connor*, 46 Cal. 347; *Beard v. Murphy*, 37 Vt. 99; *Crabtree v. Baker*, 75 Ala. 91; s. c., 51 Am. Rep. 424. Such appears also to have been the rule of the civil law. 1 Dur. No. 164; *Martin v. Jett*, 12 La. Ann. 501; s. c., 32 Am. Dec. 120.

But injuries by flowing surface water, done to a neighbor as the result of ordinary farming operations, such as plough furrows, are not actionable. The distinction seems to be between injuries occasioned by strictly agricultural operations and those occasioned by works designed to reclaim or improve the land. *Livingston v. McDonald*, 21 Iowa, 160; s. c., 39 Am. Dec. 563.

The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary

injury on the lower field. He may not construct drains or excavations so as to form new channels on to the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the wash upon the same. *Templeton v. Voshloe*, 72 Ind. 134; s. c., 37 Am. Rep. 150.

No right exists to concentrate surface water by drains and discharge it on adjacent lands, although it would naturally flow in that direction. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 359; s. c., 35 Am. Rep. 431.

The case of *Hughes v. Anderson*, 68 Ala. 280; s. c., 44 Am. Rep. 147, seems to conflict with these views, as it holds that the owner of lands may drain them by ditches although he thereby precipitates the water more rapidly and in greater volume upon the land of an adjoining owner, provided he acts with a prudent regard for his welfare; but he may not turn water upon such adjoining lands which would not otherwise have flowed there. In the opinion by Stone, J., it is said: "As we understand the facts of this case, the plaintiffs and the defendant were coterminous land-holders, each engaged in agriculture; the former owning the inferior and the latter the superior heritage. Through the lands of the plaintiffs and near the dividing line flowed a natural stream or branch, which was the natural outlet for a part at least of the water which fell on the defendant's land. The water flowed naturally from the defendant's land upon the lands of plaintiffs, and across a portion of it into the running stream. It flowed slowly, not in a collected body, but scattered over the surface. In its natural state part of this water was absorbed and part evaporated before it reached the lands of plaintiffs. By means of ditches, defendant collected all this surface water into one channel, thereby draining his own lands, and causing the water to flow much more rapidly, and in one body, into the branch on plaintiff's land. This emptied the water off defendant's land much sooner, and as a consequence, precipitated it much more rapidly and in increased volume on the lands of plaintiffs, thereby flooding a portion of his lands and rendering them uncultivable. We have then the case where plaintiffs must submit to an inconvenience and injury, or defendant must forego a beneficial improvement. . . . Under these rules, defendant had no right, by ditches or otherwise, to cause water to flow on the lands of plaintiffs, which, in the absence of such ditches, would have flowed in a different

direction. As to the water, therefore, accustomed to flow on the lands of the plaintiffs, defendant was not bound to remain inactive. He was permitted to so ditch his own lands as to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water and cause it to flow more rapidly and in greater volume on the inferior heritage. This, however, must be weighed and decided with a proper reference to the value and necessity of the improvement to the superior heritage, contrasted with the injury to the inferior; and even this license must be conceded with great caution and prudence. It is a question for the jury to determine on the facts of each particular case, under proper instructions from the court."

In the decision the case of *Kauffman v. Griesemer* (26 Pa. St. 407; s. c., 67 Am. Dec. 437) is referred to, and said to sustain this view. But the question involved in that case was whether the defendant might obstruct a drain cut through an elevation on the plaintiff's land which caused an increased flow of water upon the lands of the defendant, and it was held that he might do so.

"If from the natural disposition of the place a basin was formed on the plaintiff's land, some seventeen rods short of the defendant's, from which the water flowed upon the defendant only in time of floods or freshets, the defendant was the superior owner in respect to that place in all ordinary times, and it would be a reversal of the principle stated to subject him, against his consent, to an artificial channel that would deprive him of the advantage of his position. If his land was higher than that basin, he had a right, except in high water, to have the rains and snows run from his land on to the plaintiff's. *Aqua currit et debet currere*."

"The plaintiffs had no right to insist upon his receiving waters which nature never appointed to flow there; and against any contrivance to reverse the order of nature he might peaceably and on his own land take measures of protection. . . . The elevation which protected him in ordinary times could not be reduced without his consent, and when the undue liberty was taken, he was not a wrong-doer in protecting himself from the consequences."

True, it is said in the opinion by Woodward, J., that "It is not, however, to be understood that because the flow of water must not be caused by the act of man, that therefore the proprietor who trans-

There can be no doubt of the right of the owner of land through which a stream flows to increase the volume of the water by draining into it.¹

A. EASEMENTS.—The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, and cannot be conferred except by deed or conveyance in writing.² It cannot be conferred by parol license;³ and a

mits water to the inferior heritage is not permitted to do anything on his own land, that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this: it prohibits only the emission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow.

"Hence, for the sake of agriculture, a man may drain his ground which is too moist, and discharging the water according to its natural channel, may cover up and conceal the drains through his lands; . . . and may clear out impediments in the natural channel of the streams, though the flow of water upon his neighbor be thereby increased."

But this language, we think, is not inconsistent with the doctrine laid down by the other cases, and hardly justifies the construction put upon it in *Hugh v. Anderson*.

After citing *Martin v. Riddle*, 26 Pa. St. 415, and other cases, the judge continues: "Those cases recognize the principle that the superior owner may improve his land by throwing increased waters upon his inferior through the natural and customary channels, which is a most important principle in respect not only to agricultural but to mining operations also."

But the case of *Martin v. Riddle* was the case of a running stream, and it was there said that the land-owner may make whatever drains, in his own land, are required by good husbandry, either open or covered; and may discharge these *into the natural channel or channels*, even though by so doing he increases the quantity flowing therein.

1. *Miller v. Laubach*, 47 Pa. St. 154; *Peck v. Herrington*, 109 Ill. 611; s. c., 50 Am. Rep. 627.

The right of an owner of lands through which a water-course runs to have the same kept open, and to discharge therein the surface-water which naturally flows thereto, is not limited to the drainage and discharge of surface-water into the

stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements. He may change and control the natural flow of the surface-water therein, and by ditches or otherwise accelerate the flow or increase the volume of water which reaches the stream; and if he does this in the reasonable use of his own premises he exercises only a legal right, and incurs no liability to a lower proprietor. This right is subject to the qualification that one owner cannot, by artificial arrangements on his land, concentrate and discharge into the stream surface-water, in quantities beyond the natural capacity of the stream, to the damage of other-owners. *McCormick v. Horan*, 81 N. Y. 86. And the object for so doing, whether for the erection of buildings, agriculture, or constructing a railroad thereon, is wholly immaterial. He may so drain whenever disposed to do so, irrespective of the object. *Waffle v. N. Y. Cen. R. Co.*, 53 N. Y. 11; s. c., 13 Am. Rep. 467.

One operating a coal-mine in the usual manner may discharge the percolating water into a stream which naturally drains the land, although this may swell the stream, and render it by impurity unfit for the domestic purposes of lower proprietors. The reason is said to be that the proprietors have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on to the land artificially. The water which poured into the stream is the water which the mine naturally discharged. Its impurity arises from natural, not artificial, causes. The mine cannot of course be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it. *Penn. Coal Co. v. Sanderson*, 113 Pa. St. 126; s. c., 56 Am. Rep. 89; s. c., 14 Am. & Eng. Corp. Cas. 656.

2. *Wiseman v. Lucksinger*, 84 N. Y. 31; s. c., 38 Am. Rep. 479.

3. *Hewlin v. Shipman*, 5 B. & C. 221; s. c., 11 Eng. Com. Law Rep. 207.

license to lay a drain does not vest any title or give any irrevocable easement in the land, even though a consideration is paid for the same. It is revocable at any time, even after twenty years' user, for the use being by consent of the land-owner no prescriptive right is gained.¹

Where an easement, like an artificial drain, has been created and granted for a particular use and purpose, it cannot be changed by the grantee to another though like use, nor can the grantee increase the amount or extent of such use beyond what was originally intended and embraced in the grant.²

A grant of a right of drainage is implied on severance of the heritage by conveyance of part, where such right has been continuously exercised by the owner of the entire tract, and there is no natural drainage.³

The owner of an easement for drainage through the premises of another must exercise the right in such a way as to produce no unnecessary injury or annoyance to the servient tenement. He must keep the drain in repair, and must see to it that it creates no nuisance. It must be of sufficient capacity to discharge the water which is permitted to reach it, and for any injury done to the lands of others by waters passing its banks he must respond in damages.⁴

4. Sewers—Rights, Duties, and Liabilities of Municipal Corporations Concerning.—A. RIGHTS.—(1) *Generally.*—The right of municipal corporations to construct, repair, and control the use of sewers must be sought for in their written charters or acts of incorporation, and provisions of this character are seldom omitted. But without special authority being conferred, the right of the corporation is regarded as an incident to its express and general authority

1. *Wiseman v. Lucksinger*, 84 N. Y. 31; *Olmstead v. Dennis et al.*, 77 N. Y. 378.

The right to the use of a ditch through the land of another for the purpose of drainage may, however, be acquired by adverse use. And an actual use of a ditch for that purpose for twenty years together, if unexplained, will be sufficient to establish the right. *White v. Chapin*, 12 Allen (Mass.), 516.

A right to discharge a drain upon the land of an individual cannot be acquired by twenty years' use, unless the drain be one and the same, and the use thereof uninterrupted during the period. *Colton v. Pocasset Manufacturing Co.*, 13 Metc. (Mass.) 429.

2. *Carter v. Page*, 8 Ired. (N. Car.) 190.

3. *Elliot v. Rhett*, 5 Rich. Law (S. Car.), 405; s. c., 57 Am. Dec. 750.

A covered drain through the soil not visible on the surface, leading from the premises granted through other premises of the grantor, has been held not to pass by implied grant, where it was not abso-

lutely necessary to the enjoyment of the part conveyed. *Butterworth v. Crawford*, 46 N. Y. 349; s. c., 7 Am. Rep. 352; *Doliff v. Boston, etc.*, R. Co., 68 Me. 173. But the majority of the cases declare drains to be apparent, continuous, and necessary easements, and to pass by implication. *Pyer v. Carter*, 1 Hurlst. & N. 916; s. c., 26 L. J. Ex. 268; *Thayer v. Payne*, 2 Cush. (Mass.) 327; *Sanderlin v. Baxter*, 76 Va. 299; s. c., 44 Am. Rep. 165.

4. *Richardson v. Kier*, 34 Cal. 63; *Naurison v. Great Northern R. Co.*, 13 Hurlst. & C. 231. And any person who constructs a drain upon his own premises is bound to keep it from becoming a nuisance to his neighbors. *Marshall v. Cohen*, 44 Ga. 324; *Jutte v. Hughes*, 67 N. Y. 267.

A land-owner may sink a drain below the surface of a highway passing over his premises, care being taken to cover it so that the highway remains safe and convenient for public use. *Perley v. Chandler*, 6 Mass. 453.

to maintain streets and highways. Such sewers, carrying off the surface-water from the streets, and the filth that would otherwise accumulate upon them in a city, are to be regarded as an improvement of the highway, and not the less so because individual property-holders are benefited by the drainage of their premises.¹

When the power is conferred, the question as to when the necessity occurs for its exercise, as well as to the manner in which it shall be exercised, is for the corporation to determine, and cannot be controlled or interfered with by the courts.²

(2) *As to Assessments for.*—The legislature has the power to direct the manner in which the expense of such improvements shall be raised, whether by special assessments upon the abutters, or upon the property specially benefited, or otherwise.³ And it is well settled that the legislature may delegate this power of taxation to local municipal governments, either with or without restrictions or limitations.⁴

It is competent for the legislature to authorize a municipal corporation to assess the whole or any portion of the expenses upon the property deemed to be specially benefited in proportion to the benefit received; and it may empower the municipal authorities to judge what property is specially benefited, and define the taxing district accordingly.⁵

1. *Cone v. City of Hartford*, 28 Conn. 363; *Leeds v. City of Richmond*, 102 Ind. 372; *Griswold v. Bay City*, 35 Mich. 452; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Codman v. Evans*, 5 Allen (Mass.), 309; *Traphagen v. Jersey City*, 29 N. J. Eq. (2 Stewart) 206; *Fowler, In re*, 53 N. Y. 60; *St. Louis v. Oeters*, 36 Mo. 456.

And it has also been said that municipal corporations may authorize the construction of sewers under the police power as a regulation for the preservation of the public health. *State v. City of Charleston*, 12 Rich. (S. Car.) 702.

When the legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends that it may be done in such a way as to create a nuisance, unless this is the necessary result of the powers granted; and if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the legislature intended it should be done so. This, however, does not imply the duty of the city to adopt an extensive system of purification independent of the construction of the sewers, or require the taking of large tracts of land not authorized by statute for that purpose. *Morse v. City of Worcester*, 139 Mass. 389; s. c., 9 Am. & Eng. Corp. Cas. 642.

2. *Wilson v. Mayor of New York*, 1 Denio (N. Y.), 595; s. c., 43 Am. Dec. 719; *Carr v. Northern Liberties*, 35 Pa.

St. 324; s. c., 78 Am. Dec. 342; *Lynch v. Mayor of New York*, 76 N. Y. 60; *Freburg v. Davenport*, 63 Iowa, 119; s. c., 50 Am. Rep. 737; *City of Denver v. Rhodes*, 13 Pac. Rep. (Colo.) 729; *City of Denver v. Capelli*, 4 Colo. 25; *Horton v. Mayor, etc.*, 4 Lea (Tenn.), 39; s. c., 40 Am. Rep. 1; *Waters v. Bay View*, 61 Wis. 642. A lot-owner cannot enjoin the construction of a sewer for surface-water on the ground that the plan proposed is of inadequate size. *Mayor of Americus v. Eldridge*, 64 Ga. 524; s. c., 37 Am. Rep. 89.

3. *Dillon on Mun. Corp.* (3d Ed.) 808.

4. *Bradley v. McAtee*, 7 Bush (Ky.), 667; s. c., 3 Am. Rep. 309.

When such corporations are created, the power of taxation is said to be vested in them as an essential attribute for all the purposes of their existence, unless its exercise be in express terms prohibited. And so when authority to execute a public work is conferred, the power to levy a tax for the payment of its cost accompanies it without any special mention that such power is granted. *United States v. New Orleans*, 98 U. S. 225.

5. *Hoyt v. City of Saginaw*, 19 Mich. 39; s. c., 2 Am. Rep. 76; *Cone v. City of Hartford*, 28 Conn. 363. But the authorities have no right to assess the expense of a sewer among adjoining owners according to the number of feet front, without reference to other consid-

erations; such an arbitrary rule is unreasonable. *Clapp v. Hartford*, 35 Conn. 66. But in *Pennsylvania*, assessments which charged upon lots a portion of the cost of sewers, not to exceed a certain maximum per foot front, have been sustained. *Lipps v. Philadelphia*, 38 Pa. St. 503; *Philadelphia v. Tyron*, 35 Pa. St. 401.

An assessment by the area of lots, irrespective of proportionate benefits, is nothing but a levy of arbitrary exactions, and cannot be upheld. *Thomas v. Gain*, 35 Mich. 155; s. c., 24 Am. Rep. 535. A contrary rule seems to have been followed in *Rhode Island*. *Cleveland v. Tripp*, 13 R. I. 50; *Bishop v. Tripp*, 8 Atlantic Rep. 692. And in *Colorado* the legislature may constitutionally authorize the assessment of a tax for a sewer upon the property within a given district according to the area, and not according to the value of the property. *Gillette v. Denver* (Colo.), 7 Am. & Eng. Corp. Cas. 234. And notwithstanding the whole cost must be assessed upon the property benefited, the sewer may be made more capacious than present needs require, with a view to future extensions, and assessments therefor to the extent of the benefits conferred will be valid. *Hungerford v. City of Hartford*, 39 Conn. 279.

A town laid out and built a sewer in the street on which defendant's property was situated, and subsequently, but before any assessment was laid, adopted a general system of sewerage. The expense of the sewer first constructed was included in the cost of the general system, which increased defendant's assessment beyond his proportional share of the cost of the first sewer. *Held*, that the action of the town was lawful, no assessment having been laid for the particular sewer, at the time of adopting the general system. *Town of Leominster v. Conant*, 139 Mass. 384; s. c., 9 Am. & Eng. Corp. Cas. 390.

Lands benefited by the construction of a sewer may be assessed, although they are not in the line of the sewer, or of the street through which the sewer is built. The question is whether or not the property will be or is specially benefited. *Henderson v. Jersey City*, 41 N. J. L. 490; *Wheeler v. Chicago*, 57 Ill. 415; *Massing v. Ames*, 37 Wis. 651; *Stowbridge v. City of Portland*, 8 Ore. 67.

Where sewers are constructed under authority of a city, and afterwards special taxes are levied upon the adjacent property-owners to pay for the same, only those individuals who can use such sewers should be taxed specially to pay for their

construction or maintenance, and each should be taxed specially only for the amount of the special benefits which the sewers might confer upon him, and each should be taxed specially, precisely in proportion to the benefits which he might individually receive. *Gilmore v. Hentig*, 33 Kan. 156; s. c., 7 Am. & Eng. Corp. Cas. 175.

Lots separated from the sewer by intervening property of other persons and drained by a natural stream which, after running through other lands, flows into the sewer, are not so connected with it as to receive any assessable benefit from it. *King v. Reed*, 43 N. J. L. 187; *People v. Brooklyn*, 23 Barb. (N. Y.) 166.

Lands which have been once assessed for the construction of a sewer may be further assessed for the benefit conferred by its continuation. *Green v. Hotaling*, 44 N. J. L. 490; *Vanderbeck v. Jersey City*, 29 N. J. L. 449. And vacant lots may be assessed for sewerage as well as those which are improved and occupied. *Wright v. Boston*, 9 Cush. (Mass.) 233.

A charitable institution, exempted by the act creating it from taxation, may be assessed for the construction of sewers. *Roosevelt Hospital v. Mayor, etc.*, of New York, 84 N. Y. 108.

The property of the State cannot be assessed for benefit received from the construction of a public sewer, but the legislature has power to make it liable to such an assessment. *State v. Hartford*, 49 Conn. 89; s. c., 3 Am. & Eng. Corp. Cas. 610.

The expense either in whole or in part may be assessed upon the property specially benefited, but the assessments must not exceed in amount the benefits conferred. *Hungerford v. Hartford*, 39 Conn. 285; *Cone v. Hartford*, 28 Conn. 363; *Clapp v. Hartford*, 35 Conn. 66.

In *Michigan*, the city authorities may create a special taxing district for the construction of a sewer, on the basis of increase in value of the premises benefited. *Warren v. Grand Haven*, 30 Mich. 24.

While no particular form of words is made necessary by the statute to be used by the authorities in laying out a sewer, yet there must be such a laying out before any assessment therefor can be made; and this must be done with sufficient precision to show what the sewer is, or is to be, for which parties are liable to be assessed, or for the construction of which their estates may receive damage. *Town of Leominster v. Conant*, 139 Mass. 384; s. c., 10 Am. & Eng. Corp. Cas. 390.

Injunction will not lie to restrain col-

(3) *As to Discharging Sewerage.*—With respect to surface-waters, municipal corporations stand on the same footing as private individuals; and in the grading of streets or the exercise of their other powers, they have no right to divert surface-water, and by artificial means discharge it in increased quantities or in new and destructive currents upon the lands of others.¹

lection of special tax for construction of sewer upon ground that sewer was laid above established grade of street so as to oblige plaintiff to incur considerable expense in filling in his lots. *Robinson v. City of Milwaukee et al.*, 61 Wis. 585; s. c., 7 Am. & Eng. Corp. Cas. 540.

1. *O'Brien v. City of St. Paul*, 25 Minn. 333; s. c., 33 Am. Rep. 470; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Ross v. City of Clinton*, 46 Iowa, 606; s. c., 26 Am. Rep. 169; *Gillison v. City of Charleston*, 16 W. Va. 282; s. c., 37 Am. Rep. 763; *City of Aurora v. Reed*, 57 Ill. 29; s. c., 11 Am. Rep. 1; *City of Aurora v. Gillett*, 56 Ill. 132; *City of Jacksonville v. Lambert*, 62 Ill. 519; *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135; *Nevins v. City of Peoria*, 41 Ill. 502; s. c., 89 Am. Dec. 392; *Field v. Town of West Orange (N. J.)*, 2 Atlantic Rep. 236; *Inman v. Tripp*, 11 R. I. 520; s. c., 23 Am. Rep. 520; *Winn v. Village of Rutland*, 52 Vt. 481; *Ashley v. Port Huron*, 35 Mich. 296; s. c., 24 Am. Rep. 552; *Pettigrew v. Evansville*, 25 Wis. 223; *Hildreth v. Lowell*, 11 Gray (Mass.), 345; *Phinizy v. Augusta*, 47 Ga. 260; *Troy v. Coleman*, 58 Ala. 570.

A town, in making street improvements, caused the surface-water to be collected and turned into gutters or drains, and led to a point where the earth was low and marshy. It was then discharged on private property, so that a ditch constructed by the owner of land adjoining such marsh was rendered inadequate to drain his land, and he was damaged by the accumulation of water thereon. *Held*, that the town was liable. *Field v. Town of West Orange (N. J.)*, 2 Atlantic Rep. 236.

The fact that such artificial channel does not extend entirely to the other party's land, will not affect the question. If a city wishes to acquire the right to discharge its sewerage or drains upon the property of others, it must do so either by purchase or by an exercise of the power of eminent domain. *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50; *Ashley v. City of Port Huron*, 35 Mich. 296; s. c., 24 Am. Rep. 552. It has no right to discharge drainage into a mill-race owned by others. *Columbus*

v. Woollen Mill Co., 33 Ind. 435; *Locks & Canals v. Lowell*, 7 Gray (Mass.), 223. But may connect its sewers with any natural flow of water. *Munn v. Pittsburgh*, 40 Pa. St. 364.

The plaintiff was the owner of land, the rear of which extended back to a brook or drain or ditch. The city of N., in which the premises were situate, for the purpose of draining the surface of certain of its highways, built a drain, with catch-basins for collecting the water, and turning it into the same, and this drain connected with another drain, which terminated in a catch-basin, from which water passed into the rear of plaintiff's premises; the intention being to empty the water coming through the drain-pipe into the brook or drain before named, and so carry the same to the river. Instead of connecting directly with said brook, the drain pipe was stopped at the catch-basin, where there was a discontinued blind drain made of rubble-stone and dirt, through which only the water could pass to the brook, so that water rose to the surface, and spread over the land of plaintiff; and the sand and gravel carried into the brook choked up the culvert at its outlet, so that the water was turned backed upon plaintiff's premises. By the construction of these drains water which would not otherwise have flowed towards plaintiff's premises was conveyed there. *Held*, that the city had a right to drain the surface of its highways, even if water was thereby turned upon the land of plaintiff, provided the methods adopted were proper, and that the plaintiff could make no complaint of the city for the construction of the catch-basins and drain; and that, in the absence of evidence that the defendant had improperly constructed its drain, and in the absence of evidence that the plaintiff was a riparian owner of land bounding on a natural water-course, the plaintiff could not maintain an action against the city for interfering with the water course, so that water which flowed into it could not flow out of it. *Stanchfield v. City of Newton*, 142 Mass. 110; s. c., 14 Am. & Eng. Corp. Cas. 423.

Although it has the right to so construct sewers as to discharge their refuse

B. DUTIES AND LIABILITIES.—(1) *Generally*.—Among the special powers, the exercise of which is for the private benefit and advantage of the municipality, is that which authorizes them to construct, control, and repair common sewers; and accordingly the grant of this power is regarded as raising an implied promise on the part of the corporation to perform with fidelity and care all duties growing out of its exercise, and this promise inures to the benefit of every individual interested in their performance.¹ In respect to such duties a city or village is not a mere municipal corporation, but is a private one, and liable on the same principles and to the same extent as private corporations.²

(2) *Judicial and Ministerial Duties*.—With respect to the liability of municipal corporations, a distinction is also made between those duties which are termed ministerial and those which are of a judicial nature. Concerning the latter, no responsibility exists;

matter into the sea, yet this right must be so exercised as not to create a nuisance either public or private. *Haskell v. New Bedford*, 108 Mass. 208.

The right must be so exercised as not to interfere with the public right of navigation, or with the rights of the owners of wharves lawfully erected. And if a city allows deposits from sewers to accumulate and remain in docks in such quantities as to menace the public health, obstruct navigation, or seriously injure the rights of wharf owners, it is liable. *Franklin Wharf Co. v. Portland*, 67 Me. 46; s. c., 24 Am. Rep. 1; *Clark v. Peckham*, 10 R. I. 35; s. c., 14 Am. Rep. 654; *Brayton v. City of Fall River*, 113 Mass. 218; s. c., 18 Am. Rep. 470; *Haskell v. New Bedford*, 108 Mass. 208; *Boston v. Richardson*, 19 How. (U. S.) 263.

A municipal corporation has the right, unless expressly prohibited by its charter, in order to find an outlet for sewage, to make contracts for and construct works beyond the corporate limits for the discharge of sewage. *City of Coldwater v. Tucker*, 36 Mich. 474; s. c., 24 Am. Rep. 601.

For decisions as to what is essential under various statutes in different States, see *Massing v. Ames*, 37 Wis. 651; *Strowbridge v. Portland*, 8 Ore. 67; *Goodrich v. Minork*, 62 Ill. 121; *In re Blodget*, 46 N. Y. 180; *Roosevelt Hospital v. Mayor*, 84 N. Y. 108; *In re Rhineland*, 68 N. Y. 106; *Matter of Merriam*, 84 N. Y. 596; *Lathrop v. Buffalo*, 3 Abb. Dec. 30; *In re Metropolitan Gas Light Co.*, 85 N. Y. 526; *Matter of Kendall*, 85 N. Y. 302; *In re Burmeister*, 76 N. Y. 174; *Watertown v. Fairbanks*, 65 N. Y. 588; *In re Leak & Watts Orphan Home*, 92 N. Y. 116; *Emery v. Reed*, 65 Cal.

351; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338; *Grimmell v. Des Moines*, 57 Iowa, 144; *In re New Orleans Draining Co.*, 11 La. 338; *Philadelphia v. Scott*, 72 Pa. St. 92; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Wright v. Boston*, 9 Cush. (Mass.) 233; *Brewer v. Springfield*, 97 Mass. 152; *Workman v. Worcester*, 118 Mass. 168; *Patton v. Springfield*, 99 Mass. 627; *French v. Lowell*, 117 Mass. 363; *St. Louis v. Clemens*, 43 Mo. 395; *Sheehan v. Martin*, 10 Mo. App. 285; *Young v. St. Louis*, 47 Mo. 492; *Eyeremann v. Blakelsly*, 9 Mo. App. 231; *Creamer v. Allen*, 3 Mo. App. 545; *Trustees v. Trenton*, 30 N. J. Eq. 667; *Vanderbeck v. Jersey City*, 29 N. J. L. 449; *Cincinnati v. Bickett*, 26 Ohio St. 49; *Lippis v. Philadelphia*, 38 Pa. St. 503; *Com. v. Wood*, 44 Pa. St. 113.

1. *Cooley's Const. Lim.* 304; *Win v. Rutland*, 52 Vt. 481; *Dillon Mun. Corp. chap. 23*; *People ex rel. Board of Park Commrs. v. Common Council of Detroit*, 28 Mich. 228; s. c., 15 Am. Rep. 202; *Note to Conrad v. Trustees of Ithaca*, 16 N. Y. 158.

2. *Jones v. City of New Haven*, 34 Conn. 1; *Lloyd v. City of New York*, 5 N. Y. 369; *Hill v. City of Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332.

Degree of Care Required.—In undertaking the construction of sewers, drains, or culverts, it is the duty of municipal corporations to exercise that degree of care, skill, and prudence that a discreet and cautious individual would use if the whole loss or risk were to be his own. *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *Mayor, etc., of New York v. Bailey*, 2 Denio (N. Y.), 433; *Win v. Village of Rutland*, 52 Vt. 481.

but for the failure to perform or for the improper performance of the former the corporation is always liable.

Ministerial duties, as distinguished from those which are discretionary or *quasi-judicial*, are said to be such as are absolute, certain, and imperative.¹

The right conferred upon municipal corporations to construct sewers imposes no imperative duty to construct them. The duty created is in its nature judicial, requiring the exercise of deliberation, judgment, and discretion. The power is to be exercised whenever in the opinion of the municipal authorities the convenience or welfare of the citizens requires it, and its exercise cannot be controlled by the courts either directly or indirectly. It follows that the corporation is not liable to a civil action for failing to exercise the power, nor for any error of judgment in its exercise.²

But having once elected to act under this power, and by ordaining the construction of a sewer, determined that the necessity for one exists, the judicial duty and discretion ceases; and the prosecution of the work becomes at once ministerial in its character; and "where a judicial duty ends and ministerial duty begins, there immunity ceases and liability attaches."³ And it is liable like an individual for damages to others resulting from the negligent discharge or the negligent omission to discharge such duty.⁴

1. *Per Denio, C. J.*, in *Mills v. Brooklyn*, 32 N. Y. 489.

2. *Carr v. Northern Liberties*, 35 Pa. St. 324; s. c., 78 Am. Dec. 342; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *City Council v. Gilmer*, 33 Ala. 116; *Child v. Boston*, 4 Allen (Mass.), 41; *Wilson v. Mayor, etc.*, 1 Denio (N. Y.), 595; s. c., 43 Am. Dec. 719; *Freburg v. Davenport*, 63 Iowa, 119; s. c., 50 Am. Rep. 737; *Emery v. City of Lowell*, 104 Mass. 13; *Hines v. City of Lockport*, 50 N. Y. 236; *Weightman v. Washington*, 1 Black (U. S.), 39; *Town of Sullivan v. Phillips*, 110 Ind. 320; *Wicks v. Town of De Witt*, 54 Iowa, 130.

A court of equity has no power to compel a city to construct a new sewer where the existing one is of insufficient capacity to carry off the sewage. *Horton v. Mayor, etc.*, 4 Lea, 39; s. c., 40 Am. Rep. 1. And a lot-owner cannot enjoin the construction of one for surface-water on the ground that the plan proposed is of inadequate size.—*Mayor of Americus v. Eldridge*, 64 Ga. 524; s. c., 37 Am. Rep. 89;—nor because it will increase the flow of surface-water upon his lot,—*Heth v. City of Fond du Lac*, 63 Wis. 228; s. c., 53 Am. Rep. 279;—but separate owners of town lots may join in a

suit and enjoin the corporation from collecting the water in one body or channel, and pouring it upon their respective lots, —*Town of Sullivan v. Phillips et al.*, 110 Ind. 320.

The rule that a municipal corporation is not liable for failing to provide sewers does not apply when the necessity for drainage is caused by the act of the corporation itself. *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Van Pelt v. Davenport*, 42 Iowa, 308; s. c., 20 Am. Rep. 622; *Aurora v. Reed*, 57 Ill. 30.

3. *Jones v. City of New Haven*, 34 Conn. 1; *City of Denver v. Rhodes (Colo.)*, 13 Pac. Rep. 729.

4. *City of Denver v. Rhodes (Colo.)*, 13 Pac. Rep. 729; *Rhodes v. City of Cleveland*, 10 Ohio, 159; s. c., 36 Am. Dec. 82.

Accordingly, where a city constructed a sewer so unskillfully that it became obstructed, and caused water to set back on to the plaintiff's premises to his injury, the city was held liable. *Rowe v. Portsmouth*, 56 N. H. 291; s. c., 22 Am. Rep. 464; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463.

And there is a municipal liability where the property of private persons is flooded, either directly or by water being set back on it, where this is the result of the negligent execution of the work. *Gilluly v.*

(3) *Accidents Caused by Construction of*.—A municipal corporation takes power to construct sewers through its streets with the understanding that the power shall be so executed as not to interfere unnecessarily with the rights of the public, and that all needful and proper measures shall be taken in its execution to guard against accidents to persons lawfully using the streets at the time. The corporation is bound for the performance of these obligations, and cannot rid itself of their performance by executing the power through agents. The relation of contractor and of principal and agent must necessarily exist together where one contracts with a municipal corporation to construct a sewer through one of its streets.

Accordingly they are held liable for injuries caused by the negligence of a contractor in not placing guards to an excavation in its streets for a sewer, although the corporation is required by its charter to let the contract to the lowest bidder.¹

(4) *Devising Plans*.—As to whether the devising or adopting a plan for a sewer by a municipal corporation falls within the rule relating to ministerial duties, is a question upon which the authorities are not agreed. The majority of the adjudged cases may be said to be against it.²

City of Madison, 63 Wis. 518; s. c., 53 Am. Rep. 299; *Ellis v. Iowa City*, 29 Iowa, 229; *Thurston v. City of St. Joseph*, 51 Mo. 510; s. c., 11 Am. Rep. 463; overruling *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20; and *Hoffman v. St. Louis*, 15 Mo. 651; *Hardy v. City of Brooklyn*, 90 N. Y. 435; s. c., 43 Am. Rep. 182.

Under the constitution of *California*, a city is liable for injury to property caused by settling of soil in consequence of construction of street sewer, though property-owner made no attempt to protect his property. *Reardon v. City and County of San Francisco*, 66 Cal. 492; s. c., 7 Am. & Eng. Corp. Cas. 454.

And if a city in causing a sewer to be constructed knowingly permits earth, etc., to remain in the street an unnecessary length of time, so as to obstruct the proper flow of water in the gutters, it will be liable to an adjoining owner for injury done to his property by an overflow caused by such obstruction. *Harper v. City of Milwaukee*, 30 Wis. 365; *Jacksonville v. Lambert*, 62 Ill. 519; *Columbus v. Woollen Mills*, 33 Ind. 435.

And a town which lawfully takes land and constructs a common sewer therein, whereby a well on land not taken, and not adjoining land taken, is made dry, the well being fed by water percolating through the soil, is liable in damages to the owner of the land in which the well is situated. *Trowbridge v. Inhabitants*

of Brookline, 144 Mass. 139; s. c., 16 Am. & Eng. Corp. Cas. 558.

1. *City of Detroit v. Corey*, 9 Mich. 165; s. c., 80 Am. Dec. 78; *Harper v. City of Milwaukee*, 30 Wis. 365; *Storrs v. Utica*, 17 N. Y. 104. On the ground that the city is charged with the care and control of its streets. *City of Springfield v. La Claire*, 49 Ill. 476; *St. Paul v. Seitz*, 3 Minn. 297. The contrary is held in *City of Erie v. Caulkins*, 85 Pa. St. 247; s. c., 27 Am. Rep. 642.

In *Murphy v. Lowell*, 128 Mass. 396; s. c., 35 Am. Rep. 381, it is held that a city is not liable for an injury caused by the necessary blasting of rocks in constructing a sewer, unless its agents are chargeable with negligence. But a contrary rule is laid down in *City of Joliet v. Harwood*, 86 Ill. 110; s. c., 29 Am. Rep. 17.

2. *Mills v. City of Brooklyn*, 32 N. Y. 489; *Child v. Boston*, 4 Allen (Mass.) 41; *McCarthy v. Syracuse*, 46 N. Y. 194; *City of Denver v. Capelli*, 4 Colo. 25; s. c., 34 Am. Rep. 62; *Johnston v. District of Columbia*, 118 U. S. 19, where it is held that "the duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience

throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land." And see *Urquhart v. City of Ogdensburg*, 98 N. Y. 238; *Heth v. City of Fond du Lac*, 63 Wis. 230; *Smith v. Gould*, 61 Wis. 31; s. c., 5 Am. & Eng. Corp. Cas. 472; *Wicks v. Town of De Witt*, 54 Iowa, 130.

But there are well-considered cases that hold that the skill and care which is incumbent relates as well to the capacity of a sewer as to the mere mechanism in its construction—as well to its plan as to its execution. *City of Indianapolis v. Huffer*, 30 Ind. 235; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135; *City of Crawfordsville v. Bond*, 96 Ind. 236; *City of North Vernon v. Voegler*, 103 Ind. 314; *Rice v. City of Evansville*, 108 Ind. 7; s. c., 58 Am. Rep. 22; *Van Pelt v. City of Davenport*, 42 Iowa, 308; s. c., 20 Am. Rep. 622; *Ferguson v. Davis Co.*, 57 Iowa, 601; *Powers v. City of Council Bluffs*, 50 Iowa, 197.

The current of decisions for a long time has been to increase the liabilities of municipal corporations. *Rhodes v. City of Cleveland*, 10 Ohio, 159; s. c., 36 Am. Dec. 82. And some of the cases, while holding that the prescribing of the plan of a common sewer, as well as the determination to construct one, is and must be in the nature of a legislative action, the wisdom and propriety of which cannot be made a question for the courts, yet hold that where such a plan must necessarily result in a direct invasion of private property, as by flooding it to the injury of the owner, the municipality is liable. *Ashley v. City of Port Huron*, 35 Mich. 296; s. c., 24 Am. Rep. 552; *Hardy v. Brooklyn*, 90 N. Y. 435; s. c., 43 Am. Rep. 182.

In *Détroit v. Beckman*, 34 Mich. 125; s. c., 22 Am. Rep. 507, it is held that a municipal corporation is not liable for injuries resulting from the plan of a public work, as distinguished from its mode of execution, unless such plan must necessarily result in a direct invasion of private property. In the opinion by Cooley, C. J., it is said: "The distinction in principle between the case where the complaint is that the work must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the

owner is entitled, and a case where the fault found is with the plan as not being most wise and prudent to protect against accidents, seems very distinct and palpable." And then with reference to a defective plan he quotes from the decision by Lowrie, C. J., in *Carr v. Northern Liberties*, 35 Pa. St. 324; s. c., 78 Am. Dec. 342, as follows: "Municipal corporations have often been held liable for carelessness in the exercise of their functions; but if we undertake to correct the evils in such a case as this, on the ground of carelessness, we do not see how to escape from the necessity of submitting the propriety of all acts of grading and draining in our towns to the decision of juries; for even discretionary acts may be charged to have been ignorantly or carelessly resolved upon. Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow, or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted."

In a case which arose in *New York*,—*Seifert v. City of Brooklyn*, 101 N. Y. 136; s. c., 54 Am. Rep. 664; 14 Am. & Eng. Corp. Cas. 438,—it appeared that by reason of the incapacity of a main sewer to carry off the sewage turned into it, sewage was forced through the manhole and inundated the plaintiff's premises to his damage, and with knowledge of this the city continued to attach lateral sewers to this main sewer, increasing the injury to the plaintiff's property. The defendant invoked the principle exempting corporations from liability occasioned through the exercise of judicial functions, as a defence to the action but the city was held liable, and Ruger, C. J., rendering the opinion, after reviewing the cases referred to by the defendant, says: "We find no warrant in them for the doctrine that a municipal corporation, in the exercise of its discretionary or judicial power of determining when, where, and how to make improvements such as streets, sidewalks, sewers, etc., has the right to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to the public use." The city was held liable in a similar case

in *Lewenthal v. Mayor, etc., of New York*, 61 Barb. (N. Y.) 511.

In an earlier case, the court seems to have placed the adoption of the plan among the ministerial duties. It was held that when a corporation undertakes to build sewers they are bound to exercise such skill in their construction, and to give them such sufficiency of capacity, that they will not become a nuisance to the property of those residing in the neighborhood. "Or in other words, having elected to act under the power granted by charter, they must be held responsible for a complete and perfect execution." And the fact that the sewer was larger than the city surveyor, a man who laid no claim to the skill of a professional engineer, thought necessary, could not affect the liability of the corporation. *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463. In the opinion it is said: "The ordinance of the common council directing such public improvements is judicial in its nature, and extends immunity from private action for damages to those who perform the duty; but there this immunity ends. The further prosecution of the work is purely of a ministerial character; the agents to perform it are of their own selection, and they are bound to see that it is done in a safe and skilful manner. . . . The city has seen fit to select for the responsible duty of adviser in these important matters a man who made no claim to the skill of a professional engineer. He was their agent; and it will not answer for an individual or a corporation to select an incompetent agent, and then shield themselves from the consequences of his injudicious acts by justifying under his advice. No careful and prudent man would employ an agent to direct so important a work, destitute alike of education and skill in his particular department of professional science. It seems from the testimony that a skilful engineer would have so directed the construction of the culvert as to have prevented the injury to the plaintiffs for which they prosecute this suit. I have no doubt of the insufficiency of this ground of defence." See also *Mayor, etc., v. Bailey*, 2 Denio (N. Y.), 433; *Hubbell v. Yonkers*, 35 Hun (N. Y.), 349; *Win v. Village of Rutland*, 52 Vt. 481.

In *Morgan v. City of Binghamton*, 102 N. Y. 500; s. c., 13 Am. & Eng. Corp. Cas. 481, it was held that a court of equity will not enjoin the use of a carefully planned system of sewerage merely because, at an indefinite future

time, consequential damages may result to the complainant.

In an *Iowa* case, it is said to be the duty of a corporation, as it must act through the agency of others, to select a competent engineer, and when such selection is made the city has in that regard discharged its duty, and no direct negligence or omission is attributable to it; and if a competent engineer acts in good faith in drafting the plans of a sewer, and honestly believes that he is making it large enough to accomplish the purpose intended, the city is not liable though he misjudges as to the capacity required. *Van Pelt v. City of Davenport*, 42 Iowa, 308; s. c., 20 Am. Rep. 622. But see this case distinguished in *Parker & Co. v. Des Moines*, 53 Iowa, 679. This case was referred to and followed in a later case, where it is held that a county cannot carelessly and negligently adopt an insufficient plan for a bridge and escape liability for damages therefrom; that it was bound to exercise at least reasonable care in the adoption of the plan. *Ferguson v. Davis Co.*, 57 Iowa, 601. And in another case in *Iowa* it was held to be the duty of the city to make provision for such floods as might be expected, judging from such as had previously occurred. *Powers v. City of Council Bluffs*, 50 Iowa, 197; *German Theological School v. City of Dubuque*, 64 Iowa, 736; s. c., 2 Am. & Eng. Corp. Cas. 625.

And in *North Carolina*, it is held that a municipal corporation, in preparing side drains to its streets for carrying off rain-water, is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen. So when the plaintiffs sued for damages for flooding their cellar, caused by the gutters not being of sufficient capacity to carry off the water, and it appeared that they had for five years been sufficient, and only failed on this one occasion, it was error in the court below not to submit this view of the case to the jury. *Wright v. City of Wilmington*, 92 N. Car. 156; s. c., 15 Am. & Eng. Corp. Cas. 284.

In *Indiana*, it is held in numerous cases that a municipal corporation is responsible for negligence in devising the plan of a sewer as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment. *City of North Vernon v. Voegler*, 103 Ind. 314; s. c., 13 Am. & Eng. Corp. Cas. 434, where it is said: "Suppose that the common council of the city determine to build a sewer and

(5) *Repairing*.—The sewer having been constructed, the duty of maintaining it and keeping it in proper condition and repair is ministerial, and any violation or negligent performance of this duty will render the city liable for damages resulting therefrom.¹

cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one tenth of the water conducted to it by the drains constructed by the city. The only rule that has any valid support in principle is, that for errors of judgment in devising a plan there is no liability, but there is liability where the lack of care and skill in devising the plan is so great as to constitute negligence." *Rice v. City of Evansville*, 108 Ind. 7; s. c., 58 Am. Rep. 22; *City of Crawfordsville v. Bond*, 96 Ind. 236; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135; *City of Indianapolis v. Huffer*, 30 Ind. 235; *City of Ft. Wayne v. Coombs*, 107 Ind. 75; s. c., 13 Am. & Eng. Corp. Cas. 469.

But where, in the improvement of a public street, a municipal corporation constructs a sewer in a skilful and careful manner, and keeps the same in good repair, it will not be liable in damages, as a general rule, to the owner of an abutting lot, for the errors in judgment or mistakes of the municipal authorities in regard to the capacity of the sewer to perform the work for which it was intended. *Rozell v. City of Anderson*, 91 Ind. 591; s. c., 4 Am. & Eng. Corp. Cas. 622.

Under these Indiana decisions, a city is said not to be liable for an injury to private property by the overflowing of a sewer, caused by its incapacity resulting from a mere error of judgment not amounting to gross negligence. *Rice v. City of Evansville*, 108 Ind. 7; s. c., 58 Am. Rep. 22. Yet under the rule laid down by the *Michigan* and *New York* cases heretofore referred to, the city would seem to be liable as for a direct invasion of property; and the question of negligence in devising or adopting the plan would not arise. *Ashley v. City of Port Huron*, 35 Mich. 296; s. c., 24 Am. Rep. 552; *Detroit v. Beckman*, 34 Mich. 125; s. c., 22 Am. Rep. 507; *Seifert v. City of Brooklyn*, 101 N. Y. 136; s. c., 54 Am. Rep. 664; 14 Am. & Eng. Corp. Cas. 440. And see also *Hooker v. New Haven and North Hampton Co.*, 14

Conn. 146; *Thurston v. City of St. Joseph*, 51 Mo. 510; s. c., 11 Am. Rep. 463; *Rhodes v. City of Cleveland*, 10 Ohio, 159; s. c., 36 Am. Dec. 82.

As is said by Judge Dillon (*Dillon on Municipal Corporations*, sec. 1047): "It is, perhaps, impossible to reconcile the cases on this subject, and courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water which would not otherwise have flowed or found its way there, the corporation is liable."

1. *Child v. Boston*, 4 Allen (Mass.), 41; *Lloyd v. City of New York*, 5 N. Y. 369; *Mayor of New York v. Furze*, 3 Hill (N. Y.), 612.

The owners and occupants of houses and lots in the neighborhood having been charged with the expense of the sewers, acquire a right to the common use of them; and a corresponding duty devolves upon the corporation to keep them in proper condition and repair. *Masterton v. Village of Mount Vernon*, 58 N. Y. 391; *City of Fort Wayne v. Coombs*, 107 Ind. 75; s. c., 57 Am. Rep. 82; *Barton v. City of Syracuse*, 36 N. Y. 54.

This duty is not performed by waiting to be notified by citizens that the sewers are obstructed or out of repair, but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examinations and cleansing, the omission to make such examinations and to keep the sewer clear is a neglect of duty which renders the city liable. *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Todd v. City of Troy*, 61 N. Y. 506.

The mere absence of notice of the bad condition of the sewer does not absolve the city from liability. If the defect existed and ought to have been discovered and repaired, a party injured need not show actual notice. *Vanderslice v. Philadelphia*, 103 Pa. St. 102; *City of Fort Wayne v. Coombs*, 107 Ind. 75; s. c., 13 Am. & Eng. Corp. Cas. 469.

(6) *Connecting*.—A property-owner, in connecting his drain with a public sewer, is not bound to guard against the negligence of the corporation, and its want of care in keeping the sewer in repair.¹ And where the connection is made by permission of the city, under the direction of the city commissioner, and the work is negligently done, the city is liable for such negligence.²

(7) *Abandonment*.—It has been said that a city may in its discretion discontinue a sewer, and if the citizens are not left in a worse condition than if the sewer had not been made, the city will not be liable for injuries caused by the flow of surface-water.³

DRAM.—See note 4.

DRAMATIC.—See note 5.

But in case there is no fault in the construction, and the damage is caused by an obstruction therein, it is necessary to show neglect to remove the obstruction after notice of its existence, or some omission of duty upon the part of the municipal officers in looking after it and preventing obstructions. *Smith v. Mayor, etc., of New York*, 66 N. Y. 295.

Where a city has assumed control and management of a sewer, it is immaterial by whom the same was originally constructed, and it is bound to use reasonable diligence to keep such sewer in repair, as in other cases. *Taylor v. City of Austin*, 32 Minn. 247.

And if a running stream is converted by a city into a public sewer by enclosing it, and assuming control of, and appointing officers to keep it in repair, the city will be liable for any damage to owners of private property caused by any neglect or inattention on its part, just as if the sewer was originally an artificial one; and the fact that employees of the city were at work in the sewer a few days before it burst, is evidence of knowledge of its condition or negligence. *Kranz v. Mayor, etc., Baltimore City*, 64 Md. 491.

A city is likewise liable for any changes or alterations made by the city or its authority, or with the knowledge of the city officials, by means of which the waters are obstructed in their passage and damage ensues to others. *Nims v. Troy*, 59 N. Y. 500.

1. *Barton v. City of Syracuse*, 37 Barb. (N. Y.) 292; affirmed in 36 N. Y. 54.

A municipal corporation is liable to one who, for his private benefit, connects his premises with a sewer constructed by it, for injuries resulting from the negligent construction or maintenance of the sewer. *City of Fort Wayne v. Coombs*, 107 Ind. 75; s. c., 13 Am. & Eng. Corp. Cas. 469.

2. *Wendall v. Mayor of Troy*, 4 Keyes (N. Y.), 261.

3. *City of Atchison v. Challis*, 9 Kan. 603.

4. "In common parlance, a 'dram' means something that has alcohol in it—something that can intoxicate." Testimony of the sale of "a dram" is sufficient to sustain an indictment for selling "a drink of whiskey." *Lacy v. State*, 32 Tex. 227.

The term "dram-shop" is used in the license laws of *Illinois* to mean any place where liquors are sold in less quantities than a gallon. *Wright v. People*, 101 Ill. 134.

In *Missouri*, "a dram-shop keeper is a person permitted by law, being licensed, etc., to sell intoxicating liquors in any quantity less than a quart." *State v. Owen*, 15 Mo. 506.

5. A pantomime is a dramatic piece or entertainment, within the meaning of those terms as used in an act giving a property protected by law to the authors of such when unprinted and unpublished. *Lee v. Simpson*, 3 C. B. 871.

A similar construction was put upon the term "dramatic composition," as used in the copyright laws of the *United States*.

"A composition, in the sense in which that word is used in the act of 1856, is a written or literary work, invented and set in order." A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed, or represented. . . . A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a

DRAW.—See note 1.

DRAY.—See note 2.

DREDGE.—See note 3.

DRIFT-WOOD.—See BEACH.

DRINK.—See note 4.

dramatic composition designed or suited for public representation as if language or dialogue were used in it to convey some of the ideas. The 'railroad scene' in the plaintiff's play (*Under the Gaslight*) is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition as those parts of it which are represented by voice. . . . It is manifest that the most interesting and attractive dramatic effect [in the play] is produced by what is done by movement and gesture, entirely irrespective of anything that is spoken." *Daly v. Palmer*, 6 Blatchf. (C. C.) 256. But a merely spectacular play does not come within the meaning of the term.

"All the witnesses agree—particularly the experts—that the play has no originality, and that it consists almost wholly of mere scenic effects taken from well-known dramas and operas. . . . The *Black Crook* is a mere spectacle—in the language of the craft, a spectacular drama. It has no pretensions to be called a dramatic composition. The dialogue is very scant, and appears in the light of a mere accessory—a piece of word machinery tacked on to the ballet and tableau. . . . To call such a spectacle a 'dramatic composition' is an abuse of language. An exhibition of model *artistes*, or a menagerie of wild beasts, might as well be called a dramatic composition and claim to be entitled to copyright." *Martinetti v. Maguire*, 1 Deady (U. S.), 216; s. c., 1 Abb. (C. C.) 356.

A song, describing the burning of a ship at sea and the escape of the crew, sung by a man seated at a piano, giving effect to the verses by his delivery, but without the use of scenery or appropriate dress, is a dramatic piece. *Russell v. Smith*, 12 Q. B. 217. And see further on this subject, *Day v. Simpson*, 18 C. B. N. S. 681. See COPYRIGHT.

1. Where a company is authorized to levy toll upon every ship "drawing more than five feet of water" which entered a certain harbor, toll is payable by any ship whose ordinary draught exceeds five feet, although at the time of entering the harbor it drew less than that. *Hibernian Mine Co. v. Tuke*, 8 Ir. C. L. R. 321.

Where an applicant for a pension agreed with an agent to give him, for his services in obtaining the pension, "the first draw," the agent was held to be entitled to the first annuity only, and not to arrears of pension paid at the same time. *Trimble v. Ford*, 5 Dana (Ky.), 517.

2. In a prosecution for the violation of a license law, a vehicle described as a "certain wagon drawn by four horses, and used in the transportation of property and for transferring goods of grocers and merchants," cannot be considered as a "hackney-coach, carriage, omnibus, or dray." *Snyder v. North Lawrence*, 8 Kan. 82.

3. A dredge is not a ship or vessel within an act defining the jurisdiction of a maritime court. "The original meaning attached to the word 'dredge' I believe to be a net or drag for taking oysters; it is now called a machine for cleansing canals and rivers. To dredge is to gather or take with a dredge—to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging-machine. What is here called 'dredge' is sometimes called 'dredger,' which Worcester calls 'a sort of open barge used in removing sand, mud, silt, etc., from the beds of harbors, rivers, and canals—a dredging-machine.' In Wright's Dictionary the word 'dredger' is used instead of 'dredge,' and defined to be a sort of open barge for removing sand, silt, mud, or the like, from the beds of rivers, docks, and harbors."

"The *Nithsdale* has no internal powers of propulsion; she is not propelled by oars or sails; she is flat-bottomed; she is intended to be used in harbors; she has to be moved to a distance by means of a tug; . . . she is not and cannot be a sea or lake going vessel; she is not adapted to be an instrument of transportation." *The Nithsdale*, 15 Canada L. J. 268.

A contract to dredge carries with it the obligation to dispose of the materials obtained by dredging. *Boynton v. Lynn Gaslight Co.*, 124 Mass. 197.

4. Where one was licensed to sell beer not to be drunk on the premises, and he served it through a window in a mug of his own to a person who drank it stand-

DRIVE.—(See also CARRIAGE.)—See note 1.

DROVE.—See note 2.

DROVER.—One who buys cattle in one place to sell in another.³

DRUGGIST is one who prepares and sells drugs for medicinal purposes.⁴

A druggist who delivers one medicine when another is called for is responsible for the consequences on the ground of negligence only. If the error occurred without fault on the part of himself or his servants, the case is like one of inevitable accident, and the druggist is not liable though injurious consequences follow.⁵

ing in the highway, he was not guilty of selling beer to be drunk or consumed on the premises. *Deal v. Schofield*, L. R. 3 Q. B. 9; s. c., 8 B. & S. 760. But it was held otherwise where the beer was supplied to a traveller who sat upon a bench attached to the wall of the house while he drank the beer, and then returned the mug. *Cross v. Watts*, 13 C. B. N. S. 240.

By the Drink.—Retailing liquors by the drink is retailing in quantities not exceeding one quart. *Sappington v. Carter*, 67 Ill. 482.

1. A person who drove a van with horses, in which were calves being conveyed to market, was held not to be guilty of an infraction of an act forbidding any drover or other person to conduct or drive any cattle through any of the streets on Sunday. "The 'driving or conducting' cattle intended by the statute must be the ordinary driving, when the cattle are themselves driven." *Triggs v. Lester*, L. R. 1 Q. B. 259.

The riding a bicycle comes within an act against furiously riding a beast or driving a carriage. It is within the meaning of the latter phrase. *Taylor v. Goodwin*, 4 Q. B. D. 228.

Drive, Conduct, and Manage.—An allegation that the defendant's servants negligently "drove, conducted, and managed the coach," by the overturning of which the plaintiff was injured, is not supported by evidence of negligence in sending out an insufficient coach. *Mayor v. Humphries*, 1 C. & P. 251.

A hostler at a stage-tavern, in the employment of the mail contractors, regularly employed in changing the post-horses, and in the absence of the regular driver occasionally driving the mail-coach, is not a "stage-driver" within an act exempting such from military duty. *Littlefield v. Leland*, 8 Me. 185.

2. Under an act making it unlawful,

under certain circumstances, to herd any "drove of horses or cattle," an information is not defective because it describes the cattle as "fifty head" instead of calling them a drove. *Caldwell v. State*, 2 Tex. App. 53.

3. Jacob's L. Dict., adopted in *Mills v. Hughes*, Willes, 588, where the word, as used in an exception to a bankruptcy law, was construed. The word is derived from "drove" and not from "drive." *Bolton v. Sowerby*, 11 East, 274.

4. *Anderson v. Com.*, 9 Bush (Ky.), 571. Compare *State v. Holmes*, 28 La. Ann. 765.

Where a statute provided that "druggists may sell, for medicinal purposes only, pure alcohol to other druggists, apothecaries, and physicians known to be such," it is not sufficient evidence of a sale of alcohol "for medicinal purposes only" within the statute that the buyers were wholesale druggists. *Mills v. Parkins*, 120 Mass. 41.

5. *Brown v. Marshall*, 47 Mich. 576; s. c., 41 Am. Rep. 728. See *Walton v. Booth*, 34 La. Ann. 913; *McCubbin v. Hastings*, 27 La. Ann. 713.

A druggist is responsible only for injuries resulting from a want of ordinary care and skill. The highest degree of skill is not required of him. *Simonde v. Henry*, 39 Me. 155; s. c., 63 Am. Dec. 611.

It is the duty of druggists to know the properties of the medicine which they vend, and to employ such persons as are capable of discriminating and compounding according to prescription; and if they depart from the prescription, or ignorantly introduce other and poisonous drugs, they are responsible for the consequences to the party injured, and cannot escape responsibility by proof that they had been extraordinarily careful in general. *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219. In this case, a druggist in compound-

Where, upon the sale by a druggist of a poisonous medicine, he fully and fairly warns the purchaser of its character, and gives accurate information and directions as to the quantity which may be safely taken, and the customer is injured or killed by taking an over dose in disregard of such direction, the druggist is not liable for negligence or tort simply because of an omission on his part to put a label marked "poison" upon the "parcel in which the sale is made, as required by the statute. The customer may not disregard the warning and direction, and charge the consequences of his own negligence or recklessness upon the druggist.¹

Where a druggist in good faith recommends a prescription not as his own, but as that of another named person, and thereupon is ordered by his customer to fill it, and does so, charging only for the medicines and for compounding them, he is not responsible to the customer for any damage which may result from the use or administration of the remedy by the latter.²

The remote vendor of medicine upon which he has carelessly put a wrong label, and which so labelled he puts upon the market, is liable for injuries resulting therefrom. This is so although

ing a medicine ground the different ingredients in a mill which had been used for poisonous drugs, and did not first properly clean it. They claimed to go to the jury on the question of due care, and under instructions that if they used due care, or at least if they used extraordinary and unusual care, they were not liable in a civil action. The court of appeals said: "It is absurd to speak of degrees of diligence and of negligence as excusing or not excusing, or as settling the question of liability or no liability, in a case where the vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground."

Contributory Negligence.—Where defendant in putting up a prescription for plaintiff took belladonna instead of rhubarb from a jar properly labelled, and plaintiff in the presence of defendant, taking a small quantity of the drug from the same jar, asked whether that was a proper dose, and being answered in the affirmative, took it and suffered injury, *held*, that the plaintiff was guilty of contributory negligence sufficient to defeat recovery. *Gwynn v. Duffield*, 61 Iowa, 64; s. c., 47 Am. Rep. 802; 66 Iowa, 708; 55 Am. Rep. 286.

If a druggist sell one medicine for another, and injury results from taking it, it is no defence for him that the case was negligently treated and cared for. *Brown v. Marshall*, 47 Mich. 576; s. c., 41 Am. Rep. 728.

1. In an action against a druggist for

alleged negligence in the sale of a poisonous medicine without attaching a label marked poison, thus causing the death of W., plaintiff's intestate, it appeared that W., having been advised to take a comparatively harmless preparation known as "black draught," and that he could take a small wine-glass thereof, which he could procure at any drug-store for ten cents, went to defendant's drug-store, where, according to the testimony of defendant's clerk, he asked defendant for ten cents worth of "black drops;" defendant told him that was a poison, and advised him to take another preparation; this W. refused, and defendant thereupon directed the witness to give him black drops, but informed him that he should only take ten or twelve drops for a dose; witness gave W. two drachms of the medicine asked for in a vial, upon which was a label marked "black drops;" the label did not have the word "poison" thereon. W. took nearly the whole of the contents of the vial, and died in consequence. *Held*, that if the testimony of the clerk was to be taken as the truth, a verdict for defendant was properly directed; but that the jury were at liberty, under the circumstances, to disbelieve such testimony, as the witness was interested, having violated the law by omitting the prescribed label; and that, therefore, the question as to whether the warning testified to was in fact given was one for the jury, and the direction was error. *Wohlfahrt v. Beckert*, 92 N. Y. 490; s. c., 41 Am. Rep. 406.

2. *Ray v. Burbank*, 61 Ga. 505; s. c., 34 Am. Rep. 103.

there be no privity or connection between such vendor and the person injured by its use.¹

Where a druggist negligently sells a deadly poison as and for a harmless medicine to A, who buys it to administer to B, and gives B a dose of it, as medicine, from which he dies, a right of action in tort against the druggist survives to B's administrator.²

Where a statute provides that "it shall be unlawful for any person not a registered pharmacist to conduct any pharmacy or drug-store," it is no defence that the sales were made by a clerk who was a registered pharmacist.³

Under a statute which declares that it shall be unlawful for any person who has license to sell vinous and spirituous liquors to keep open the bar or place where such liquors are sold on Sunday, it is unlawful for a druggist who also sells liquor in the same store with his drugs to keep such store open on that day, unless keeping open that part of the store where the drugs are kept does not afford access to the place where the liquors are sold.⁴

The sale of intoxicating liquors by druggists is regulated by local statutes.⁵ (See also EXCISE LAWS.)

DRUGS.—Drugs are substances used in the composition of medicines, or in dyeing or chemical operations.⁶

1. *Thomas v. Winchester*, 6 N. Y. 397.

The sale of an article (sulphide of antimony) in itself harmless, and which becomes dangerous only by being used in combination with some other article, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchased the article from the original vendee, and who is injured while using it in dangerous combination with another article, although by mistake the article actually sold is different from that which is intended to be sold. *Davidson v. Nichols*, 11 Allen (Mass.), 514.

2. *Norton v. Sewall*, 106 Mass. 143; s. c., 8 Am. Rep. 298.

3. *State v. Norton*, 67 Iowa, 641.

4. *Elkin v. State*, 63 Miss. 129.

5. Where a statute requires that a license shall be first obtained, no liquor can be lawfully sold even upon the prescription of a physician. *Woods v. State*, 36 Ark. 36. See *The Druggist Cases*, 85 Tenn. 449; *State v. Wharton* (Tenn.), 3 S. W. Rep. 490; *Wright v. People*, 101 Ill. 126; *Com. v. Sloan*, 4 Cush. (Mass.) 52; *Com. v. Kimball*, 24 Pick. (Mass.) 366; *Com. v. Hallett*, 103 Mass. 452; *State v. Brown*, 31 Me. 522; *State v. Hall*, 39 Me. 107; *State v. Whitney*, 15 Vt. 298; *State v. Chandler*, 15 Vt. 425; *State v. Laffer*, 38 Iowa, 422; *Intoxicating Liquor cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284; *State v. Wray*, 72 N. Car. 253; *Carson v. State*,

69 Ala. 239; *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep. 344; *Boone v. State*, 10 Tex. App. 418; s. c., 38 Am. Rep. 641.

6. *Collins v. Ins. Co.*, 79 N. C. 281; s. c., 28 Am. Rep. 322, where it was held that where a policy of fire insurance covered a stock of drugs and medicines, and contained a stipulation that the policy should be avoided "if the insured shall keep gunpowder, fireworks, saltpetre, etc.," the prohibition was not against keeping saltpetre as a drug, but only in such manner or quantity as would increase the risk.

Where the written part of an insurance policy included "drugs" and "such other merchandise as is usually kept in a country store," and the printed part excepted benzine without written permission, it was held that it should have been submitted to the jury whether benzine came within the written description. "Webster defines a drug as including any mineral substance used in chemical operations; and the court cannot say that as matter of law benzine is not included in that term." *Carrigan v. Ins. Co.*, 53 Vt. 418; s. c., 38 Am. Rep. 687.

A druggist selling at his drug-store whiskey, less than a quart, on the statement of a physician that it was wanted for medical purposes, was held subject to indictment and conviction for selling without a license, whiskey not being a

DRUMMERS.—(See also COMMERCIAL TRAVELLER.)—The term “drummer” has acquired a common acceptation, and is applied to commercial agents who are travelling for wholesale merchants and supplying the retail trade with goods, or rather taking orders for goods to be shipped to the retail merchant.¹ A drummer is one who solicits custom.²

DRUNKARD.—(See also CRIMINAL LAW; CRIMINAL PROCEDURE; HABITUAL.)—He is a drunkard whose habit is to get drunk, whose ebriety has become habitual. To convict a man of the offence of being a common drunkard, it is at the least necessary to show that he is an habitual drunkard. Indeed the terms “drunkard” and “habitual drunkard” mean the same thing.³

drug. *Gault v. State*, 34 Ga. 533. The court said: “If in fact whiskey was what it has been argued to be, a drug, then we apprehend the payment by an apothecary for a license to vend drugs would have protected him against this indictment. We are old-fashioned, and perhaps ignorant of the expansion of many words in modern use, amongst them the word ‘drug.’ We have grown up with the idea that drugs were compounds, mostly of mineral, animal, or vegetable substances, made by apothecaries and others, and used as medicine in the treatment of disease, and commonly called physic. We cannot well see how whiskey can be, with propriety, included in the term last used. That term carries along with it an idea, inseparable from it, of something repulsive, nauseous—at which the gorge heaves. Whiskey, on the contrary, is inviting, exhilarating. . . . It is certainly sometimes taken medicinally; never as a drug. Nor will whiskey fall within another sense of the term ‘drug,’ viz., that of being a commodity that lies on one’s hands, and is not salable in market; or an article of slow sale and for which there is little demand. If these are the characteristics of a drug, is it not a palpable misnomer to call whiskey one?”

The selling of peppermint lozenges by a druggist, it was held, must be considered *prima facie* the selling of drugs and medicines, which was lawful on Sunday. *Reg. v. Howarth*, 33 U. C. Q. B. 537.

1. *Singleton v. Fritsch*, 4 Lea (Tenn.), 96, where it was held that the term does not include a merchant tailor.

2. *Thomas v. City of Hot Springs*, 34 Ark. 557, where it is said “Drummers are, and have been for ages, a large and active class of commercial and business agents.”

As to constitutionality of tax on

drummers, see *Robbins v. Taxing Dist. of Shelby Co., Tenn.*, 7 Sup. Ct. Repr. 592; *Ex parte Asher* and note, 18 Am. & Eng. Corp. Cas. 533.

3. *Com. v. Whitney*, 5 Gray (Mass.), 86, where it is said: “The exact degree of intemperance which constitutes a drunkard it may not be easy to define. . . . Whether the word ‘common,’ as used in the statute, has reference only to the frequency of the offence, it is not easy to determine. If so, it would seem to give it no new force; as ‘drunkard’ of itself means one who habitually gets drunk. . . . The word ‘common’ would seem to be used in the sense of public. It seems to be the offence to the public peace and good order which the statute is intended to punish. Common pipers and fiddlers, common railers and brawlers, are persons who are so to the nuisance of the public. Applying the familiar rule of construction, *noscitur a sociis*, he would seem to be within the statute a common drunkard who not only is an habitual drunkard, but is so to the disturbance of the public peace and good order.”

In *Com. v. McNamee*, 112 Mass. 286, it is said: “The charge of being a common drunkard can be substantiated, without proving that the person accused of it has been constantly drunk during the time covered by the complaint, or even that his drunkenness was a matter of daily occurrence. The law nowhere undertakes to define how many instances of intoxication, in any given time, shall be deemed sufficient to fix upon a man the imputation of being a common drunkard. The use of the word ‘common’ imports frequency, and it has been held that to convict a man upon such a charge, it must be shown that he is an habitual drunkard.”

Evidences of habitual intoxication from the use of chloroform held not to sustain a complaint charging a person with

DRUNKENNESS.—(See also INTOXICATION.)—Drunkenness, as it is commonly understood in the community, is the result of the excessive drinking of intoxicating liquors. Such is also the signification given to it by lexicographers. It is ebriety, inebriation—all words nearly synonymous, and all expressive of that state or condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of such liquors.¹ A person is drunk in a legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired by the liquor.²

DRUNKENNESS AS A DEFENCE TO CONTRACTS.—SEE INTOXICATION AS A DEFENCE TO CONTRACTS.

DRUNKENNESS AS A DEFENCE TO CRIMES.—See CRIMINAL LAW, Vol. IV, p. 707 *et seq.*; CRIMINAL PROCEDURE, Ib. p. 802 *et seq.*

DRY-GOODS.—See note 3.

being a "common drunkard." *Com. v. Whitney*, 11 Cush. (Mass.) 477. See DRUNKENNESS.

1. *Com. v. Whitney*, 11 Cush. (Mass.) 479, cited *supra*. "This common signification of the word seems very clearly to be the sense in which it is used by the legislature in all its various enactments relative to the crime of drunkenness, or the disorderly conduct of common drunkards. . . . All these enactments will be found, upon examination, to be pointed against the drinking of these exhausting and destroying liquors; while there is nowhere to be found, and no one would expect there should be, any intimation against indulgence in the inspiration of ether or chloroform, the extraordinary effects of which liquors were, till quite recently, wholly unknown and unsuspected. . . . All its prohibitions and penalties have uniformly been applied and pointed directly, both in respect to unlawful sales and excessive use, to this same general and well-known class of intoxicating liquids. It is the drunkenness which they produce which the laws have pronounced. . . . We cannot, therefore, doubt that the legislature, by the term 'common drunkards,' . . . intended to designate and comprehend those persons only who drink these intoxicating liquors in unreasonable and excessive quantities and with habitual frequency."

In *Com. v. Coughlin*, 123 Mass. 437, it is said: "The crime of drunkenness, as set forth in the Gen. Stats. c. 165, a. 25, is 'drunkenness by the voluntary use of intoxicating liquor.' It is possible, there-

fore, that one may be drunk without being guilty of the offence described. Arrested in a public place, kept in custody till sober, and then brought before a court of justice, he may be able to show that the intoxication, which he admits existed, was produced by some other cause or means than the voluntary use of intoxicating liquor. If he does this, he is entitled to acquittal and discharge."

2. *State v. Pierce*, 65 Iowa, 88.

The offence of a licensed person "selling any intoxicating liquor to any drunken person," under the Licensing Act, 1872, is committed by a sale to a person who is drunk, although he show no indications of insobriety, and neither the licensee nor his servants notice that he is drunk. *Cundy v. Le Cocq*, 53 L. J. R. M. C. 125.

3. Whether boots and shoes, hats and caps, embraced in a stock of merchandise insured as "dry-goods," were or were not "dry-goods," was held a question of fact for the jury, and not necessarily one of mere law for the court. *Bassell v. Amer. Fire Ins. Co.*, 2 Hughes (U. S.), 532.

The testimony of experts to prove the meaning of the terms "dry-goods" and "groceries" in a policy of insurance, was held inadmissible evidence for the insurance company in an action against them, where the witnesses speak of the meaning of these terms, not at the place where the property insured was located and the policy effected, but at some other place. *Germ. Fire Ins. Co. v. Francis*, 52 Miss. 458.

DUE (see also DEBT; DUE PROCESS OF LAW) has various meanings. At times it signifies a simple indebtedness, without reference to the time of payment,—*debitum in presenti, solvendum in futuro*; at others, that the day of payment or render has passed.¹

1. *Scudder v. Coryell*, 10 N. J. L. (5 Halst.) 345, in construing an affidavit that "the debt was justly due and owing to the plaintiff." "In the former sense it appears to have been used in the statute, as it is connected with a word of the like signification, 'due and owing.' . . . Moreover, the word 'justly' being connected with the word 'due' shows the true import of the phrase 'justly due.'" And see *Hoyt v. Hoyt*, 1 Harr. (N. J.) 143.

So, in construing the rules of an order as to forfeiture of a certificate for non-payment of "dues" which were in arrears, the court said: "The word 'due,' unlike 'arrears,' has more than one signification, and expresses two distinct ideas, and this distinction is important in relation to its use in these rules and regulations . . . [quoting the definition given in the text]. It is evidently used in the rules and regulations of this order in the first of these significations, and not at all in the second; and hence there is some confusion of ideas, perhaps, in their interpretation." *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 125.

In *U. S. v. State Bank of N. C.*, 6 Pet. (U. S.) 36, Judge Story said: "It [i.e., the term 'due'] is sometimes used to express the mere state of indebtedment, and then is equivalent to owed, or owing. And it is sometimes used to express the fact that the debt has become payable. Thus, in the latter sense, a bill or note is often said to be due when the time for payment of it has arrived. In the former sense, a debt is often said to be due from a person when he is the party owing it, or primarily bound to pay, whether the time of payment has or has not arrived. This very clause of the act furnishes an apt illustration of this latter use of the term. It declares that the priority of the United States shall attach 'where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts *due* from the deceased.' Here the word 'due' is plainly used as synonymous with 'owing.' . . . Now, if the term 'due,' in reference to the debts of deceased persons, means owing, and includes all debts, whether payable *in presenti* or not, it is difficult to perceive how a different meaning can be given to it, in regard to the debt of the United States,

considering the connection in which it stands in the sequel of the same sentence." It was accordingly held that a priority given to "debts due to the United States" extended as well to debts by bonds for duties which are payable after the insolvency or decease of the obligor, as to those actually payable or due at the period thereof.

In a complaint that a sum was "due" from the defendant to the plaintiffs, "due" was held to mean "payable," Judge Story's definition *supra* being quoted. *Allen v. Patterson*, 7 N. Y. 476.

An after-assessed tax was held a "fund due" in *Dist. Township of Jasper v. Dist. Township of Sheridan*, 47 Iowa, 183. "It is claimed by the defendant that the taxes in question were not then *due*, and so not covered by the agreement. The question presented is as to the meaning of the word 'due' as used by the parties. It is claimed by the defendant that a fund is due when the time arrives in which payment is enforceable. And it must be admitted that this is the ordinary meaning of the word. But, while that is so, there is certainly another meaning somewhat broader. To determine what the parties meant in this case, we may have reference to the duty which they were attempting to discharge. The statute required them to make an equitable division of the assets. Now assets embrace claims not matured, as well as claims matured. We are not allowed to conclude, therefore, that the parties used the word 'due' in its restricted sense."

The word "due" in a stipulation contained in a chattel mortgage, providing for insurance for the mortgagee's benefit, in a sum equal to the full amount *due* on the mortgage, was construed to be synonymous with "owing." *Fowler v. Hoffman*, 31 Mich. 219. "The judge was clearly in error in holding that the stipulation for insurance, when speaking of the 'amount due' meant not the whole sum secured, but only the amount that had become presently payable; in other words, the amount overdue. We cannot suppose such to have been the understanding of the parties. The word 'due' is often used in business transactions as synonymous with 'owing' or 'remaining unpaid,' and no reasonable doubt can exist that it was so used here."

So, where a chattel mortgage provided that the mortgagee might seize and sell the goods to reimburse himself for "all such sums and sum of money as may then be due," it was held that the goods might be sold though the mortgage money might not have been payable. *Dederick v. Ashdown*, 4 Manitoba L. Rep. 139. The court says: "The argument urged for the plaintiffs seems founded upon a misconception of the meaning of the word 'due.' . . . This is to make the amount then due mean the amount which should by that time have been paid—to make, in fact, the word 'due' mean 'overdue.' In the Imperial Dictionary the word 'due' is defined to mean that which ought to be paid or done to another, owed by one to another, and by contract, justice, or propriety required to be paid; that which is owed, that which one contracts to pay to another. The argument used is just the one which was urged, but unsuccessfully, in *Hall v. Brown*, 15 U. C. Q. B. 419. The covenant there was, to pay a sum of money in eight instalments, with interest on the principal sum remaining due at each payment. In the county court this was construed to mean that the covenantor was to pay interest only upon each instalment as it fell due, leaving the interest upon all such portion of the principal as should not at that time be payable to be paid in proportions with the principal as the instalments successively became due. On appeal this was reversed. *Robinson, C. J.*, who delivered the judgment of the court, said: "That a sum may be *debitum in presenti*, though *solvendum in futuro*, is very clear, and it was in this sense that the word 'due' was used in the instrument. . . We must construe the agreements of parties according to the common acceptance of the words they use; and we know very well that when a man is asked how much is due on his land, he understands well what is meant by the question, namely, how much of the purchase-money he yet owes—which is only a circumlocution for the word 'due.' In a strict sense, and for certain purposes, 'due' is confined to what is payable, as when we speak of a bill or note being due; but that is not its general sense, and certainly not its only sense."

A statement in an affidavit for attachment, that the defendants are indebted to the plaintiffs in a sum named "over and above all legal set-offs, and that the said indebtedness is for a bill of merchandise purchased by said defendants of said plaintiffs," was held not to show that the

sum named was "due." *Bowen v. Slocum*, 17 Wis. 181. "The appellant urges that the words 'due upon contract, etc.,' were intended only to require the party to show that the debt arose upon contract. But although that was clearly a part of the intention, it cannot be assumed to have been the whole. The word 'due' has a well-defined meaning when applied to indebtedness, which is, that the day when payment ought to have been made has already arrived."

A contract for the sale of land reserved liens on the land for "all said sums of money due" from the purchaser to the vendors. It was held that "due" was used in the sense of "owing." "The argument that the sum in question was not due, is, we think, without force. The word 'due' was inaccurately used by the scrivener, but no one, we presume, would pretend that it was not intended to refer to the deferred payments to be made to . . . , although they were not technically due. The word was manifestly used in the sense of 'owing'; and surely it could with as much propriety be applied to an unascertained sum as to one which was already ascertained and agreed upon. Both were alike parts of the consideration for the land, and one was as much owing or due as the other, and the vendor's lien was, in our opinion, reserved for both." *Carr v. Thompson*, 67 Mo. 475.

Where, by the articles of association of a company, it was provided that the company should have a first lien on, with power to sell, the shares of a member for any money "due" to the company from him, "due" was held to mean "due and payable." *In re Stockton Co.*, 2 Ch. D. 101. "It was said 'moneys due' included moneys owing, but not at present payable. To that I answer, adopting the criticism of Lord Justice Mellish in *Ex parte Kemp*, L. R. 9 Ch. 383, on the words in the Bankruptcy Act, that the word 'due' may mean either owing or payable, and what it means is determined by the context. Now there is a context here which, to my mind, puts the thing out of all argument whatever. . . . It is absurd to suppose that the company may sell the shares of a man, and apply the proceeds in payment of a bill of exchange which he has given, but which is not yet due, that is not yet payable; for that must be the meaning of the word 'due' in that article. In the seventh article, then, the word 'due' means payable, and the words 'such debtor' mean a man who owes a debt presently payable." And see *Ex parte Kemp*, L. R. 9 Ch. 383, cited in the above opinion.

"'Due' is the synonym of 'payable;' and when it is asked if a promissory note is due, it plainly means it is now payable; and even when I speak of a promissory note 'due,' without the verb, or 'a debt due,' it just as plainly means the same thing—present liability to pay." Leggett v. Bank of Sing Sing, 25 Barb. (N. Y.) 332. But this case was reversed in 24 N. Y. 283, where "debts due" were held to include liabilities of the shareholder which had not matured.

In *Ex parte Sturt & Co., L. R. 13 Eq. Cas. 309*, "due," as applied to a petitioning creditor's debt, was held to mean "presently payable."

"'Due' means that which law or justice requires to be done. *Due* rights mean *just* rights, *legal* rights." Ryerson v. Boorman, 4 Halst. Ch. (N. J.) 705.

Where an agent was to receive for services and expenses commissions payable from the proceeds of sale, and sales were made, the purchase price being payable in instalments by draft, it was held that no debt was "due" the agent which could be reached by foreign attachment until his principal had received payment or at least a draft. "The word 'due' is not used in the restricted sense of payable, but it does import an existing obligation." Sandblast, etc., Co. v. Parsons (Conn.), 10 East. Rep. 232.

On an issue as to whether a promissory note had been paid or not, a finding that certain sums were "due" thereon is equivalent to finding that such sums are owing and unpaid. Myers v. McDonald (Cal.), 8 Pac. Rep. 810.

The expression "amount that is due," in a statute, plainly indicates *indebtedness*, either in money or property, and cannot refer to an action sounding in tort, where the damages are unliquidated. Manson v. Jacob (Mo.), 6 S. W. Rep. 251.

"The word 'due' imports a consideration—an indebtedness." U. S. v. Learned, 1 Abb. (U. S.) 487, where its insertion in an instrument, with other factors, was held to constitute the instrument a contract.

Where a statement of debt on which suit is brought is "due to A and B," without more, parol testimony is proper to show whether the debt is joint or several, and an instruction of the court that the statement shows it to be joint, is improper. Amonett v. Montague, 63 Mo. 201.

Where a statute provides that in an action on a mortgage if it appears that nothing is "due" on the mortgage, judgment shall be for defendant, "this is intended for a case where a mortgage has

been fully satisfied or paid. That defence is made out when it appears that nothing is due or ever to be due. 'Nothing due' does not mean nothing payable merely." Mason v. Mason, 67 Me. 548.

A demand by a collector is not necessary to make a tax *due*. "Although a demand is necessary before a levy can be lawfully made, still the tax is due as soon as legally imposed. It is immaterial whether it is *debitum in presenti* or *debitum in futuro*." Goddard v. Town of Seymour, 30 Conn. 401.

A loss becomes *due* when the property insured is destroyed, or at farthest when the requisite proofs of loss are furnished; and is then a debt *debitum in presenti, solvendum in futuro*, where a statute postpones the time of payment. Allen v. Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 445.

A vested legacy given upon a condition subsequent is a legacy "due" to the legatee. Hull v. Eddy, 2 Green (N. J.), 177.

Become Due.—"We think if a debt is due it can be truly said it has become due; and that if a demand be made while it is due, the demand is made after it became due. Nothing can be due which has not become due. Becoming is before being, and becoming must be finished in order for it to be succeeded by that which becomes. Take the example of becoming 21 years of age. Every person is a minor or an adult; there is no intermediate stage. Every person is becoming or has become 21 years of age. So, every debt is becoming due or has become due. The moment of time which, by expiring, terminates in maturity, renders the debt mature. There is no intervening moment. Immaturity vanishes and maturity appears. To demand payment of the debt in the first moment of its matured existence is to demand payment after it becomes due. Consider the first moment as enduring all day, or the first day as an ultimate unit without parts or factions; expand the moment into a day, or contract the day into a moment; in either way make their duration coextensive, and merge them into one identity,—and it must follow that demand made upon the first day is demand made 'after the debt became due.' It is the expiration of the preceding day which renders the debt due, and the demand must be made subsequent to that day, else it would be made before the debt became due. . . . Hence, 'at maturity,' 'when due,' 'after due,' applied to demand for payment, will each include a demand made on the day of maturity, though the last will comprehend as well a demand made on any sub-

sequent day, and the other two will not." *Favors v. Johnson* (Ga.), 4 S. E. Rep. 926.

The salary of an employee which is payable at the end of the month cannot be attached during the month as money "to become due" him. *Foster v. Singer* (Wis.), 24 Rep. 671; s. c., 34 N. W. Rep. 395. The court said, quoting from the opinion in *Bishop v. Young*, 17 Wis. 41: "The debts due or to become due" evidently relate to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include in the language 'to become due' a debt which might possibly become due upon a performance of a contract by the defendant in attachment. . . . There was nothing absolutely due him at the time of service of garnishee process upon the respondent. And whether anything would become due, depended upon a contingency."

The value of stock in a national bank, owned by a tax-payer, must be considered a part of the debts "due or to become due" him, from which he is entitled to deduct the amount of his *bona fide* and unconditional indebtedness in listing his property for taxation. *Ruggles v. City of Fond du Lac*, 53 Wis. 436.

An indebtedness "to become due" includes an indebtedness to arise on the payment by the assignee of a note on which he is then contingently liable as indorser. *Kellogg v. Barber*, 14 Barb. (N. Y.) 13.

See also BECOME.

Grow Due.—An assignment in trust for the benefit of creditors provided for the payment of all of the assignor's indebtedness to the trustee, whether "due or to grow due." In construing this term the court said: "The words 'to grow due' might well be construed as synonymous with the expression 'to become due' or 'to mature,' and in fact are hardly capable of any other construction. And when we take into consideration the fact that the same language is used in reference to the debts mentioned in the schedule attached, and that some of these debts are due, and some are to mature in the future, but all existed at the date of the deed of trust, we can come to no other conclusion than that the words 'due and to grow due' were to include all his subsisting liabilities to . . . and the other parties named, as well those which were already due as those which had not arrived at maturity." *Van Hook v. Walton*, 28 Tex. 75.

The terms "debts, dues, demands and claims now due or to grow due hereafter" held to include legal costs and charges

against the estate afterwards incurred in the settlement of the estate. *Springsteen*.

Justly Due.—The words "justly due" in a statute held to refer to the validity of a claim, and not to the time of payment, so that a demand might be proved against an estate before it was due. *Cassatt v. Vogel*, 12 Mo. App. 323. "The words 'justly due' do not necessarily mean justly due and presently payable: they mean that it is a just indebtedness. But it may be this, and yet it may be *debitum in presenti, solvendum in futuro*."

The term "claim justly due" in an insolvent act was held to mean a matured claim, "for in the sixth and complementary section provision is made specifically for claims not matured," in *Sperry's Appeal*, 47 Conn. 87.

Where a note was made without the knowledge of the payee, who was liable as a surety for the maker for a debt due but not paid, against which liability the maker had promised to secure the payee, and the maker caused his own property to be attached for the purpose of securing payment of the note, it was held that the note did not constitute a debt "justly due" to the payee, until assented to by him, and that the attachment might be vacated. *Baird v. Williams*, 19 Pick. (Mass.) 381. See also *Scudder v. Coryell*, 10 N. J. L. 345, quoted *supra*.

Legally Due.—An offer to pay a debt "legally due" applies to a debt the remedy for which is barred by the Statute of Limitations. *Barke v. Early*, (Iowa) 33 N. W. Rep. 680.

Nothing Due.—An award finding "that there is nothing due to the plaintiff" is sufficiently final, and determines the right of action at time when the submission was made; "because it must, I think, be presumed, in the absence of proof to the contrary, that the question between the parties remained the same from the time of making the submission, to the time of making the award." *Dickins v. Smith*, 8 Dowl. & Ry. 288.

Now Due.—Where a donor assigned "all debts now due to him," it was held that this included all debts *due and payable* to him at the date of the deed, but not such debts as though contracted had not become payable at the date of the deed. *Collins v. Janey*, 3 Leigh (Va.), 389.

Sum Due.—From a delinquent town collector, in a statute, is "the sum appearing by the sheriff's return of the warrant to remain unpaid." *Looney v. Hughes*, 26 N. Y. 517.

What May be Due.—Where an agree-

Other meanings of this word are, appropriate; fit; proper.¹

ment is made between two parties to enter judgment "for what may be due," one of them has no right to decide the question. "It is evident from the terms of the agreement that there was something to settle; and the plaintiff, either by arbitration or by a jury, should have proceeded to make the settlement, with notice to the defendant before he entered the judgment, or at least before he issued the execution." *Hancock v. Hillegas*, 2 Dall. (U. S.) 380.

Due, Owing.—Where there is an award "in full of all debts and demands then due and owing," the word "demands" "extends to all things that the one party has a right to demand or exact of the other at the time of the submission; and the words 'due and owing' do not qualify or restrain it to a debt, or other special demand, that is, more strictly speaking, a duty; for whatever a man has a right to demand of another, may well be said to be 'due and owing' from the other to him; so it may extend to a right of entry into land, to a suit for partition, etc." *Knight v. Burton*, 6 Mod. 232.

An agreement to pay "all such sums of money as may now be due and owing" held to embrace those debts only which were then actually payable. *Hawes v. Smith*, 12 Me. 429.

Due, Payable.—Where there was provision in a will with regard to the death of a child "before the share of such child shall become 'due and payable,'" held that the words "due and payable" did not postpone the vesting of the share under the circumstances. *Mendham v. Williams*, L. R. 2 Eq. Cas. 396.

Compare In re Wilmott's Trusts, L. R. 7 Eq. Cas. 532.

A statute providing that promissory notes of a certain description "shall be due and payable as therein expressed," does not disallow days of grace. *Turk v. Stahl*, 53 Mo. 437.

1. *Winner v. Hoyt*, 68 Wis. 291.

Due Care.—By due care is meant reasonable care adapted to the circumstances of the case. *Butterfield v. West*, R. Corp. 10 Allen (Mass.), 532; *B. & P. R. Co. v. State*, 54 Md. 656. See also CARE.

Due Cause.—The "due cause shown" for which a liquidator may be removed under Companies Act, 1862, s. 93, does not refer to the personal unfitness only of the liquidator. Whenever the court is satisfied that it is for the general advantage of those interested in the assets

of the company that a liquidator should be removed, it has power to remove him and appoint a new one. *In re Eyton*, 36 Ch. D. 299; s. c., 57 L. J. R. Ch. 127. *Bowen, L. J.*, says: "To my mind the lord justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair-play to the liquidator himself is not to be left out, if right; but the measure of due cause is the substantial and real interest of the liquidation." See also CAUSE.

Due Course.—A direction that a claim be paid in "due course of administration" means that it shall be paid as, and *pro rata* with, other claims of that class out of the assets administered. *McCall v. Lee* (Ill.), 8 West. Rep. 655; *Darling v. McDonald*, 101 Ill. 376.

"Due course of trade," with regard to the circulation of negotiable paper, is "where the holder has given for the note his money, goods, or credit at time of receiving it, or has on account of it incurred some loss or incurred some liability." *Merchants' Bk. v. McClelland* (Colo.), 13 Pac. Rep. 725; citing *Kimbro v. Lytle*, 10 Yerg. (Tenn.) 423.

Where an agent of a bank filled up a bill at holder's request as the latter's agent, and the bill so filled up was complete and regular on its face, the bank was held to be a "holder in due course." *Pirie v. Union Bank of Scotland* (Sc.), 3 Sher. Ct. Rep. 478.

Due Course of Law.—"The words 'by due course of law' are synonymous with 'due process of law' or 'the law of the land'; and the general definition thereof is 'law in its regular course of administration through courts of justice'; and while not always confined to judicial proceedings (as, for instance, the collection of taxes is held to be within the phrase 'by due process of law'), yet these words have such a signification when used to designate the kind of an eviction or ouster from real estate by which a party is dispossessed, as to preclude thereunder proof of a constructive eviction resulting from the purchase of a paramount title when hostilely asserted by the party holding it." *K. P. R. Co. v. Dunmeyer*, 19 Kan. 542.

So, in *Dorman v. State*, 34 Ala. 236, it is said: "The expressions 'the law of the land,' 'due process of law,' and 'due course of law,' as found respectively in the English charters, and in the various

State constitutions in the United States, are substantially identical, and have always been held to mean a judicial proceeding regularly conducted in a court of justice, as contradistinguished from statutory enactment."

"**'Due course of law,'** when applied to the prosecution of a demand in a court of record, confessedly means no more than a timely and regular proceeding to judgment and execution." *Backus v. Shipherd*, 11 Wend. (N. Y.) 635; *Dwight v. Williams*, 4 McLean (U. S.), 586.

The constitutional provision which declares that no person can "be deprived of his property but by due course of law," secures to every person the right to have notice of any judicial proceeding by which his rights of property may be affected, and an opportunity to be heard, and to contest every material fact involved in the proceeding; and any law authorizing a judicial proceeding by which his rights of property might be divested or affected, without giving him notice and opportunity, would be unconstitutional. *Wilburn v. McCalley*, 63 Ala. 436.

In *Griffin v. Mixon*, 38 Miss. 424, it was held that an act providing for forfeiture of lands to the State, on failure of the owner to pay taxes, was unconstitutional, as a deprivation of property not by "due course of law." *Handy, J.*, in a dissenting opinion, said: "'Due course of law,' therefore, must mean such rules of action in relation to the rights and duties of the citizen, and such forms and modes of legal proceedings of a general character to ascertain and enforce duties, rights, and remedies, as the legislature may deem fit, and which are not forbidden by the language or the spirit of other parts of the constitution."

The phrase "due course of law" does not necessarily imply a trial by jury, "but rather means a proceeding carried on according to the law of the land, either with or without a jury." *Reagh v. Spann*, 3 Stew. (Ala.) 108.

Where a Federal court was declared by statute to be the successor of the supreme court of the Territory in respect to all pending cases, with power to proceed therein "in due course of law," this was held to mean that the former court might do all that was left undone by the latter court, and might proceed as that court would have proceeded if it had retained the case. *Bates v. Payson*, 4 Dill. (U. S.) 266.

A discharge from prison under an insolvent act, though obtained by fraud, was held a discharge in "due course" of

law, in *Simms v. Slacum*, 3 Cranch (U. S.), 300. Otherwise where the magistrate who grants the discharge is incompetent. *Slacum v. Simms*, 5 Cranch (U. S.) 363.

Due Diligence.—With respect to notice to indorsers, due diligence consists in making inquiry from such accessible persons as, from their connection with the transaction, or place, or parties, are most likely to be informed, and in sending notice to the place where, according to the best information to be obtained, the party is most likely to be reached. 1 Am. Lead. Cas. 405, and cases cited. And see *Bk. of U. S. v. Carneal*, 2 Pet. (U. S.) 551; *Dickins v. Beal*, 10 Pet. (U. S.) 578. See **BILLS AND NOTES.**

Due diligence in searching for a non-resident defendant means "some effort or attempt to find the party which the court or judge shall be satisfied is reasonable under the circumstances; and the phrase 'after due diligence' can have no other just signification than would be given if it read 'after due diligence has been used.' What the diligence used has been should be shown, and the court or judge is to determine whether, under the circumstances, it is or is not 'due' within the intent of the statute. Of course the judge or court will determine the question whether the diligence shown is due or not, in view of the other fact that the defendant resides out of the State; for less effort to ascertain that a non-resident cannot be found within the State would be satisfactory proof of due diligence than would be required to show that a resident cannot be so found." *Bixby v. Smith*, 49 How. Pr. (N. Y.) 53.

Where a statute requires that the proof of service must show "that after due diligence such service cannot be made within the State," "this does not mean an absolute impossibility to make such service, nor anything more than 'due,' appropriate, fit, proper diligence—that is, ordinary diligence." *Winner v. Hoyt*, 68 Wis. 291.

As to due diligence in searching for an old indenture, see *Rex v. Inhab. of E. Farleigh*, 6 Dowl. & Ry. 147.

An allegation in an affidavit that "the defendant cannot be found after due diligence," was held insufficient. "It is a conclusion of law based upon statements showing what search and what diligence have been made in the attempt to discover the defendant. The facts upon which is predicated the conclusion of 'due diligence' must appear by affidavit." *Alderson v. Marshall* (Mont.), 16 Pac. Rep. 578. And see *Kilmer v. Railroad Co.*, 37 Kan. 84.

"Due" is also sometimes used in the sense of exactly.¹

"What is due diligence must always be a part of the determination of a jury upon the whole evidence submitted to them." Rudy v. Wolf, 16 S. & R. (Pa.) 82.

Due diligence in the collection of a promissory note "imports not only a demand, but an attempt to collect by legal process (unless excused by the insolvency of the makers)." Rhodes v. Seymour, 36 Conn. 5. See Keener v. Finger, 70 N. Car. 35; State v. Welles, 70 N. Car. 55, for instance of what constitutes due diligence in collection.

Due diligence by a United States marshal in keeping a vessel safely "is understood to be such as a careful, prudent man, of reasonable sense and judgment, well acquainted with the condition of his property, might reasonably be expected to take if the vessel belonged to himself. He should know whether she leaked, whether the place she occupied was a proper one; whether, in the removal of the pipes, any holes had been left open through which water might enter the vessel; what bad effect ice might have upon her, which might be avoided; what would be her condition in case of a sudden rise of water and breaking up of the ice." Jones v. McGuirk, 51 Ill. 387.

Due Notice.—"No fixed rule can be recognized as to what shall constitute 'due notice.' 'Due' is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances." Lawrence v. Bowman, 1 McAll. (U. S.) 420-1.

Where a sheriff's return states that he had given "due notice" by the within advertisement, this does not import notice to the owner in actual possession of land sold, and the sale is void. Downing v. Stephens, 57 Tenn. 454.

Where "actual notice" was required by a city charter, a complaint alleging "due notice" was held sufficient on demurrer; though, perhaps, on motion for that purpose, plaintiff might have been required to make the complaint more definite and certain as to the manner of such notice. Kusterer v. City of Beaver Dam, 52 Wis. 146.

Averments of "due notice" held sufficient in Seneca Bank v. Mease, 3 Comst. (N. Y.) 442; Cullum v. Casey, 9 Port. (Ala.) 134.

"Due proof" in a statute held to mean proof by some competent witness. Stanley v. Horner, 4 Zab. (N. J.) 511.

As to circumstances constituting "due regard" under the endowed schools act,

see *In re* Free Grammar School at Hemsworth, 12 App. Cas. 444.

Due Return of process means "a proper return made in proper time. . . . Whether in any particular case a due return has been made may involve questions both of law and fact. Whether the return is a proper one in form and substance, is a question of law to be decided by the court; but whether it was made in proper time is a question of fact to be decided by the jury." Waugh v. Brittain, 4 Jones L. (N. Car.) 470-1.

"Due return" means the bringing the process into court with such indorsements on it as the law requires him to make. Whether the indorsement be true or false, if it be such an one as the law requires, it is a true return. But it is not a 'due return' if the indorsement be such as is not authorized by law, whether it be true or false." Harman v. Childress, 3 Yerg. (Tenn.) 329.

Due Rights.—See Ryerson v. Bowman, 4 Halst. (N. J.) Ch. 705, quoted *supra*.

Due Security.—"The loaning of trust money, and especially where infants are concerned, on private security, is not a compliance with the rule that requires 'due security' to be taken." Gray v. Fox, 1 N. J. Eq. 266.

"Due taking" of a coroner's inquest "implies not only care and diligence in the taking, but the taking under such circumstances as make it proper that it should be taken." Reg. v. Carmarthen-shire, 10 Q. B. 800.

1. Due West.—The words "due west" or "due north" prefixed to the courses in a deed mean *exactly* north or *exactly* west, and apply with equal propriety to these points, whether the magnetic or the sidereal meridian be referred to. Wells v. Co., 47 N. H. 236, where it was held a part of the common law of the State that the courses in deeds of private lands are to be run according to the magnetic meridian when no other is specially designated.

In McKinney v. McKinney, 8 Ohio St. 423, it was held that some of the original surveys in that State having been made by the magnetic and some by the true meridian, a call "due west" made in a contract for the subdivision of an original section had not a determinate meaning fixed by judicial interpretation. "The fact that an original survey was made by the magnetic meridian would raise a strong, perhaps a conclusive, presumption that all deeds and contracts,

DUE PROCESS OF LAW.—(See also CONSTITUTIONAL LAW; DUE; and LAW.)—The words “due process of law” in the provisions of various constitutions to the effect that “no person shall be deprived of life, liberty, or property without due process of law,” have been frequently defined. The following (including the cases in the notes) may be considered an exhaustive synopsis of the definitions given:

The words “due process of law,” in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property.¹ They mean, in each particular case, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.² As ap-

referring as well to the original as subdivision lines, had reference to the magnetic meridian. And even where the original survey was made by the true meridian, calls of courses of new subdivision lines, unless so made in reference to the original courses as to manifest an intention to be controlled by original courses, would in general be run by the magnetic meridian, as that is the general and customary usage in running lines; but each case must depend so much upon the calls, the connection of the subdivision lines with the original true meridian lines, and other facts and circumstances, that no definite general rule of construction can be prescribed.”

1. *Taylor v. Porter*, 4 Hill (N. Y.), where it was held that a statute authorizing a private road to be laid out over the lands of a person without his consent was unconstitutional and void.

In *Bertholf v. O'Reilly*, 74 N. Y. 519, it is said: “We need not enter into any elaborate discussion of the meaning of the words ‘due process of law.’ This has been done in numerous judicial decisions. They are held, under the liberal interpretation given to them, to protect the life, liberty, and property of the citizens against acts of mere arbitrary persons in any department of the government. [Denio, J., in *Westervelt v. Gregg*, 12 N. Y. 212.] These are the fundamental civil rights, for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty. In judicial proceedings, due process of law requires notice, hearing, and judgment; in legislative proceedings, conformity to the settled maxims of free government, observance of constitutional

restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as difficult as it would be unwise to attempt an exact definition of their scope. Their application in a particular case must be determined when the question arises, and in the absence of exact precedents courts must determine the question upon a consideration of the general scope of legislative power, the practice of governments, and in view of the conceded principle that individual rights may be curtailed and limited to secure the public welfare and the equal rights of all.” It was there held that private property was not taken away “without due process of law” by a legislative enactment creating a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person against the owner of real property, who leased the premises where the liquor causing the intoxication was sold, with knowledge that such liquor was to be sold thereon.

“The words ‘law of the land,’ as used originally in the *Magna Charta* in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; ‘and this,’ says Lord Coke, ‘is the true sense and exposition of those words.’ The better and larger definition of ‘due process of law’ is, that it means law in its *regular course of administration through courts of justice.*” 2 Kent Com. 13, quoted in *Wynehamer v. People*, 13 N. Y. 395; *Rowan v. State*, 30 Wis. 146.

2. *Stuart v. Palmer*, 74 N. Y. 191, quoting from *Cooley on Const. Lim.* 355. The court said: “It is difficult to define with precision the exact meaning

plied to judicial proceedings, they mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.¹ The words “due process of law” were undoubtedly

and scope of the phrase ‘due process of law.’ Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States supreme court, to leave the meaning to be evolved ‘by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.’ [Davidson v. Board of Admrs. of New Orleans, 17 Alb. L. J. 223.] It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this.” It was held, accordingly, that a law imposing an assessment for a local improvement, without notice to the owner of the assessed property, and a hearing or an opportunity to be heard on his part, was unconstitutional.

So in *Ex parte Ah-Fook*, 49 Cal. 406, in which this definition of Judge Cooley’s is quoted, the court said: ‘It would be difficult, perhaps impossible, to find in the reports a definition of the terms ‘law of the land’ or ‘due process of law’ which is accurate, complete, and appropriate under all circumstances. The peculiar necessities which call for the action of an officer, and whether a power was exercised in the same manner prior to the adoption of the constitution, without being regarded a violation of the principles of Magna Charta, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person who is subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit,—the case being one in which the end sought to be

obtained is lawful,—a statute cannot be said to deprive a party of the benefits of due process of law.” It was held that an act empowering a commissioner of immigration to visit vessels arriving from a foreign port to determine whether there were lewd women on board, and prevent them from landing without bonds being given, and making the judgment of the commissioner final, did not deprive such persons of due process of law.”

1. *Pennoyer v. Neff*, 95 U. S. 733. And see *Kennard v. La. ex rel. Morgan*, 92 U. S. 480.

So in *People ex rel. Witherbee v. Supervisors*, 74 N. Y. 234, it is said: “Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity when there to prove any fact which, according to the constitution and the usages of the common law, would be a protection to him or his property.”

“Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter evolved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.” *Zeigler v. S. & N. Ala. R. Co.*, 58 Ala. 599, where it was held that an act fixing absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without negligence or wrong on its part, when under the general law of the land no one else was so liable under such circumstances, did not provide for ‘due process of law,’ and was void.

“Private property cannot be taken from one person and delivered to another person or applied to the private use of another, except by a suit instituted and conducted in accordance with the pre-

scribed course of procedure for determining the title to property. The institution and conduct of such suit is what is meant by 'due process of law.'" *In re Hatch*, 43 N. Y. Super. Ct. 91.

See *South Platte Land Co. v. Buffalo*, 7 Neb. 258, and *Hatson v. Woodbridge Protection Dist.* (Cal.), 16 Pac. Rep. 549, where it is held that in case of an assessment an opportunity should be given the owner to be heard, otherwise it is "without due process of law." And see cases cited under note 1, page 980.

The erroneous decision of a State court, having proper jurisdiction, does not come within the prohibition of the Fourteenth Amendment. *Arrowsmith v. Harmoning*, 118 U. S. 194.

But an act of the legislature undertaking to validate a judgment of a court void for want of jurisdiction contravenes the provision as to "due process of law." *Pryor v. Downey*, 50 Cal. 388.

The appointment of a guardian *ad litem* for an infant defendant, who has had no notice of the suit, is not "due process of law," "as that has reference to judicial proceedings according to the course and usage of the common law, and must always be based upon notice." *Campbell v. Campbell*, 63 Ill. 462.

But an act authorizing summary process against delinquent tax-collectors is constitutional. "Such summary process, it is said, which gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law. There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative." *Weimer v. Bunbury*, 30 Mich. 210-11. And see *Springer v. U. S.*, 102 U. S. 586.

In *Co. of San Mateo v. So. Pac. R.*, 8 Am. & Eng. R. R. Cas. 27, it is said: "There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company requiring for any just estimate of their value accurate knowledge upon a multitude of subjects not usually possessed without

special study. We cannot assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property, without an opportunity of being heard against the proceeding. The principle is as old as Magna Charta, and is embodied in all the State constitutions, and in the Fourteenth Amendment of the Federal constitution. The provision in this amendment is in the form of an interdict upon the States: 'Nor shall any State deprive any person of life, liberty, or property without due process of law.' And by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary manner prescribed by the law; it must be adapted to the end to be attained; and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guarantee against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case: it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form." And see the concurring opinion of Sawyer, C. J.

These constitutional provisions relate to those rights whose protection is peculiarly within the province of the judicial branch of the government, which protection will be extended for an unlawful invasion of them by public officers. *U. S. v. Lee*, 106 U. S. 196.

"These terms, 'law of the land,' 'due course of law,' 'due process of law,' do not mean the general body of law, 'common and statute,' as it was at the time the constitution took effect. For that would seem to deny to the legislature the power to alter, change, or amend the law. . . . It refers to certain fundamental rights which that system of jurisprudence,

intended to convey the same meaning as the words "by the law of the land" in Magna Charta;¹ and by the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.² "Due process of law" is not necessarily process

of which ours is a derivative, has always recognized. If any of these is disregarded, in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due course of law.'" *Brown v. Bd. of Levee Commrs.*, 50 Miss. 479, where the statute declared unconstitutional dispensed with personal notice where the defendants were residents of the county and amenable to such process.

In *Happy v. Mosher*, 48 N. Y. 317, it is said with reference to "due process of law." "It need not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend."

In the construction of a highway act the court said: "In the act . . . now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal constitution." *Pearson v. Yewdall*, 95 U. S. 296.

An *ex parte* determination of two overseers of the poor was held not "due process of law," in *Portland v. Bangor*, 65 Me. 120.

A statute providing for the drainage of tracts within the State, upon proceedings instituted by at least five owners of separate lots included in a tract, and not objected to by the owners of the greater part of the tract, and for assessment by commissioners, after notice and hearing, of the expenses upon all the owners, does not deprive them of their property "without due process of law," within the meaning of the Fourteenth Amendment. *Wurts v. Hoagland*, 114 U. S. 606.

1. *Murray's Lessee v. Hoboken Co.*, 18 How. (U. S.) 276; *Millitt v. People*

(Ill.), 5 West. Rep. 157; *Davidson v. New Orleans*, 96 U. S. 101; *People ex rel. Pickard v. Sheriff*, 11 N. Y. Civ. Proc. 178.

2. ". . . If this were so, acts of attainer, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void." *Zeigler v. S. & N. Ala. R. Co.*, 58 Ala. 528, quoting Mr. Webster's definition in the argument in *Dartmouth College v. Woodward*, 4 Wheat. 518, 581.

This definition is quoted also in *State v. Staten*, 6 Coldw. (Tenn.) 244, where it was held that an act of legislature conferring on the Governor the power to set aside and annul the registration of the voters of a county, in whole or in part, was unconstitutional, as depriving them of their rights "without due process of law."

"As to these words from Magna Charta, . . . after volumes spoken and written, with a view to their exposition, the good sense of mankind has at length settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bk. of Columbia v. Okely* 4 Wheat. (U. S.) 244.

"The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages

according to the course of the common law, but process according to the course of proceedings applicable to the subject-matter, and conformable to those general rules that affect all persons alike.¹ It

and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray v. Hoboken Co.*, 18 How. (U. S.) 276-7, where it was held that a distress warrant issued by the Solicitor of the Treasury under act of Congress was not inconsistent with this constitutional provision.

In *Clark v. Mitchell*, 64 Mo. 578, after quoting Mr. Webster's definition, the court says: "The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense." An act not possessing attributes of the given description was therefore held unconstitutional.

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass, is in no sense the process of law designated by the constitution." *Westervelt v. Gregg*, 12 N. Y. 209, where it was held that an act depriving a husband of his rights to a legacy, and making it the sole and separate property of his wife, was unconstitutional.

"Lord Coke construed the words 'law of the land' to mean *due process of law*. Hence we sometimes find one phraseology used, and sometimes the other. They were held, and we think correctly, to mean the same thing in *The Matter of John and Cherry Streets*, 19 Wend. 659. By 'the law of the land' we understand laws that are general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected

by existing laws." *Sears v. Cottrell*, 5 Mich. 254.

In *People v. Smith*, 21 N. Y. 598, it is said: "In imposing a tax or in appropriating the property of a citizen or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act itself is due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use." And see *Garrison v. City of New York*, 21 Wall. (U. S.) 196.

"The words 'due process of law' in this connection are held to be synonymous with the words 'the law of the land'; . . . and this means general public law binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals." *Millett v. People* (Ill.), 5 West. Rep. 157; s. c., 117 Ill. 294.

See, to the same effect, *Atchison & Nebraska R. Co. v. Baty*, 6 Neb. 37, where it was held that a statute giving to the owner of live-stock *double the value* of his property accidentally injured or destroyed on a railroad track was unconstitutional. And see *Camp v. Rogers*, 44 Conn. 291. Compare *Speedman v. Mo. Pac. R. Co.*, 71 Mo. 434, where an act making a railroad company liable in double damages for stock killed in consequence of their failure to erect and maintain fences was held not unconstitutional as depriving of property "without due process of law."

1. *Bartlett v. Wilson* (R. I.), 8 Atl. Rep. 331; s. c., 4 New Eng. Rep. 119; 10 East. Rep. 398, in which an act giving power to listers, where a person omitted to return his taxable property, to appraise the same at its value and double the sum so obtained, one per cent of which total sum was to be the list upon which the taxes were to be assessed, was held constitutional. "Government must have the public revenues, and obviously cannot postpone their collection to await the determination of a common-law trial to see if it is entitled to them. It must from necessity proceed in a summary way; not omitting, however, those safeguards that protect individual rights. Its

right to levy taxes is determined the moment the individual comes under the protection of its laws, and the only question open between it and its citizens is one of *method* in the enforcement of such right. If its *method* is one that in its intended and normal workings will result in equal and uniform taxation as between all its citizens, and the right of hearing upon alleged errors is preserved, such method *is* due process of law. All such rights are preserved in the statute in question, and we discover nothing in its letter or spirit that contravenes any provisions of the State or Federal constitutions, or is subversive of those fundamental principles of justice in which the 'law of the land' has its root."

It is "due process of law" when a statute requires that the fixing of a tax or assessment before it becomes effectual must be submitted to a court of justice, with notice to the owners of the property, all of whom have the right to appear and contest the assessment. *Davidson v. New Orleans*, 96 U. S. 97. The court said, *inter alia*: "It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitution of the several States and of the United States. . . . Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision. A most exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice or after the manner of such courts. *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. 272. . . . While it has been a part of the constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold 'that State

courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law.' There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. . . . If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property, without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and the application of such an important phrase in the Federal constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. . . . As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Mr. Justice Bradley in a concurring opinion said: "In the conclusion and general tenor of the opinion just read I concur. But I think it narrows the scope of inquiry as to what is due process of law more than it should do. It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment or the want of a judicial proceeding. If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a

does not necessarily require trial by jury,¹ except in regular common-law proceedings;² nor an indictment by a grand jury in

conflagration, or in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. . . . I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

A statute authorizing an assessment for the grading of streets among the owners of lands benefited by the improvement, in proportion to the amount of such benefit, does not deprive them of their property without "due process of law." *People v. Mayor of Brooklyn*, 4 N. Y. 419. And see *Lent v. Tillson*, 72 Cal. 404; *Hagar v. Reclamation Dist.*, 111 U. S. 701. See also *Weber v. Reinhard*, 73 Pa. St. 370; *In re Ryers*, 72 N. Y. 1, a decision on a drainage act, in which the court said: "'Due process of law,' in the Fourteenth Amendment to the United States constitution, does not mean by a judicial proceeding." *McMillen v. Anderson*, 95 U. S. 37 (where a similar statement is made); *Kelly v. Pittsburgh*, 104 U. S. 8.

An act providing for the laying of drains through the property of private owners for the benefit of land belonging to others, was held unconstitutional, as taking property "without due process of law." *Fleming v. Hull* (Iowa), 35 N. W. Rep. 673. So where those benefited have been assessed without notice. *Campbell v. Dwiggins*, 83 Ind. 473.

The consent of the owner will validate an otherwise unconstitutional assessment. *Embury v. Conner*, 3 N. Y. 511.

1. *Walker v. Sauvinet*, 92 U. S. 90, where it said: "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. . . . Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

See also *Reagh v. Spann*, 3 Stew. (Ala.) 108, where it is said: "Nor does the phrase 'due course of law' necessarily imply a trial by jury, but rather means a proceeding carried on according to the law of the land, either with or without a trial by jury."

See also *In re Curry*, 1 N. Y. Civ. Proc., 319.

The provision of the Fourteenth Amendment against depriving of property "without due process of law" does not prevent a State from giving to a court of equity jurisdiction of a suit brought by the owner of an equitable interest in land to establish his rights against the holder of the legal title, because it deprives the holder of the legal title of the right to a trial by jury which he would have in a suit at law. *Church v. Kelsey*, 7 Sup. Ct. Rep. 897.

A statute giving a county board power to remove a county officer for nonfeasance or malfeasance in office, without a trial in a court of law, is not unconstitutional, there being no such thing as title or property in a public office. *Donahue v. Co. of Will*, 100 Ill. 94.

The denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise is not depriving the importer of his property "without due process of law." *Hilton v. Merritt*, 110 U. S. 97.

2. "While it is true that in actions *in rem* in admiralty property in the nature of ships may be divested from an owner without the verdict of a jury, yet I think it can be laid down with perfect truth, that in any proceeding at common law, even proceedings *in rem*, a citizen of the United States cannot be divested of his property except by the verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, etc." The *J. W. French*, 13 Fed. Rep. 924.

A law compelling a party to arbitrate upon a claim which properly should be

criminal cases,—for “any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.”¹

the subject of an action, thus depriving him of a trial according to the course of common law, proceeds “without due process of law.” *People v. Haws*, 37 Barb. (N. Y.) 440.

“It was against the enactment of new laws which ignored the proceedings according to the course of common law, and provided summary methods of determining legal rights, that the protecting shield of the constitution was required. The true criterion is, Does the act destroy or materially impair the right of trial by jury, according to the course of the common law, in cases proper for the cognizance of a jury? The nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law, and not the nature of the tribunal, nor the summary mode of proceeding therein, should decide the question.” *Risser v. Hoyt*, 53 Mich. 201.

1. *Hurtado v. People of Cal.*, 110 U. S. 516, a case of prosecution by a State for murder, in which the history of the phrase is elaborately gone into, both in the opinion of the court and in the dissenting opinion of Harlan, J. After the historical survey, having quoted the Fifth Amendment to the United States constitution, the court said: “According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the constitution ‘due process of law’ was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense, and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers

conferred upon Congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . . But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular case, but, in the language of Mr. Webster, in his familiar definition, ‘the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,’ so ‘that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;’ and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. . . . Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as

authorized by the statute of *California*, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

So in *Rowan v. State*, 30 Wis. 149; s. c., 11 Am. Rep. 559, it is said: "The words 'due process of law,' in this amendment, do not mean and have not the effect to limit the powers of the State governments to prosecutions for crimes by indictments; but these words do mean law in its regular course of administration, according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and if the people of the State find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our State constitution as it now stands, and nothing in the Fourteenth Amendment to the constitution of the United States, which prevents them from doing so." See *State v. Becht*, 23 Minn. 411; *State v. Whisner*, 35 Kan. 271; *Kallock v. Super. Ct.*, 56 Cal. 229.

In *State v. Doherty*, 60 Me. 509, it is said: "When applied to proceedings in criminal cases, the expression 'due process of law,' or 'the law of the land,' means that no person shall be deprived of life, liberty, property, or privileges, without indictment or presentment by good and lawful men, selected, organized, and qualified in accordance with some pre existing law, and a trial by a court of justice, according to the regular and established course of judicial proceedings." *Coke*, 2 Inst. 46; 2 Kent Com. 13 Story on Const. 661."

Where an act made the notorious character of premises *prima facie* evidence that liquor was sold there illegally, it was held to be unconstitutional. *State v. Beswick*, 13 R. I. 211; s. c., 23 Alb. L. Journ. 489. The court says, after quoting with approval the definition of "due process of law" given in *Westervelt v. Gregg*, 12 N. Y. 202, cited *supra*: "The effect in criminal prosecutions is to secure to the accused, before condemnation, a judicial trial, if not strictly in all points according to the common law, at least not in violation of those fundamental rules and principles which have been established at common law for the protection of the subject or the

citizen. Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty."

A State board of health was held to have no power to revoke a certificate to practise medicine except for good cause, and then only after notice and a hearing. *People v. McCoy*, 20 Chic. Leg. N. 151. The court said: "While there is not entire agreement as to what is meant by due process of law, it is universally conceded that it does not mean anything that the legislature may enact, or any course of procedure it may prescribe: if it did, the expression in the constitution would be meaningless; and while necessarily summary proceedings for the divestiture of property have in some instances been sanctioned, I think it has nowhere been held that one could be deprived of liberty except by proceedings in accordance with the common law, that is, by the due course of procedure of a judicial tribunal. It is true that the proceeding to take away a physician's certificate is not a criminal one, although the punishment inflicted for the offence for which he is deprived of his certificate is far more severe than that prescribed for most criminal offences."

The action of a court in disbarring an attorney was held "due process of law" in *Ex parte Wall*, 107 U. S. 265.

A statute authorizing a judge to commit to jail a party who refused to obey an order in proceedings auxiliary to execution, was held not unconstitutional. *Eikenbury v. Edwards* (Iowa), 25 N. W. Rep. 832. And see *State v. Smith* (Wis.), 26 N. W. Rep. 258.

But a law enacting that "any person charged with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of a court of record for trial, and if convicted shall be sentenced to confinement, etc.," is unconstitutional, as depriving such person of liberty "without due process of law." *State v. Ryan* (Wis.), 36 N. W. Rep. 823.

A statute providing that no convict shall be discharged until he has remained the full term for which he was sentenced, *excluding* the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, was held in derogation of the constitutional provision that a man should not be deprived of his liberty "without due process of law," and therefore unconstitutional and void. *Gross v. Rice*, 71 Me. 241.

Where the law under which a person is imprisoned is valid, he is not impris-

For miscellaneous cases bearing on "due process of law," see note 1.

oned without due process of law, although there is error in the proceedings resulting in the commitment. *In re Ah Lee*, 2 Crim. L. Mag. 336.

A statute purporting to authorize the prosecution, trial, and punishment of a person for an offence previously committed, and as to which all prosecution, trial, and punishment were, at its passage, already barred according to pre-existing statutes of limitation, is unconstitutional and void. *Moore v. State*, 43 N. J. L. 203.

A statute enacting that in the trial of criminal cases the fact that a person called as a juror may have formed an opinion based upon rumor or newspaper statements (about the truth of which he had expressed no opinion), should not disqualify him from serving as a juror if he should swear that he could render a verdict in accordance with the evidence,—which statute was interpreted not to make it a test question whether the juror will have the opinion which he has formed from the newspapers changed by the evidence, but whether his verdict will be based only upon the account given by witnesses under oath,—was held not to be repugnant to the constitutional provision against deprivation "without due process of law." *Spies v. Illinois (Anarchists' Case)*, 123 U. S. 131.

1. An act validating loans or investments previously made in a State by corporations of other States or counties, authorized by their respective charters to invest or loan money, is not in conflict with the provision of the Fourteenth Amendment. *Gross v. U. S. Mortgage Co.*, 108 U. S. 477.

A city ordinance making it an offence to keep a laundry within the limits of the larger part of a city was held unconstitutional, as depriving of property "without due process of law." *In re Sam Kee*, 31 Fed. Rep. 680.

Acts authorizing the seizure of animals running at large are not unconstitutional. *Campbell v. Evans*, 45 N. Y. 356; *Cook v. Gregg*, 46 N. Y. 439.

Nor is an act restricting the driving of cattle upon the streets and prohibiting the business of slaughtering cattle within certain limits. Metropolitan Board of Health *v. Heister*, 37 N. Y. 667.

Impairing a man's beneficial use of his property by means of smoke, gas, steam, cinders, etc., caused by an elevated railway, is depriving him of his property "without due process of law." *Abendroth v. Elev. R. Co.*, 54 N. Y. Super. Ct. 417.

A statute authorizing any person to erect and maintain on his own land a water-mill and mill-dam upon and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding, does not deprive them of their property "without due process of law" within the meaning of the Fourteenth Amendment. *Head v. Amoskeag Co.*, 113 U. S. 9.

An act making water-rates a charge upon lands in a municipality prior to the lien of all incumbrances does not deprive any one of property without "due process of law." *Provident Institution v. Jersey City*, 113 U. S. 506. Nor does the exaction of tolls, under a State statute, for the use of an improved natural water-way. *Sands v. Manistee River Imp. Co.*, 123 U. S. 288.

Where the board of public works of a State leased the surplus water of her canals, but reserved the right to resume the use of it for purposes of navigation, and a statute was subsequently passed whereby one of the canals within certain limits was appropriated by a city for a highway, *held*, that the lessee was not deprived of his property "without due process of law." *Fox v. Cincinnati*, 104 U. S. 783.

An act authorizing an appeal from a decree where the time previously allowed for appealing had expired, and the decree had been executed, is in conflict with the constitutional provision with reference to "due process of law." *Burch v. Newbury*, 10 N. Y. 374. And see *Beaupre v. Hoerr*, 13 Minn. 366.

The repeal of a Statute of Limitation of actions on personal debts does not, as applied to a debtor the right of action against whom is already barred, deprive him of his property "without due process of law." *Campbell v. Holt*, 115 U. S. 620.

An act forbidding the use of bicycles upon a certain road without express permission was held not to deprive any one of the use of property "without due process of law," but merely to operate as a police regulation. *State v. Yopp*, 2 S. E. Rep. 458. Nor does an act forbidding the use of cars or engines on certain streets. *Railroad Co. v. Richmond*, 96 U. S. 521.

In a covenant to procure and enforce payment of money due on mortgage "by due process of law," this phrase means "all ordinary legal measures prosecuted with good faith." *Thomas v. Woods*, 4 Cowen (N. Y.), 173, 182.

In *Backus v. Shipherd*, 11 Wend. (N.

DUELLING.—The fighting of two persons one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.¹

Y.) 629, the question whether such a provision had been complied with was said to be a mixed one of law and fact, and submissible to a jury.

Laws restricting the sale of liquors or authorizing the forfeiture and sale of liquors illegally kept are not unconstitutional as depriving the owners "without due process of law." *State v. Fitzpatrick* (R. I.), 11 Atl. Rep. 773; *State v. Jordan* (Iowa), 34 N. W. Rep. 285 (where the nuisance was abated by proceedings in chancery); *People v. Quant*, 12 How. Pr. (N. Y.) 83; *Mugler v. State of Kansas*, 8 Sup. Ct. Rep. 273 (in which case it is said: "The principle that no person shall be deprived of life, liberty, or property without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"); *Dorman v. State*, 34 Ala. 216; *Ex parte Kohler* (Cal.), 15 Pac. Rep. 436. Compare *Wynehamer v. People*, 13 N. Y. 378. See, as to the interference of such acts with the regulation of commerce given by the constitution to Congress, *Bowman v. Chicago & N. W. R. Co.*, 8 Sup. Ct. Rep. 689.

In *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129, it was said that if a case were presented in which a person owned liquor at the time a law was passed by the State absolutely prohibiting the sale of it, it would be a very grave question "whether this would be a statute depriving him of his property without due process of law."

In *State v. Walruff*, 26 Fed. Rep. 178, it was held that a constitutional amendment prohibiting the manufacture of beer in so far as it deprived certain persons of the use of their property acquired previous to the adoption of the amendment, without compensation, deprived them without due process of law, and was void. "I affirm that, no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not 'due process of law' if the plain purpose and inevitable result is the spoliation of private property

for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute 'due process of law.' No complete and perfect definition of the phrase 'due process of law' has yet been given. The most familiar, and one for ordinary cases sufficiently accurate, is that given by Daniel Webster in the celebrated *Dartmouth College Case*."

1. Bouvier's L. Dict.

Challenge.—No particular form of words is necessary to constitute a challenge to fight a duel; whether a challenge to fight in single combat with deadly weapons was intended, or whether it was the mere effusion of passion, or folly, or the idle boast of a braggart, not intended at the time to lead to any result, or to be understood by the other party as a challenge to fight a duel, are questions which the jury must determine. *Ivey v. State*, 12 Ala. 276. See *State v. Strickland*, 2 Nott & McC. (S. Car.) 181; *State v. Perkins*, 6 Blackf. (Ind.) 20; *Com. v. Hart*, 6 J. J. Marsh. (Ky.) 119.

An indictment for challenging to fight a duel, containing a copy of the challenge, which seems merely a demand of satisfaction, and averring that it was intended and understood as a challenge to fight with deadly weapons, is sufficient, if supported by oral evidence of such meaning. *Com. v. Pope*, 3 Dana (Ky.), 478.

It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavor to provoke another to send a challenge, or to fight; as by dispersing letters, for that purpose, full of reflections, and insinuating a desire to fight. And it will be no excuse for a party so offending, that he has received provocation; for as, if one person should kill another, in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second; the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. 1 Russ. Cr. (9th Am. Ed.) *412; Roscoe's Cr. Ev. (7th Am. Ed.) 379, note. Where, after a prisoner had been convicted, his brother went to the house of the foreman of the jury, and challenged him to mortal combat, it was

DULY.—In a proper way; regularly; according to law.¹

held that this was a high contempt of the court before which the trial was held, and punishable as such. *R. v. Martin*, 5 Cox C. C. 356.

The expression of a readiness to accept a challenge does not amount to a challenge, though it may to a misdemeanor at common law. *Com. v. Tibbs*, 1 Dana (Ky.), 524. See *Auljer v. State*, 34 Ill. 486.

The offence of endeavoring to provoke another to send a challenge to fight was much considered in a modern case, in which it was held to be an indictable misdemeanor: and more especially as such provocation was given in a letter containing libellous matter, and as the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the king's peace. *R. v. Phillips*, 6 East, 464. See *Com. v. Tibbs*, 1 Dana (Ky.), 524. And the sending such letter was held to be an act done towards the procuring the commission of the misdemeanor meant to be accomplished. In this case, with respect to the intent of the defendant, the rule was adopted that where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved, though it is sufficient to allege it in the prefatory part of the indictment: but that where the act is in itself unlawful, the law infers an evil intent; and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution. 1 Russ. Cr. (9th Am. Ed.) *413.

Disfranchisement.—A statute which declares that any person convicted of challenging another to fight a duel shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under the State, is constitutional. *Barker v. People*, 20 Johns. (N. Y.) 457; s. c., 3 Cow. (N. Y.) 686. See *Cochran v. Jones*, 14 Am. L. Reg. (N. S.) 222; *Moody v. Com.*, 4 Met. (Ky.) 1; *Com. v. Jones*, 10 Bush (Ky.), 725; *State v. Dupont*, 2 McCord (S. Car.), 334; *Royall v. Thomas*, 28 Gratt. (Va.) 130.

One who has aided and assisted in a duel may be removed from office by *quo warranto*. *Royall v. Thomas*, 28 Gratt. (Va.) 130.

Jurisdiction.—The State where the challenge is given has jurisdiction of the offence, even though the place of meeting is in another State. *Com. v. Booth*,

Thatcher's Cr. Cas. (Mass.) 390; *State v. Farrier*, 1 Hawks (N. Car.), 481; *State v. Taylor*, 3 Brev. (S. Car.) 243; *Ivey v. State*, 12 Ala. 276; *Harris v. State*, 58 Ga. 332.

In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the twopenny post-office in a street in Westminster, addressed to the prosecutor in the city of London, by whom it was there received, Lord Ellenborough, C. J., held that the defendant might be indicted in Middlesex, as there was a sufficient publication in that county by putting the letter into the post-office there, with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same. *R. v. Williams*, 2 Campb. 506.

Consent is the gravamen of the offence in a second. *Harris v. State*, 58 Ga. 332.

Evidence.—The declarations of the seconds are admissible against the principal. *State v. Dupont*, 2 McCord (S. Car.), 334. So also the declarations of the principal upon an indictment for carrying a challenge. *Com. v. Booth*, *Thatcher's Cr. Cas. (Mass.)* 390.

A, in a letter to B, uses expressions supposed to amount to a challenge to fight a duel, and by a postscript refers B to C (the bearer of the letter) if any further arrangements were necessary. On an indictment, *held*, that B might give testimony of the conversation between C and himself. *State v. Taylor*, 3 Brev. (S. Car.) 243.

As to whether printed copies of the challenge and letters are competent, see *Moody v. Com.*, 4 Met. (Ky.) 1.

Practice.—In an indictment for a challenge it is not necessary to set forth a copy of the challenge, and if it varies slightly from the original, preserving the sense, it has been held that such variance is not fatal. *State v. Farrier*, 1 Hawks (N. Car.), 481. See *Com. v. Rowan*, 3 Dana (Ky.), 397; *Moody v. Com.*, 4 Met. (Ky.) 1.

If it be averred that a letter was sent, that fact must be proved. *Com. v. Hooper*, *Thatcher's Cr. Cas. (Mass.)* 400.

1. *Gibson v. People*, 5 Hun (N. Y.), 542, where it was held that an indictment which sets out that "the said J. G. having been so convicted of the crime of grand larceny aforesaid, and having been duly discharged and remitted of such judgment and conviction, afterwards" committed a second larceny charged in

DUMB.—See note 1.

DUNCE.—See note 2.

DUNNAGE.—(See also **BALLAST**; **CARGO**.)—"Fagots, boughs, or loose material of any kind laid on the bottom of a ship to raise heavy goods above the bottom to prevent injury by water in the hold; also loose articles of merchandise wedged between parts of the cargo to prevent rubbing and to hold them steady."³

the indictment, sufficiently alleges a discharge "either upon being pardoned or upon the expiration of his sentence."

A statute allowing fees to coroners in cases where inquests are duly taken, intends not inquests taken with due solemnity or formality, but those which it was proper to take. *Reg. v. Gloucestershire*, 7 E. & B. 812.

The word "duly" in pleading is very often surplusage, and had better be omitted. *Miles v. McDermott*, 31 Cal. 271. Its insertion will not supply a defective allegation, nor supersede the necessity of stating facts from which a conclusion is drawn. *Reg. v. Inhabitants of Keighley*, 8 Q. B. 877; *Reg. v. Lewis*, 1 Dowl. & L. 822; *Beach v. King*, 17 Wend. 197. But an allegation that a sidewalk was "duly completed" is a sufficient averment that it was completed in accordance with the specifications of an ordinance, whose terms are recited in the complaint. *Auburn v. Eldridge*, 77 Ind. 126. And see *Jones v. Davis*, 22 Wis. 422.

Duly Arrest.—In an action on a contract to pay the plaintiff a certain sum of money for obtaining the release of R. S. from imprisonment, the allegation in the declaration that the sheriff duly arrested R. S. does not mean that he was in custody so that he could not be discharged without plaintiff's consent, but that the sheriff acted duly under the writ, so as not to become a trespasser. *Butcher v. Stewart*, 11 M. & W. 857.

Duly Convened.—An averment that a meeting was duly convened implies that it was regularly convened, and, if necessary to its regularity, that it was an adjourned meeting. *People v. Walker*, 23 Barb. 304.

Duly Directed.—Directed in the ordinary way by writing on the outside. *Birch v. Edwards*, 5 C. B. 45. See **DIRECT**.

Duly Done.—See **DO**.

Duly Qualified.—The recital in a referee's report that he had been duly qualified is *prima facie* evidence that he had been sworn as the statute required, particularly where there had been no objec-

tion by the parties. *Edwardson v. Garnhart*, 56 Mo. 81.

Duly Recorded in an act means recorded according to law. *Dunning v. Coleman*, 27 La. Am. 47.

Duly Sworn, when applied to an officer who is required to take and subscribe an oath, means that he has taken the required oath. *Bennett v. Treat*, 41 Me. 226.

Where an act requires assessors to be "duly sworn," it is sufficient for them to have taken an oath to "faithfully and impartially perform the duties assigned to them." *Patterson v. Creighton*, 42 Me. 367.

Where a commissioner in the caption of a deposition states that the witness was "duly sworn," and in his certificate that he was "first duly sworn to testify the truth," it cannot be inferred that he was irregularly sworn, the objection being that he should have been sworn specially to the interrogatories. "The addition 'to testify the truth' does not impair the force of the certificate that he was 'duly sworn.'" *Clarke v. Benford*, 22 Pa. St. 353.

1. A dog is a dumb animal within a cruelty to animals statute. *McDaniel v. State*, 5 Tex. App. 475.

2. It is actionable to say of a barrister, "He is a dunce;" a dunce being one of dull capacity and apprehension, and not fit for a lawyer. *Peard v. Jones*, Cro. Car. 382. And see *Fitzgerald v. Rdefield*, 36 How. Pr. (N. Y.) 901.

3. Webster, quoted by Bradley, J., in *Great Western Ins. Co. v. Thwing*, 13 Wall. (U. S.) 672.

"There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship, and bringing it down to a draught of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising or injuring each other."

The point decided in this case was that cannon coal used for the purpose of dunnage

DUPLICATE—DURATION.

DUPLICATE.—(See also **COPY.**)—A document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and in its operation.

DUPLICITY.—See **PLEADING.**

DURATION.—Extent ; limit ; time.²

nage, and paying freight as merchandise, was to be considered as a part of the ship's loading within the meaning of a warranty in an insurance policy, against an excess of loading beyond a limited amount, it being admitted that an equal quantity of ballast or dunnage would not be so regarded. "Many kinds of cargo require no dunnage whatever. They are composed of articles which will not be injured by water, nor by contact with each other. A cargo may be so assorted that some portions of it may be placed so as to keep the other portions dry, or prevent them from coming into mutual collision. It is manifest in this case, as in that of ballast, that a prudent and skilful master of a vessel will so assort and arrange his cargo, as to dispense with dunnage proper. And yet in a loose sense the articles of merchandise which he uses to perform the office of dunnage may be called dunnage. Still they are not legally nor properly such. If they are merchandise they are cargo and form part of the vessel's lading. They will be subject to duties, and they will be covered by insurance on the cargo."

"It is true that ballast or dunnage, even when clearly such, as shingle from the beach, wooden slabs, chips of brush, may be sold for some small sum after the voyage is ended; but that will not make it any the less ballast or dunnage, as contradistinguished from merchandise." The distinction is that freight is never paid for dunnage.

Clifford, J., dissenting, said: "Insurance was obtained by the defendant on his ship *Alhambra*, from Liverpool to San Francisco; she received injuries by perils of the sea during the voyage, and the plaintiffs as insurers paid the loss under protest, and brought this suit to recover back the amount. The policy contained the warranty described in the opinion of the court, and the claim to recover back the amount paid for the loss is based solely upon the fact that the ship took on board twenty-three tons of the excepted articles mentioned in the warranty in excess of her registered tonnage. Two hundred and thirty-eight tons of the loading consisted of cannell coal, which the proofs showed was often

used as dunnage, and that much more in quantity of the coal than the excess mentioned was used for dunnage on this occasion. Dunnage is required in every case, and it is not shown nor pretended that any more was used in loading the cargo than was necessary for the purpose. Deduct from the loading the amount of the coal used as dunnage, and it is conceded that the loading of the ship did not exceed her registered tonnage, and the jury have found that the excess beyond her registered tonnage was used as dunnage, and I have no doubt it was properly so used. Beyond doubt the ship-owner in ballasting his chartered vessel may take freight, paying merchandise for that purpose, provided the merchandise occupies no more space than the ballast would have done if ordinary ballast had been used instead of merchandise paying freight; and I am of the opinion that the same rule should be applied in respect to the dunnage used in stowing the cargo. *Towse v. Henderson*, 4 Exch. 890." Such was also the view taken in *Thwing v. Great Western Ins. Co.*, 103 Mass. 401. *Chase, C. J.*, and *Swayne, J.*, also dissented, concurring in the views expressed by *Clifford, J.*

1. *Maule, J.*, in *Toms v. Cuming*, 8 Scott N. R. 910, said, "It is a very different thing from an examined copy, although an examined copy may be a duplicate under certain circumstances." A statute required a notice of a certain kind to be served by post, and directed that it should be presented in duplicate to the postmaster, who should compare the notice and the duplicate, stamp the latter and return it to the sender, when it should be evidence of service. Under this the duplicate as well as the original must bear the signature of the sender. s. c., 7 M. & G. 88.

A draft having been lost, the drawer made a new one, writing "duplicate" across the face thereof. This word was held to signify that the draft was made as a substitute for the original, and that no new liability was created thereby. *Benton v. Martin*, 40 N. Y. 345.

See further, on duplicate, *Comm. v. Beamish*, 81 Pa. St. 389; *Nelson v. Blakely*, 54 Ind. 29; *Birch v. Edwards*, 5 C. B. 45.

2. *People v. Hill*, 7 Cal. 102.

DURESS.—(See also **THREATS**; **UNDUE INFLUENCE**.)

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 - (a) *Parent and Child*, 92.
 - (b) *Husband or Wife*, 93.
 - (c) *Principal and Surety*, 96.
 - (d) *Admissions*, 99.

1. **Definition.**—Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly said to be of the person or the goods of the party. Duress of the person is either by imprisonment or by threats, or by an exhibition of force which apparently cannot be resisted. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.¹

1. *Hackley v. Headley*, 45 Mich. 569, *per* Cooley, J. See *Silliman v. U. S.*, 101 U. S. 465; *Brown v. Pierce*, 7 Wall. (U. S.) 215; *Baker v. Morton*, 12 Wall. (U. S.) 150; *U. S. v. Huckabee*, 16 Wall. 414; *Evans v. Gale*, 18 N. H. 401; *Walkins v. Baird*, 6 Mass. 506; *Olivari v. Menger*, 39 Tex. 76; *Alston v. Durant*, 2 Strob. (S. Car.) 257; s. c., 49 Am. Dec. 596; *King v. Williams*, 65 Iowa, 167.

Duress, like fraud, only becomes material, as such, on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that when, as usual, the so-called "duress" consists only of threats, and does not go to the height of such bodily compulsion as turns the ostensible party into a mere machine, the contract is only voidable. *Fairbanks v. Snow*, 13 N. E. Rep. (Mass.) 596; *Foss v. Hildreth*, 10 Allen (Mass.), 26, 80; *Vinton v. King*, 4 Allen (Mass.), 561, 565; *Lewis v. Bannister*, 16 Gray (Mass.), 500; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Worcester v. Eaton*, 13 Mass. 371, 375; *Duncan v. Scott*, 1 Camp. 100; *Whelpdale's Case*, 3 Coke, 241; 1 Bl. Comm. 130; *Clark v. Pease*, 41 N. H. 414. This rule necessarily excludes from the common law the often-recurring notion, just

referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen Coactus Volui*, D. 4, 2. 25, § 5. See 1 Windscheid, Pandectien, § 80.

Duress consists not merely in the act of imprisonment or other hardship, but in the state of mind produced thereby, and in which the act sought to be avoided was done. *Feller v. Green*, 26 Mich. 70; *Stoner v. Mitchell*, 45 Ill. 213; *Bane v. Detrick*, 52 Ill. 11; *Blair v. Coffman*, 2 Overton (Tenn.), 176; s. c., 5 Am. Dec. 659.

Duress exists where one is induced, by another's unlawful act, to make a contract or perform some act under circumstances which prevent his exercising free will. It is either of the person or the goods of the party constrained. *Hackley v. Headley*, 45 Mich. 569. See *Griffith v. Sitgreaves*, 90 Pa. St. 161.

The fear must be such as would influence a man of reasonable courage. *Bosley v. Shanner*, 26 Ark. 280; *Harmon v. Harmon*, 61 Me. 222.

The wife may plead the duress of the husband in an action to recover her property wrongfully obtained from him. *Koehler v. Wilson*, 40 Iowa. 183.

Duress Per Minas.—In *Miller v. Miller*,

68 Pa. St. 486, it is said that in civil cases the rule as to duress *per minas* has a broader application at the present day than formerly. Where a party has the property of another in his power, so as to enable him to exert his control over it to the prejudice of the owner, a threat to use this control may be in the nature of the common-law duress *per minas*, and enable the person threatened with this pernicious control to avoid a bond or note obtained without consideration, by means of such threats. The constraint that takes away free agency and destroys the power of withholding assent to a contract must be one that is imminent and without immediate means of protection, and such as would operate on the mind of a person of reasonable firmness. As it is expressed in *Astley v. Reynolds*, 1 Strange, 915, the rule *voluntis non fit injuria* is applied only "where the party had his freedom of exercising his will." *Motz v. Mitchell*, 91 Pa. St. 114. The same general principle is also recognized in *Colwell v. Peden*, 3 Watts (Pa.), 327; *Foshay v. Ferguson*, 5 Hill (N. Y.), 154; *Sasportas v. Jennings*, 1 Bay (S. Car.), 470; *Collins v. Westbury*, 2 Bay (S. Car.), 211.

Menaces which induce a fear of life, of mayhem, or of imprisonment, may avoid a deed; but a menace to commit a battery, to burn a house, or spoil goods, is not sufficient. *Edwards v. Handley, Hardin* (Ky.), 602; s. c., 3 Am. Dec. 745.

Whether duress can be predicated of compulsion to discharge a legal duty, is a question upon which the cases differ. The following cases hold that it can: *Taylor v. Jaques*, 106 Mass. 291; *Osborn v. Robbins*, 36 N. Y. 365; *Phelps v. Zuschlag*, 34 Tex. 371. *Contra*: *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Shepherd v. Watrous*, 3 Caines (N. Y.), 168; *Eddy v. Herrin*, 17 Me. 338; *Crowell v. Gleason*, 10 Me. 325; *Clark v. Turnbull*, 47 N. J. L. 265; s. c., 54 Am. Rep. 157; *Stouffer v. Latshaw*, 2 Watts (Pa.), 167; *Alexander v. Pierce*, 10 N. H. 494; *Vane v. Williams*, 50 Conn. 348; *State v. Davis*, 79 N. Car. 603; *Gresham v. Landens*, Ga. Dec. (pt. 2) 149; *Meek v. Alkinson*, 1 Bailey (S. Car.), 84; s. c., 19 Am. Dec. 653; *Dickerman v. Lord*, 21 Iowa, 338; *Green v. Scranage*, 19 Iowa, 461; *Hatter v. Greenlee*, 1 Port. (Ala.) 222; s. c., 26 Am. Dec. 370; *Diller v. Johnson*, 37 Tex. 47.

There is duress of imprisonment sufficient to invalidate acts done thereby where an arrest legal in its inception has been followed by maltreatment of the prisoner. *Hatter v. Greenlee*, 1 Port. (Ala.) 222; s. c., 26 Am. Dec. 370.

The person against whom the redress is sought must be a party to the act of duress. *Talley v. Robinson*, 22 Gratt. (Va.) 888. See *Green v. Scranage*, 19 Iowa, 461; *Jones v. Rogers*, 36 Ga. 157; *Lester v. Union Mfg. Co.*, 1 Hun (N. Y.), 288; *Humphrey v. Humphrey*, 79 N. Car. 396. Compare *Mann v. Lewis*, 3 W. Va. 215; *Bogle v. Hammons*, 2 Heisk. (Tenn.) 136; *Weatherspoon v. Woodey*, 5 Coldw. (Tenn.) 149; *Olivari v. Menger*, 39 Tex. 76.

The action for redress must be brought within a reasonable time. *Murphy v. Paynter*, 1 Dill. (U. S.) 333. See *Doolittle v. McCullough*, 7 Ohio St. 299; *Lyon v. Waldo*, 36 Mich. 345.

The illegal demand must be accompanied by the apparent power, at least, to carry the threat of enforcement into immediate execution. *Vick v. Shinn* (Ark.), 4 S. W. Rep. 60; *Ligonier v. Ackerman*, 46 Ind. 552; *Brumagim v. Tillinghast*, 18 Cal. 265.

Mere advice, direction, influence, and persuasion do not constitute duress. *Barrett v. French*, 1 Conn. 354; s. c., 6 Am. Dec. 241.

Threats to commit suicide will not constitute duress. *Metropolitan L. Ins. Co. v. Meeker*, 85 N. Y. 614; *Wright v. Remington*, 41 N. J. L. 48.

A written assignment of personal property from A to B as agent, authorizing B to sell the property to C at a price therein named, to be paid by them to the workmen and creditors of A, obtained by threats of personal violence by the workmen, is voidable for duress. *Doolittle v. McCullough*, 7 Ohio St. 229.

Where a seaman is induced to assent to his discharge, upon payment of a nominal sum, from just apprehension of future ill-treatment, arising from the misconduct of the master, such assent is given under a species of duress, and is no bar to a recovery of the amount actually due to him at the time of his discharge. *Bates v. Seabury*, 1 Sprague (U. S.), 433.

Where no Duress of Person or Goods.—In *West Va. Trans. Co. v. Sweetzer*, 25 W. Va. 434; s. c., 22 Am. & Eng. R. R. Cas. 469, the court said: "Some have said that, to entitle any one to recover back money which has been paid on an unjust demand, there must be either duress of one's person or duress of his goods. But clearly there are circumstances in which a person may be placed where he would have much less freedom of will in making a payment on an unjust demand than he would have because of a duress of his goods; and accordingly

Duress (like fraud) vitiates all contracts made under its influence..

A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.¹

there are very many cases to be found in the books where a party paying an unjust demand has been allowed to recover it back as paid on compulsion, though there was no duress of either his person or of his goods, because it was obvious that the payments were made involuntarily and under so heavy a pressure as to make the payments not only involuntary, but really compulsory.

"Some of these cases are based on the peculiar circumstances of the case, and no rule of law could well be deduced from them; and others, which are of more frequent occurrence, and from which a rule might be deduced, are cases in which the authorities differ. Thus, in Massachusetts it has been said that, when the payment of money has been made upon an illegal demand by one who has authority to levy upon the property of the person upon whom such demand is made, and by a sale of property to satisfy and discharge such claim, and when payment is made upon such demand to prevent such seizure and sale of property, the payment is compulsory." *Boston & S. Glass Co. v. Boston*, 4 Metc. (Mass.) 181; *Amesbury W. & C. Mfg. Co. v. Amesbury*, 17 Mass. 461; *Preston v. Boston*, 12 Pick. (Mass.) 7. These statements in these Massachusetts cases, or the doctrine stated in them, has received considerable countenance from cases decided elsewhere. *Mariposa Co. v. Bowman*, *Deady* (U. S.), 228; *Hendy v. Soule*, *Deady* (U. S.), 400; *Erskine v. Vanarsdale*, 15 Wall. (U. S.) 76; *Harvey v. Olney*, 42 Ill. 336; *Bradford v. Chicago*, 25 Ill. 411; *Wiley v. Parmer*, 14 Ala. 627; *Crutchfield v. Wood*, 16 Ala. 702; *Cahaba v. Barnett*, 34 Ala. 407; *Tuttle v. Everett*, 51 Miss. 27; *First National Bank v. Watkins*, 21 Mich. 483; *Atwell v. Zeluff*, 26 Mich. 118; *McKee v. Campbell*, 27 Mich. 500.

"On the other hand, it was held in *Smith v. Redfield*, 27 Me. 145, that if payment be made on an unjust demand to one having authority to enforce payment by sale of property, before there is any seizure of property, and when no immediate seizure of the property for sale was threatened, so that payment could not have been shown to have been made to avoid the seizure and sale of the property, such payment is voluntary, and cannot be recovered back by suit. This position receives countenance from, and

is apparently sustained by, many decisions, among which may be cited *N. Y.* etc. *R. Co. v. Marsh*, 12 N. Y. 308; *Walker v. St. Louis*, 15 Mo. 563; *Phillips v. Jefferson Co.*, 5 Kan. 412; *Taylor v. Board of Health*, 31 Pa. St. 73; *Barnett v. Cambridge*, 10 Allen (Mass.), 48; *Robinson v. Charleston*, 2 Rich. (S. Car.) 317; *Morris v. Baltimore*, 5 Gill (Md.), 244."

1. *Radich v. Hutchins*, 5 Otto (U. S.), 210; *Maxwell v. Griswold*, 10 How. (U. S.), 242; *Quincey v. White*, 63 N. Y. 370; *Baltimore v. Lefferman*, 4 Gill (Md.), 425; *Awalt v. Eutaw Building Assoc.*, 34 Md. 435; *Mays v. Cincinnati*, 1 Ohio St. 268; *Elston v. Chicago*, 40 Ill. 514; *Harvey v. President*, 42 Ill. 336; *Swanston v. Ijams*, 63 Ill. 165; *Phillips v. Jefferson Co.*, 5 Kan. 412; *Kansas, etc., R. Co. v. Wyandotte Co.*, 16 Kan. 587; *Brumagim v. Tillinghast*, 18 Cal. 265; *Jackson v. Allen*, 4 Colo. 263; *Harmon v. Harmon*, 61 Me. 222; *Elston v. Chicago*, 40 Ill. 514; *Fogg v. Union Bank*, 4 Baxt. (Tenn.) 530; *Ladd v. Southern Press, etc., Co.*, 53 Tex. 172. See *Benson v. Monroe*, 7 Cush. (Mass.) 125; *Emery v. Lowell*, 127 Mass. 138; *Cook v. Boston*, 9 Allen (Mass.), 393; *Lee v. Templeton*, 13 Gray (Mass.), 476; *Robinson v. Charleston*, 2 Rich. Law (S. Car.), 317; s. c., 45 Am. Dec. 739; *Champlin v. Laytin*, 18 Wend. 407; *Dickins v. Jones*, 6 Yerg. (Tenn.) 483; s. c., 27 Am. Dec. 488; *Ligonier v. Ackerman*, 46 Ind. 552; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Natcher v. Natcher*, 47 Pa. St. 496; *Detroit v. Martin*, 34 Mich. 170; *Town Council v. Burnett*, 34 Ala. 400; *Flower v. Lance*, 59 N. Y. 603, 610; *Baker v. Cincinnati*, 11 Ohio St. 534; *Harrison v. Milwaukee*, 49 Wis. 252; *Powell v. Sup'rs. St. Croix Co.*, 46 Wis. 210; *Parcher v. Marathon Co.*, 52 Wis. 388; *Plant v. Gunn*, 2 Woods (U. S.), 372; *Corkle v. Maxwell*, 3 Blatchf. (U. S.) 413; *Solinger v. Earle*, 82 N. Y. 393.

Where the money was paid upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage from which he could not be saved but by the payment of the sum wrongfully demanded, it can be recovered back. *Corkle v. Maxwell*, 3 Blatchf. (U. S.) 413.

To entitle a party who has paid money to recover it back on the ground of duress, he must at the time of payment have been under the necessity of either then:

The compulsion must have been illegal, unjust, or oppressive,¹ and must proceed directly from the party receiving the benefit.²

2. Duress of Person.—Duress of the person is by imprisonment, threats, or an exhibition of apparently irresistible force.³

3. Duress of Goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them, but refuses to surrender them unless the exaction is endured.⁴

making the payment, or of resorting to the courts to get possession of the property wrongfully detained, or to recover his liberty, or he must at least show that there was an apparent necessity of resorting to the courts for one or the other of these purposes. *Ladd v. Southern C. P. Co.*, 53 Tex. 172.

A sold B a house; A claimed the right to remove the gas fixtures and heater before delivering possession. B denied that A had such right, and upon A's threat to make such removal, executed his note to A for their value. Held that the action of B was voluntary. *Heys-ham v. Dettre*, 89 Pa. St. 506.

To recover, on the ground of duress, money paid upon a note executed in pursuance of an illegal agreement, duress at the time of such payment (and not merely at the time of giving the note) must be shown. *Schultz v. Culbertson*, 46 Wis. 313; s. c., 49 Wis. 122; *Cunningham v. Boston*, 15 Gray (Mass.), 468; *Fellows v. School District*, 39 Me. 559. Compare *Taylor v. Jaques*, 106 Mass. 291; *Heckman v. Swartz*, 50 Wis. 267.

A was greatly worried by a lawsuit which he was anxious to compromise. In order to relieve him of his distress his wife executed a mortgage upon her property. Held, that it was her voluntary act. *Tooker v. Sloan*, 30 N. J. Eq. 394. Compare *Latterade v. Kaiser*, 15 La. Ann. 296.

Money voluntarily paid to escape from a criminal prosecution to which the payor is exposed is not paid under duress. *Comstock v. Tupper*, 50 Vt. 596. Compare *Taylor v. Jaques*, 106 Mass. 291.

Where A was arrested for non-payment of a tax, and while under imprisonment promised to pay the same on condition of his release, and was thereupon discharged, and subsequently pays the amount, held, a voluntary payment. *Fellows v. School Dist.*, 39 Me. 559.

1. *Dickerman v. Lord*, 21 Iowa, 338.

2. *Smith v. Schroeder*, 15 Minn. 35; *Brumagin v. Tillinghast*, 18 Cal. 265; *Taylor v. Board of Health*, 31 Pa. St. 73. Compare *Cunningham v. Munroe*, 15 Gray (Mass.), 471; *Voiers v. Stout*, 4 Bush (Ky.), 572.

As to knowledge that the property was procured by duress, see *Voiers v. Stout*, 4 Bush (Ky.) 572.

3. *Hackley v. Headley*, 45 Mich. 569. See *Peyser v. Mayor*, 70 N. Y. 495; s. c., 26 Am. Rep. 624; *Voiers v. Stout*, 4 Bush (Ky.), 572.

4. *Hackley v. Headley*, 45 Mich. 569; *Spaids v. Barrett*, 57 Ill. 289; *Mays v. Cincinnati*, 1 Ohio St. 268; *Beckwith v. Frisbie*, 32 Vt. 559; *Chamberlain v. Reed*, 13 Me. 357; s. c., 29 Am. Dec. 506; *Chandler v. Sanger*, 114 Mass. 364; *Fashay v. Ferguson*, 5 Hill (N. Y.), 154; *Briggs v. Boyd*, 56 N. Y. 289; *Peyser v. Mayor*, 70 N. Y. 497; s. c., 26 Am. Rep. 624; *White v. Heylman*, 34 Pa. St. 142; *Miller v. Miller*, 68 Pa. St. 493; *Central Bank v. Copeland*, 18 Md. 305; *Baltimore v. Lefferman*, 4 Gill (Md.), 425; *Nelson v. Suddarth*, 1 Hen. & M. (Va.) 350; *Adams v. Reeves*, 68 N. Car. 134; *Sasportas v. Jennings*, 1 Bay (S. Car.), 470; *Collins v. Westbury*, 2 Bay (S. Car.), 211; *Crawford v. Cato*, 22 Ga. 594; *Brumagin v. Tillinghast*, 18 Cal. 266; *Adams v. Schiffer* (Colo.), 17 Pac. Rep. 21; *Radich v. Hutchins*, 95 U. S. 210; *U. S. v. Huckabee*, 16 Wall. (U. S.) 414. Compare *Atlee v. Backhouse*, 3 M. & W. 650; *Skeate v. Beale*, 11 Ad. & El. 983; *Glynn v. Thomas*, 11 Exch. 878; *Bingham v. Sessions*, 14 Miss. 13; *Edwards v. Handley*, *Hardin* (Ky.), 602; s. c., 3 Am. Dec. 745; *Hazelrigg v. Donaldson*, 2 Metc. (Ky.) 445.

Wherever money is paid through a necessity to obtain possession of goods illegally withheld, and where the detention is fraught with great immediate hardship or irreparable injury, the payment is held to be compulsory. *Cobb v. Charter*, 32 Conn. 358.

In *Hackley v. Headley*, 45 Mich. 569, *Cooley, J.*, says: "The leading case involving duress of goods is *Astley v. Reynolds*, 2 Strange, 915. The plaintiff had pledged goods for £20, and when he offered to redeem them the pawnbroker refused to surrender them unless he was paid £10 for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been

unlawfully demanded and taken. This, say the court, 'is a payment by compulsion: the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not; we must take it he paid the money relying on his legal remedy to get it back again.' The principle of this case was approved in *Smith v. Bromley*, Doug. 696, and also in *Ashmole v. Wainwright*, 2 Q. B. 837. The latter was a suit to recover back excessive charges paid to common carriers who refused, until payment was made, to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances. *Harmony v. Bingham*, 12 N. Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid. *Scholey v. Mumford*, 60 N. Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays. *Chase v. Dwinal*, 7 Me. 134. Other cases in support of the same principle are *Shaw v. Woodcock*, 7 B. & C. 73; *Nelson v. Suddarth*, 1 H. & Munf. 350; *White v. Heylman*, 34 Pa. St. 142; *Sasportas v. Jennings*, 1 Bay (S. Car.), 470; *Collins v. Westbury*, 2 Bay (S. Car.), 211; *Crawford v. Cato*, 22 Ga. 594. So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action. *Chandler v. Sanger*, 114 Mass. 364. See *Spaids v. Barrett*, 57 Ill. 289. Nor is the principle confined to payments made to recover goods; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example, when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to.—*Bates v. Insurance Co.*, 3 Johns. Cas. (N. Y.) 238,—or a creditor withholds his certificate from a bankrupt. *Smith v. Bromley*, Doug. 696. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it. *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. Car. 134; *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School District*, 57 Pa. St. 433; *First Nat. Bank v. Watkins*, 21 Mich. 483.

"But where the party threatens nothing

which he has not a legal right to perform, there is no duress. *Skeate v. Beale*, 11 Ad. & El. 983; *Preston v. Boston*, 12 Pick. (Mass.) 14. When therefore a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress. *Wilcox v. Howland*, 23 Pick. (Mass.) 167. Many other cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed, and none are more, favorable to the plaintiff's case than those above referred to. Some of them are much less so; notably, *Atlee v. Backhouse*, 3 M. & W. 633; *Hall v. Schultz*, 4 Johns. (N. Y.) 240; *Silliman v. U. S.*, 101 U. S. 465."

In order to entitle a party to recover back money paid under a claim that it was a forced or compulsory payment, it must appear that it was paid upon a wrongful claim or unjust demand, under the pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with his property of serious import to him; and that he could escape from or prevent the injury only by making such payment. *Kraemer v. Deutermann* (Minn.), 35 N. W. Rep. 276; *Radich v. Hutchins*, 95 U. S. 210; *Brumagim v. Tillinghast*, 18 Cal. 265; *Mayor v. Lefferman*, 4 Gill (Md.), 425; s. c., 45 Am. Dec. 156; *Tapley v. Tapley*, 10 Minn. 459; *Fergusson v. Winslow*, 34 Minn. 386.

In *Cent. Bank v. Copeland*, 18 Ind. 305, threats were made to destroy the property by fire if the wife did not sign the deed. It was held to be duress.

An action will lie to recover back money paid to release goods wrongfully detained on a claim of lien. *Ashmole v. Wainwright*, 2 G. & D. 217; s. c., 2 Q. B. 837.

Where an animal distrained as damage feasant is impounded on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good; and if the distrainer, by demanding an excessive sum for damages as the condition of his release of the animal, obtains payment of such sum from the owner, such payment is not voluntary, and the sum paid may be recovered in an action for money had and received. *Green v. Duckett*, L. R. 11 Q. B. D. 275.

The attorney for a mortgagee, who had advertised a sale of the mortgaged property, under a power reserved to him for non-payment of interest, having ex-

4. Arrest—Imprisonment.—To put the party under duress, the imprisonment must be unlawful, or there must be an abuse of or an oppression under lawful process or legal detention.¹

torted from the administratrix of the mortgagor money exceeding the sum due for principal, interest, and costs, under a threat that he would proceed with the sale unless his demand were complied with, *held*, that the administratrix might recover it as money had and received. *Close v. Phipps*, 7 M. & G. 586.

1. *Heaps v. Dunham*, 95 Ill. 583; *Bane v. Detrick*, 52 Ill. 11; *Taylor v. Cottrell*, 16 Ill. 93; *Schommer v. Farwell*, 56 Ill. 542; *Thurman v. Burt*, 53 Ill. 129; *Seiber v. Price*, 26 Mich. 518; *Rood v. Winslow*, 2 Doug. (Mich.) 68; *Holbrook v. Cooper*, 44 Mich. 373; *Clark v. Pease*, 41 N. H. 414; *Breck v. Blanchard*, 22 N. H. 303; *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Neally v. Greenough*, 25 N. H. 325; *Severance v. Kimball*, 8 N. H. 386; *Rollins v. Lashus*, 74 Me. 218; *Bowker v. Lowell*, 49 Me. 429; *Soule v. Bonney*, 37 Me. 128; *Eddy v. Herrin*, 17 Me. 338; *Whitefield v. Longfellow*, 13 Me. 146; *Watkins v. Baird*, 6 Mass. 306; *Hackett v. King*, 6 Allen (Mass.), 58; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Guilleaume v. Rowe*, 94 N. Y. 268; *Osborn v. Robbins*, 36 N. Y. 365; *Strong v. Grannis*, 26 Barb. (N. Y.) 122; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Work's App.*, 59 Pa. St. 444; *Stouffer v. Latshaw*, 2 Watts (Pa.), 167; *Bush v. Brown*, 49 Ind. 573; *Hatter v. Greenlee*, 1 Port. (Ala.) 222; s. c., 26 Am. Dec. 310; *Smith v. Atwood*, 14 Ga. 402; *Fossett v. Wilson*, 59 Miss. 1; *Belote v. Henderson*, 5 Coldw. (Tenn.) 471; *Phelps v. Zuschlag*, 34 Tex. 371; *Diller v. Johnson*, 37 Tex. 47; *Plant v. Gunn*, 2 Woods (U. S.), 372; *Baker v. Morton*, 12 Wall. (U. S.) 150.

Where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, the rule is that in either of those events the party arrested, if he is thereby induced to enter into a contract, may avoid it as one procured by duress. *Baker v. Morton*, 12 Wall. (U. S.) 150; *Phelps v. Zuschlag*, 34 Tex. 371.

To make out the defence of duress by imprisonment, it must appear that the party's action has been influenced by the restraint; the conclusion of coercion is not a necessary one from the fact of unlawful restraint, and especially not where the par-

ty is suffered to go at large, and has every assurance that the restraint at most can only subject him to a little inconvenience. *Feller v. Green*, 26 Mich. 69; *Baldwin v. Murphy*, 82 Ill. 485.

It is a general rule that imprisonment by order of law is not duress; but to constitute duress by imprisonment, either the imprisonment or the duress after must be tortious and unlawful. If, therefore, a man supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action. And although the imprisonment be lawful, yet unless the deed be made freely and voluntarily it may be avoided by duress. And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner in prison unlawfully, by covin with the jailer, this is a duress which will avoid the deed. But when the imprisonment is unlawful, although by color of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment. *Watkins v. Baird*, 6 Mass. 506.

That the person arrested was unaware that the arrest was illegal is immaterial. *Stearns v. Veasey*, 33 N. H. 61.

It is not enough to establish duress that a party was imprisoned at the time of making a promise or executing a contract in respect to the subject concerning which he had been arrested. Imprisonment, when lawful, is by no legal intendment an abridgment of the free and voluntary volition of the mind in the management of business transactions. *Heaps v. Dunham*, 95 Ill. 583; *Smillie v. Titus*, 32 N. J. Eq. 51; *Farmer v. Walter*, 2 Edw. Ch. (N. Y.) 601.

A person arrested on *capias* could not get bail, and on giving the plaintiff secured notes, the latter consented to his discharge. The arrest was caused in good faith for an injury which plaintiff supposed had been done by defendant, and the notes were taken in satisfaction of the injury, though they did not fully compensate it. *Held*, that a bill would not lie for the cancellation of the securities on the ground that they had been ob-

tained by duress. *Prichard v. Sharp*, 51 Mich. 432.

While under arrest in bastardy proceedings the plaintiff paid money in settlement thereof. No threats were made to extort such settlement, and the plaintiff did not then deny that he was the father of the child, but took a receipt by the terms of which he virtually admitted such paternity. Afterwards, in an action to recover the money as having been paid under duress of imprisonment, he denied the paternity. *Held*, that the payment was voluntary, and the money could not be recovered. *Mayer v. Hoffman*, 67 Wis. 279.

Where a person had been arrested upon a charge of bastardy, under a warrant regularly issued, and while under arrest but not actually in prison, or even under such restraint as would prevent him from going where he pleased, he executed his promissory notes in settlement of the subject-matter of the charge, it was held the party was under no such duress as would enable him to avoid the contract. *Heaps v. Dunham*, 95 Ill. 583.

A marriage performed while the husband is under arrest as the putative father of a bastard, is not void for duress. *Sickles v. Carson*, 11 C. E. Greene (N. J.), 440; *Jackson v. Winnie*, 7 Wend. (N. Y.) 47; *Williams v. State*, 44 Ala. 24; *Johns v. Johns*, 44 Tex. 40; *Benton v. Benton*, 1 Day (Conn.), 111. *Compare* *Scott v. Schufeldt*, 5 Paige (N. Y.), 43; *Collins v. Collins*, 2 Brews. (Pa.) 515.

Though a person is arrested under a legal warrant, and by a proper officer, yet if one of the objects of the arrest is thereby to extort money, or enforce the settlement of a civil claim, such arrest is false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purpose; and a release or conveyance of property obtained by means of such arrest is void. And the discharge of the person arrested without being taken before a magistrate for examination, and the failure to return the warrant, are circumstances competent to be considered as bearing upon the question whether the release or conveyance was obtained by duress. *Hackett v. King*, 6 Allen (Mass.), 58.

Notes or securities procured under stress of criminal proceedings, commenced to obtain civil redress, are voidable. *Seiber v. Price*, 26 Mich. 518; *Heckman v. Swartz*, 50 Wis. 267; *Watkins v. Baird*, 6 Mass. 506; s. c., 4 Am. Dec. 170. *Compare* *Schommer v. Farwell*, 56 Ill. 542; *Holmes v. Hill*, 19 Mo. 159.

A note obtained from a prisoner falsely charged with felony is void in the hands of one who received it, with knowledge that it was procured through an abuse of legal process, for the purposes of oppression and exaction. *Osborn v. Robbins*, 36 N. Y. 365.

By duress of imprisonment on a criminal charge, with threats of future prosecution if a certain sum of money be not paid him, and promise to dismiss the prosecution on such payment being made, A. induces B. to procure for him negotiable promissory notes for said sum from X., a friend of B., and then causes the prosecution to be dismissed, and B. discharged. B. thereupon gives X. his (B.'s) own notes secured by mortgage for the same amount, and X. pays his notes to A. when due. B. is not guilty of said offence; the complaint against him fails to charge him with any offence; the warrant on which he was arrested is void on its face; and both complaint and warrant are colorable only. *Held*, if B., after his release from duress, might by suit have restrained payment of the money by X. to A., and rescinded the whole contract, yet his failure to do so is no defence to his action against A. for the amount. *Heckman v. Swartz*, 50 Wis. 267.

A arrested B on a criminal charge for the purposes of extorting a note from B's father for the amount that B owed A. *Held*, that the note was void. *Shenk v. Phelps*, 6 Ill. App. 612. *Compare* *Simms v. Barefoot*, 2 Hayw. (N. Car.) 402.

The payment of an illegal fine in order to obtain release from imprisonment is duress. *Devlin v. U. S.*, 12 Ct. of Cl. 266.

After an arrest the judgment creditors notified the sheriff that they "countermanded" the execution, and the latter thereupon informed the prisoner that he had been directed to discharge him if he would sign a stipulation not to sue for false imprisonment, and upon the prisoner's refusal assured him that if he did not sign it "he would have to stay in jail a long time." The prisoner then signed and was discharged. In an action for false imprisonment, *held*, that the release was void for duress, and so furnished no defence. *Guillaume v. Rowe*, 94 N. Y. 268; s. c., 46 Am. Rep. 141.

An affidavit which alleges that a person cut and floated away timber from a bayou belonging to the levee board charges no crime, and a warrant for his arrest and seizure of the property is void. Such person can recover, upon the ground of

5. **Threats.**—Duress by threats exists, not wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong—as of death or great irremediable injury, or unlawful imprisonment—about to be then and there or at least to be very shortly inflicted. The threat must be such as would naturally excite such a fear (grounded upon the reasonable belief that the person who threatens has at hand the means of carrying his threat into present execution) as would overcome the will of a person of ordinary courage.¹

duress, money which he paid the informer to procure the release of himself and the timber, although the parties would be *in pari delicto* if the affidavit charged a crime. *Fossett v. Wilson*, 59 Miss. 1.

Where a plaintiff is guilty of perjury in swearing to an affidavit to procure the arrest of a defendant, and the latter whilst in custody gives a note with surety to procure his discharge, the note is void for duress. *Strong v. Grannis*, 26 Barb. (N. Y.) 122.

A person, who had received a reward for finding a sum of money, repaid it, after he had pleaded guilty to a complaint for violation of the Gen. Sts. ch. 79, § 1, and had been told by the magistrate, before whom the hearing on the complaint was had, that the law required him to return the money. *Held*, in an action by him for money had and received, that his arrest was legal, and that the evidence would warrant a finding that the money was repaid by him voluntarily, and not under duress. *Felton v. Gregory*, 130 Mass. 176.

Where the order requiring the defendant to give a bond in a bastardy process is void, the giving of the bond will be under duress. *Fisher v. Shattuck*, 17 Pick. (Mass.) 252.

The imprisonment will be no defence if the contract is an equitable one, and one which the defendant was bound to comply with, having derived benefits therefrom. *Diller v. Johnson*, 37 Tex. 47. See *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *State v. Davis*, 79 N. Car. 603; *Diller v. Johnson*, 37 Tex. 47; *Bates v. Butler*, 46 Me. 387; *Smith v. Atwood*, 14 Ga. 402. Compare *Taylor v. Jaques*, 106 Mass. 291; *Osborn v. Robbins*, 36 N. Y. 365; *Phelps v. Zuschlag*, 34 Tex. 371.

A contract made by one under arrest through lawful process, as a condition of his deliverance from imprisonment, cannot be avoided on the ground of duress, although it be shown that no cause of action actually existed. *Clark v. Turnbull*, 47 N. J. L. 265; s. c., 54 Am. Rep. 157. See *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Shepherd v. Watrous*, 3 Caine

(N. Y.), 166; *Neally v. Greenough*, 25 N. H. 325; *Crowell v. Gleason*, 10 Me. 325; *Watkins v. Baird*, 6 Mass. 506; *Waterman v. Barrett*, 4 Harr. (Del.) 311; *Meek v. Atkinson*, 1 Bailey (S. Car.), 84; *Smith v. Atwood*, 14 Ga. 402. Compare *Taylor v. Jaques*, 106 Mass. 291.

An arrest, even upon a legal warrant and upon a criminal charge, to compel the payment of a mere debt, would be a misuse of legal process, and the threat of such arrest would constitute unlawful duress. *Taylor v. Jaques*, 106 Mass. 291. See *Richards v. Vanderpoel*, 1 Daly (N. Y.), 71.

A bond and warrant of attorney executed by a party while under imprisonment, and without the presence of his attorney, is void. *Wilder v. Baumstauck*, 3 How. Pr. (N. Y.) 81; *Evans v. Begleys*, 2 Wend. (N. Y.) 243; *Boutel v. Owens*, 2 Sandf. (N. Y.) 655.

The plaintiff, being a foreigner, ignorant of the English language, was arrested at Falmouth, soon after his first arrival there from abroad, by the defendant, for £10,000. The defendant and plaintiff then signed an agreement, by which, in consideration of £500 paid by the plaintiff to the defendant, the plaintiff was to be discharged, and not to be again arrested; and the plaintiff was to put in bail in twelve days; the sum of £500 was to be "as a payment in part of the writ;" and both parties were to abide the event of the action, the agreement containing no provision for refunding the money if the action should fail. The plaintiff paid the £500, and was released. No bail was put in, and the writ was afterwards set aside for irregularity. The plaintiff then sued the defendant for the £500, as money had and received; and the jury found that he knew that he had no claim upon the plaintiff. *Held*, that the action lay, the payment having been made under compulsion of colorable legal process. *Duke de Cadaval v. Collins*, 4 A. & E. 858.

1. *Buchanan v. Sahlein*, 9 Mo. App. 552; *Bosley v. Shanner*, 26 Ark. 280; *Mollère v. Harp*, 36 La. Ann. 471; *Sey-*

mour v. Prescott, 69 Me. 376; *Baker v. Morton*, 12 Wall. (U. S.) 150.

In *Buchanan v. Sahlein*, 9 Mo. App. 552, the court said: "As to the precise character of the threats which would constitute duress of the person or of the goods, no rule can be laid down; each case stands upon its own peculiar facts and circumstances. They must be threats of such bodily harm as will overcome the mind of a person of ordinary firmness. If the threat is of illegal imprisonment, there must be a reasonable ground of apprehension that the threat will be carried into immediate execution, and the threat must operate so as to overcome the will. If the imprisonment is to be by process, it must appear that process to that end has actually issued, or that there was a moral certainty that it would issue. A mere apprehension that legal proceedings will be set on foot by perjury or other improper means is not enough. Thus, where a person who was co tenant with the plaintiff demanded of him a portion of the insurance money received by the plaintiff on a policy of insurance, to the whole of which plaintiff was entitled, and threatened, with violent language and curses, that unless plaintiff paid it to him then and there he would prosecute him on a charge that he had set fire to the property, saying that he had seen three responsible men who saw plaintiff set it on fire, and that he would have him in irons and in jail before night, and plaintiff, fearing immediate ill-consequences to his wife's health, paid the money, the threats were held to be not of such a nature as to make the payment involuntary. 'A threat of prosecution,' says the judge delivering the opinion of the court, 'before the commencement of any legal proceedings does not necessarily include an arrest. It is no more than an assertion that steps will be taken to institute a legal process, which may or may not result in an arrest. And whether the process is to be initiated before a magistrate or the grand jury, the law so shields it by the oath of the complainant and the witnesses, as well as the official oaths and responsibilities of the magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness.' *Harmon v. Harmon*, 61 Me. 231.

"A paymaster's clerk embezzled money belonging to the government, by altering vouchers and checks. Upon settlement of the paymaster's accounts, a deficiency was found in consequence of the embezzlement, and he was suspended

until he paid that balance into the treasury. He sought relief under the Disbursing Officers' Act, after payment and after his accounts were closed, on the ground that the payment was made under pressure of the suspension and his liability to be court-martialled and dismissed. This he set up as a 'moral duress,' a species of duress, as is remarked by Chief Justice Drake in delivering the opinion of the court, that is not known to the law. It was held by the court of claims that his payment must be held to be voluntary, and to conclude him. *Hall v. U. S.*, 9 Ct. of Cl. 270.

"A liquor-dealer paid a license under an ordinance which imposed a fine for selling without a license, which ordinance provided for imprisonment till the fine was paid, charged the officers of the town with the enforcement of the ordinance, and made an allowance to informers. The ordinance was afterwards declared to be void, and the liquor-dealer sought to recover back the money paid for the license, on the ground that it was paid under duress and imminent danger of the ruin of his lawful business, or imprisonment if it was not paid. It was held that the payment was voluntary, and that the mere apprehension of legal proceedings was insufficient. *Town v. Ackerman*, 46 Ind. 552.

"In *Town Council v. Burnett*, 34 Ala. 400, the court say: 'No one can be heard to say that he had the right and the law with him, but he feared his adversary would carry him into court, and that he would be unlawfully imprisoned, and that, being deprived of his free will, he yielded to the wrong, and the courts must assist him to reclamation.'

"In *Preston v. Boston*, 12 Pick. (Mass.) 12, the court say: 'Threat of legal process is not such duress,' as will authorize the party to recover back money voluntarily paid on an illegal claim; for the party may make proof and show that he is not liable.

"The legal principle is, that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction of a demand unjustly made upon him, he cannot afterwards allege the payment to have been made by compulsion, and recover the money back, even though he should protest at the time of payment he was not legally bound. The reason of the rule and its propriety are quite obvious when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such a case, if the party would

resist an unjust demand he must do so at the threshold.' Boston, etc., Co. v. Boston, 4 Metc. (Mass.) 181.

"Lord Kenyon, in *Fulham v. Down*, 6 Esp. 26, note, says that 'when a voluntary payment is made of an illegal demand, without an immediate and urgent necessity, or to redeem your person or your goods, it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties to revision.'

"By submitting to the demand,' says Gibbs, J., in *Brisbane v. Dacres*, 5 Taun. 143, 'he that pays the money gives it to the person to whom he pays it, makes it his, and closes the transaction between them.' In the course of the argument in the last case, Best, Serj., advanced the proposition that money shall not be recovered back if it be consistent with honor and conscience to retain it, but otherwise it shall. Gibbs, J., interrupted him, saying: 'The principle has always been this: whenever the money has been paid in consequence of a demand as of right, then, although the demand was unfounded, the payment cannot be recovered back. There is a case of money paid under distress for standings in a market; though the party had no right to distrain, the money could not be recovered back.' p. 147.

"To avoid an act on the ground of menace of arrest and imprisonment, it must appear that the threat was of unlawful imprisonment, and the party put in fear of such imprisonment, and induced by such fear to do the act. *Alexander v. Pierce*, 10 N. H. 498; *Eddy v. Herrin*, 17 Me. 340.

"In *Wolff v. Marshall*, 52 Mo. 171, the court said: 'There are many cases on the subject, and the conclusion clearly deducible from them is, that a payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where he can only be reached by a proceeding at law, he is bound to make his defence in the first instance, and he cannot postpone the litigation by paying the demand and afterwards suing to recover it back.'

It must be shown that the party performed the act under the influence of the threats. *Feller v. Green*, 26 Mich. 70; *Dunham v. Griswold*, 100 N. Y. 224;

Snyder v. Braden, 58 Ind. 143. But the threats need not be made directly to the party influenced. *Taylor v. Jaques*, 106 Mass. 291; *Sartwell v. Horton*, 28 Vt. 370.

Mere angry or profane words, or strong and earnest language, will not constitute such duress as will relieve a party from his contract; for duress by threats, which will avoid a contract, only exists where such threats excite, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment. *Adams v. Stringer*, 78 Ind. 175.

A complaint to recover personal property alleged to have been obtained from plaintiff by fraud and duress, averring substantially, in detail, that the defendant threatened to arrest, imprison, and send plaintiff to the State prison for the crime of rape; threatened to beat and wound him; refused to permit him to confer with an attorney or consult his friends; and that the defendant and another, by acts, threats, and gestures, induced plaintiff to believe that they were armed with deadly weapons, and put the plaintiff in great fear; alleging also that the defendant knew that the plaintiff was not guilty of the offence charged, and that the property was surrendered because of such wrongful acts. *Held*, that the allegations of the complaint show such threats and means used as were calculated to produce fear, and thus overcome the will, and make the act of the plaintiff the result, not of his judgment, but of fear. *Reynolds v. Copeland*, 71 Ind. 422.

If a person is in a perturbed state of mind, and his debtor takes advantage of his condition, and employs menace to compel him to cancel the debt, it would be a gross fraud; and the debtor could no more plead the relinquishment of the debt as a defence than if he had compelled it by the direct use of physical force. *Parmentier v. Pater*, 13 Oregon, 121. In this case the court said: "Persons of a 'weak or cowardly nature' are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them to be robbed by the unscrupulous because they are so unfortunately constituted."

Where a party seeks to be relieved from the obligation of a contract on the ground of duress *per minas*, regard will be had to age, sex, and condition of life, and if the threats employed were such

as were calculated to deprive one individually of his freedom of will, he will be relieved from liability, even though they were not of such a character as would produce a like effect on a firm and courageous man. In such case, evidence is sometimes admissible to show that the person subjected to duress had heard that the person using the threats was of a violent disposition, for this may be a circumstance which among other things led to the execution of the contract. *Jordan v. Elliott*, 15 Cent. L. J. 232; s. c., 12 W. N. Cas. (Pa.) 56.

"On the trial of this case, the following facts appeared:

"The defendant, Olive Fox Elliott, was a widow of about seventy-seven years. Her son, Edward T. Elliott, resided with her. Said Edward T. Elliott applied from time to time to the plaintiff, Jordan, for loans of money. Jordan advanced the amounts asked for, taking as security a judgment note from Elliott, the amount of which, exclusive of interest, was \$7,419.78. He also held in addition to this note a policy of insurance for \$10,000 on Elliott's life, which the latter had assigned to him as collateral security.

"Jordan, desiring to obtain additional security for the debt, pressed Elliott from time to time therefor, and Elliott finally agreed to give him a new judgment note for the entire amount due, in which defendant was to join as surety. On May 1, 1877, Jordan called at defendant's house in order to see her son about this new note. While he was talking to the son, defendant entered the room. As to what followed, defendant testified substantially as follows:

"As she came into the room she saw Jordan pacing up and down, and heard him say, 'Perhaps this bitter cup may pass.' She asked him to sit down, but he declined, and continued to walk to and fro, gesticulating wildly. Elliott asked him repeatedly not to trouble the defendant, but to these requests Jordan paid no attention, and in a very fierce and excited manner continued to talk of the amount due him.

"Defendant became very much alarmed at this conduct, and began, together with several other women in the room, to cry. Jordan then proposed to her to give him a judgment note for the whole amount due. This proposition she at first declined, begging Jordan to postpone the matter for a day, as she was not in a fit condition to transact business. Elliott also interposed at this point, entreating Jordan not to trouble defendant. Jordan, however, thrust his clinched fist in

Elliott's face, commanding him to be quiet, and turning to the defendant, said: 'By the Eternal, if this thing is not settled to-day, I have my lawful remedy, and I will put your son in jail before night.' This speech defendant construed to be a threat that Jordan would institute criminal proceedings against her son. And, being thoroughly frightened, she finally agreed to sign whatever Jordan should tender her. He thereupon wrote out on the spot the following judgment note:

"TOWANDA, PA., May 1, 1877.

"\$7419.78.

"After death, for value received, I promise to pay Mrs. Sarah Jordan, or bearer, seven thousand four hundred and nineteen dollars and seventy-eight cents, with interest, without stay of execution, and I hereby authorize any prothonotary or attorney of any court of record to appear and confess judgment for the above sum with costs, and waive the benefit of all laws exempting property from levy and sale on execution, and the right of inquisition on real estate. With interest from 14th of February, 1877, it being understood this note is not to be entered unless others are going to be."

"Defendant signed it, but in her agitation wrote her maiden name instead of her married one—a mistake which she testified she had never before made, and which was, at Jordan's request, immediately rectified."

The rule on the question of duress is thus stated by Gordon, J., giving the opinion of the court: "Now, we are free to admit that to a man of ordinary courage this fuss and fume of Jordan might have been regarded as a mere farce, and would probably have been productive of a consequence no more serious than a summary and unceremonious ejection of the intruder from the premises. But to this old lady, helpless as she was, and unprepared either to encounter or deal with such sham heroics, the matter was altogether different, and the jury were justified in believing that she was much frightened, and that her will was so controlled thereby that the obligation which she signed was not her free and voluntary act. We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be sufficient to release Mrs. Elliott from her contract. For, according to Blackstone, the threats, to produce such an effect, must be of such a character as to induce a well-grounded fear in the mind of a firm and courageous man of the loss of life or limb; and the rule of the civil law

was of like import; the fear must be of that kind which would influence a man of the greatest constancy, '*Metus non vani hominis, sed qui in homine constantissimo cadat.*' As we have already said, the fantastic heroics of Jordan would not have been sufficient to induce a courageous man to do that which he was not disposed; hence, if this rule is to be applied to the case in hand, the defence is insufficient. But, fortunately for the weak and timid, courts are no longer governed by this harsh and inequitable doctrine, which seems to have considered only a very vigorous and athletic manhood, overlooking entirely women and men of weak nerves. Pothier regards this rule as too rigid, and approves the better doctrine, that regard must be had to the age, sex, and condition of the parties, since that fear which would be insufficient to influence a man in the prime of life and of military character, might be deemed sufficient to avoid the contract of a woman or man in the decline of life. [Evans' Poth. on Oblig. I. 18.] And we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind, both of this country and of England, that is, that any contract produced by actual intimidation ought to be held void, whether as arising from a result of merely personal infirmity, or from circumstances which might produce a like effect upon persons of ordinary firmness."

A threat to withhold payment of a debt, or to refuse performance of a contract, or to do an injury which may be at once redressed by legal process, is not duress *per minas*. Miller v. Miller, 68 Pa. St. 486.

On an issue whether a promissory note was made under duress, evidence is admissible that a person to whom the payee made threats against the maker repeated them to the maker, in the absence of the payee, just before the making of the note. Taylor v. Jaques, 106 Mass. 291.

A mere threat to sue upon a claim, and to arrest the person against whom it is made in such suit, or by virtue of an execution which may be issued upon a judgment obtained therein, is not such duress as will avoid a promise to pay the claim, induced by the threat. Where it is claimed that a promise was obtained by duress, and it appears there was no arrest and no actual force used, but simply threats, the question as to duress is ordinarily one of fact, and may not be determined as one of law. It is not sufficient to establish duress to show that the threats were uttered; it must be shown

that they constrained the will of the promisor, and so induced the promise. Dunham v. Griswold, 100 N. Y. 224. See Snyder v. Braden, 58 Ind. 143; Feller v. Green, 26 Mich. 70; Green v. Scranage, 19 Iowa, 461; Alexander v. Pierce, 10 N. H. 494; Evans v. Gale, 18 N. H. 397; Harris v. Tyson, 24 Pa. St. 347; Miller v. Miller, 68 Pa. St. 486; Wells v. Barnett, 7 Tex. 584.

A father and son, while in complainant's employ, appropriated to their own use a large number of store orders and goods. Upon detection, and under what the defendants claim was duress, the father gave complainant a mortgage on his lands for the amount so abstracted. Held, that there was no proof of coercion; that threats of a lawful arrest do not constitute duress, and that the fact of the father continuing to work for complainants, at intervals, for nearly five years after the mortgage had been given, and that he made no objection to its validity until after the foreclosure had been instituted, were significant indications that the giving of the mortgage was voluntary. Bodine v. Morgan, 37 N. J. Eq. 426.

Previous to 1872 B. had made sundry notes held by plaintiff, and had forged thereon the names of the defendants, C. & K., the latter being his son-in-law. Plaintiff informed K. that B. would be prosecuted for the forgery, unless K. with C., as indorsers for B., as maker, gave a new note in lieu of the forged notes. The new note was accordingly given, and B. was not prosecuted. The note of 1872 was repeatedly renewed, and the note in suit was given by defendants (B. having been dropped off) for the balance, after sundry payments. Held, these facts do not amount to such duress as will avoid a contract. Keckley v. Union Bank, 79 Va. 458.

In an action to recover money paid for a liquor license, the complaint alleged that the payment was made "by reason of threats and menaces" by the town officers to prosecute the plaintiff. Held, that the payment was voluntary. Colglazier v. Salem, 61 Ind. 445.

Under Code Ga. 1882, §§ 2633, 2752, a contract of sale which is the result of duress on the part of the purchaser towards the vendor, whereby his free will is constrained, and his consent induced by threats of the purchaser to do him bodily harm, is void. Thus where the defendant, a tenant of the prosecutor, purchased from him a mule, and gave a note for \$170, secured by a mortgage on the mule, 100 bushels of corn, and 3

stacks of fodder, the corn being the same that he had borrowed from the prosecutor, and agreed to return. The defendant being unable to pay for the mule, returned it, as he alleged, in satisfaction of the prosecutor's entire claim; but the latter contended that he was to have all the corn raised on the premises that year in settlement of his demand. After cursing the defendant, the prosecutor told him if he removed the corn he would hurt him, and defendant replied that "he would have nothing more to do with it," and tacitly assented to the prosecutor's right to it; but he subsequently removed the corn. *Held*, that the defendant's consent was not free, but was induced, and his will constrained, by the threats and violent conduct of the prosecutor, and that the agreement was void. *Love v. State*, 3 S. E. Rep. 893.

Judicial Process.—A threat by a judgment creditor to levy his execution on the property of the debtor will not render a promissory note given thereupon by the debtor void, as being made under duress, such note being in other respects valid. *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11.

Threats of Arrest — Imprisonment.—Where a person has committed a crime, a threat to have him arrested and imprisoned, being only a threat of a lawful arrest, will not constitute duress, in any such sense as will discharge him from liability upon a contract to indemnify the person injured by the commission of the offence. *Compton v. Bunker Hill Bank*, 96 Ill. 301. See *Neally v. Greenough*, 25 N. H. 325; *Alexander v. Pierce*, 10 N. H. 494; *Eddy v. Herrin*, 17 Me. 338; *Davis v. Luster*, 64 Mo. 43; *Knapp v. Hyde*, 60 Barb. (N. Y.) 80. Compare *Taylor v. Jaques*, 106 Mass. 291.

It must appear that the menace was of an unlawful imprisonment. *Alexander v. Pierce*, 10 N. H. 494; *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Worcester v. Eaton*, 13 Mass. 371; *Foss v. Hildreth*, 10 Allen (Mass.), 76; *Whitefield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 Me. 338; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11.

A threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby. *Knapp v. Hyde*, 60 Barb. (N. Y.) 80.

Where a party, threatened with arrest and imprisonment by legal process, when in fact no grounds for a criminal arrest existed against him, gave a promissory note in settlement of a pre-existing claim, which he had already recognized as just,

held, that such threats formed no defence to an action on the note, and were not of such a character as to constitute duress. *Knapp v. Hyde*, 60 Barb. (N. Y.) 80. See *Diller v. Johnson*, 37 Tex. 47; *Foss v. Hildreth*, 10 Allen (Mass.), 80; *Bane v. Detrick*, 52 Ill. 11.

To constitute duress by threats of illegal arrest, the act which the party seeks to avoid must have been done by him through fear of such threatened arrest. *Flanigan v. Minneapolis (Minn.)*, 31 N. W. Rep. 359.

It is not duress for an officer to threaten to take an execution debtor to jail unless he secures the debt by a mortgage of personal property, when the officer has in his hands legal process requiring him so to do. *Bunker v. Steward (Me.)*, 4 Atl. Rep. 558.

In *Buchanan v. Sahlein*, 9 Mo. App. 553, the court said: "Duress by threats of imprisonment must be such as to excite a reasonable fear of immediate imprisonment. We do not think that a threat of prosecution addressed to a man conscious of innocence is such a threat as would induce in any man of ordinary firmness an overwhelming fear of immediate imprisonment. Had the proper preliminary steps been taken, an affidavit been made before a magistrate or an information been filed, or had process issued, the case might be different. But we are not aware of any case in which threats of imprisonment have been held to constitute duress, where the threat was not accompanied at least with the statement that the prosecution had been begun, and that the parties had thus the means immediately at hand of procuring the instant arrest and imprisonment of the person threatened. *Harmon v. Harmon*, 61 Me. 227."

Threats of Criminal Prosecution.—Where the defence is made to a suit upon a promissory note that it was given in compromise of a criminal complaint against the maker's son-in-law, and was procured through the entreaties of the daughter, whose fears had been played upon by the threats of the plaintiff with that purpose, it is competent to show what she stated to her father to induce him to give the note. *Snyder v. Willey*, 33 Mich. 483. See *Buck v. First Nat. Bank*, 27 Mich. 293.

Plaintiff seduced defendant's wife. Defendant placed his claim for damages in the hands of an attorney and directed that suit be brought. Plaintiff went to the office of the attorney, where plaintiff and defendant and the attorney were together. The demand was reduced to

The mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it.¹

\$500, after plaintiff had said he could not raise the \$1000. The plaintiff testified that he told the attorney he did not have any money, and did not know how to raise it, and the attorney said he had better settle it than to go to the penitentiary. The attorney left the office, plaintiff and defendant remaining. During the negotiations plaintiff and defendant, at the suggestion of defendant, went to a saloon together and took a drink. Defendant seeing that plaintiff was ill at ease, as plaintiff testified, "He seen it on me that it was not very right, and he said I should not be afraid about this, what they have got together, that he would make it easy, and I went with him to the saloon, and he treated me, and we went back to the attorney's office." The only suggestion of a criminal prosecution was the remark made by the attorney. The plaintiff desired that his wife should not hear of his crime, or at least of an action being brought against him, and for that purpose, and under a written pledge of secrecy from the defendant, he paid over the money. *Held*, that the payment was voluntary. *Sieber v. Weiden*, 17 Neb. 582.

Threat of a criminal prosecution used to compel the giving of a promissory note, may constitute duress, although the amount for which the note is given is actually due to the payee from the maker. *Taylor v. Jaques*, 106 Mass. 291. *Compare Clark v. Turnbull*, 47 N. J. L. 265; s. c., 54 Am. Rep. 157; *Dunham v. Griswold*, 100 N. Y. 224.

One who obtains a note and mortgage from an irregular practitioner of medicine by means of threats to send him to the penitentiary for having made an alleged indelicate, indecent, and injurious examination of the daughter of the former while treating her for supposed suppression of the menses, obtains no lawful property in such note or mortgage, and the same will be enjoined. *Hullhorst v. Scharner*, 15 Neb. 57.

Mere threats of criminal prosecution, when no warrant had been issued nor proceedings commenced, do not constitute duress. *Higgins v. Brown*, 78 Me. 473.

Mere threats of criminal prosecution do not constitute duress, when neither warrant has been issued nor proceedings commenced. *Higgins v. Brown* (Me.), 5 Atl. Rep. 269; *Hilborn v. Bucknam* (Me.),

7 Atl. Rep. 272; *Harmon v. Harmon*, 61 Me. 222.

Threats of criminal prosecution which do not simply any unusual, harsh, oppressive, or illegal use of the process threatened do not constitute duress. *Landa v. Obert*, 45 Tex. 539. See *Lester v. Union Mfg. Co.*, 1 Hun (N. Y.), 288; *Plant v. Gunn*, 2 Woods (U. S.), 372; *Catlin v. Henton*, 9 Wis. 476.

1. *Hackley v. Headley*, 45 Mich. 569; *First Nat. Bank v. Watkins*, 21 Mich. 483; *Briggs v. Lewiston*, 29 Me. 472; *Beckwith v. Frisbie*, 32 Vt. 559; *McMurtree v. Keenan*, 109 Mass. 185; *Grim v. School Dist.*, 57 Pa. St. 433; *Adams v. Reeves*, 68 N. Car. 134.

Mere threats of a civil suit do not constitute duress when no proceedings are commenced. *Hilborn v. Bucknam* (Me.), 7 Atl. Rep. 272.

A threat to attach property for a demand not yet due is not duress. *Lehman v. Shackelford*, 50 Ala. 437.

Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate or urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment files a protest, does not make the payment involuntary. *Wabaunsee Co. v. Walker*, 8 Kans. 431. See *Wolf v. Marshall*, 52 Mo. 167; *Murphy v. Creighton*, 45 Iowa. 179; *Nickodemus v. East Saginaw*, 25 Mich. 456; *London v. East Saginaw*, 41 Mich. 18; *Hubbard v. Brainard*, 35 Conn. 563.

A. purchased a lot of corn, giving his note secured by chattel mortgage, with a power of sale, in payment. Only a part of the corn was delivered, but the vendor insisted upon payment of the note in full. A. objected to paying the full amount, and the vendor agreed to make a small deduction, but threatened to take the property mortgaged from A.'s possession, and sell it to satisfy his claim, if A. did not pay the amount claimed. After some negotiation between the parties, A. paid the full amount under protest, and sued to recover the amount overpaid. *Held*, that the payment was voluntary, and that A. was not entitled to recover. *Vick v. Shinn* (Ark.), 4 S. W. Rep. 60.

But where the party threatens nothing which he has not a legal right to perform, there is no duress.¹

6. Business Necessities.—The fact that business necessities compelled the payment of money will not alter the voluntary character of the payment.²

1. *Hackley v. Headley*, 45 Mich. 569. See *Snyder v. Braden*, 58 Ind. 143; *Brazil v. Kress*, 55 Ind. 14; *Thompson v. Doty*, 72 Ind. 336; *Davis v. Luster*, 64 Mo. 43; *Clafin v. McDonough*, 33 Mo. 412; *Wolfe v. Marshall*, 52 Mo. 167; *Eddy v. Herrin*, 17 Me. 338; *Harmon v. Harmon*, 61 Me. 222; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Forbes v. Appleton*, 5 Cush. (Mass.) 115; *McPherson v. Cox*, 86 N. Y. 472; *Dunham v. Griswold*, 100 N. Y. 224; *Heysham v. Dettre*, 89 Pa. St. 506; *Colwell v. Peden*, 3 Watts (Pa.), 327; *Stouffer v. Latshaw*, 2 Watts (Pa.), 167; *Harris v. Tyson*, 24 Pa. St. 347; *Matthews v. Smith*, 67 N. Car. 374; *State v. Davis*, 79 N. Car. 603; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *State v. Harney*, 57 Miss. 863; *Hunt v. Bass*, 2 Dev. Eq. (N. Car.) 292; s. c., 24 Am. Dec. 274; *Landa v. Obert*, 45 Tex. 539; *Oceanic S. N. Co. v. Tappan*, 16 Blatchf. (U. S.) 296; *Skeate v. Beale*, 11 Ad. & El. 983. Compare *Quinnett v. Washington*, 10 Mo. 53.

It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. *Hilborn v. Bucknam*, 78 Me. 482. See *Taylor v. Board of Health*, 31 Pa. St. 73; *Muscantine v. Keokuk Packet Co.*, 45 Iowa, 185; *Matthews v. Smith*, 67 N. Car. 374; *Grady v. Crook*, 2 Abb. N. Cas. (N. Y.) 53; *Emmons v. Scudder*, 115 Mass. 367.

The execution of a note to avoid an expensive lawsuit, threatened by the holder of an account, is not duress. Where one has the right and the law with him and his free will, he cannot claim to have yielded to the wrong, and that the court must assist him to a reclamation. *Peckham v. Hendren*, 76 Ind. 47.

A threat by a lessor to eject a tenant unless he will pay a sum demanded as rent, is not such duress as will enable the tenant to recover back the rent, although a greater sum is demanded than is due, and the tenant pays it under protest. *Emmons v. Scudder*, 115 Mass. 367. See *Colwell v. Peden*, 3 Watts (Pa.), 327.

A lease of a shop provided that the lessee should pay a certain rent, except in case of fire, and should keep the premises in repair, damage by fire excepted;

that in case the demised premises should be damaged by fire, so as to be rendered unfit for use and habitation, the rent, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, should be abated or suspended, until the premises should be put in proper condition for use and habitation by the lessor. During the term of the lease, the shop was injured by fire, so as to be unfit for use; the lessor did not repair for a certain time, refused to abate the rent, and demanded full rent of the lessee, which he paid under protest in order to save his estate and business. Held, that the lessee had no cause of action against the lessor. *Regan v. Baldwin*, 126 Mass. 485; s. c., 30 Am. Rep. 689.

An actor by misrepresentation secured an engagement at a salary in excess of what his services were worth. After the play was set he refused to act unless paid the amount agreed. Held, that the payment was compulsory. *Dana v. Kemble*, 17 Pick. (Mass.) 545.

Money Paid under a Distress.—Where a party threatened with a distress for rent pays money where he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back nor set off against another demand. *Knibbs v. Hall*, 1 Esp. 84. See *Webber v. Aldrich*, 2 N. H. 461; *Colwell v. Peden*, 3 Watts (Pa.), 327. Compare *Quinnett v. Washington*, 10 Mo. 53. And this action will not lie to recover back money paid for the release of cattle damage feasant, though the distress was wrongful. *Lindon v. Hooper*, Cowp. 414.

2. *Custin v. Viroqua*, 67 Wis. 314; *Town v. Ackerman*, 46 Ind. 552; *Colglazier v. Salem*, 61 Ind. 445; *Westlake v. St. Louis*, 77 Mo. 47; s. c., 3 Am. & Eng. Corp. Cas. 581. Compare *Peyser v. Mayor*, 70 N. Y. 495; s. c., 26 Am. Rep. 624.

In *Custin v. Viroqua*, 67 Wis. 314, the court said: "It is said that the necessities of the plaintiff compelled him to pay the sum exacted; that it must be presumed that he was prepared to carry on the business for which he desired the license; and that, unless he obtained one, he would be greatly damaged, and that he was therefore under restraint. This argument was urged in the case of *Emery*

Refusal, on demand, to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress if the debtor has done nothing unlawful to cause

z. Lowell, 127 Mass. 138. The court answered this argument as follows: 'We do not regard it as changing the character of the payment from voluntary to involuntary or compulsory, that it is important to the party paying to get what he gets for the payment; in other words, that there should be an urgent need on his part. It is ordinarily and almost necessarily true that one pays what he regards as extravagant only for what then seems to him an important result, and submits to the demand for what he regards as an exorbitant or illegal fee only because there is an urgent need for what the payment will produce. It would be unsafe to have the question of recovering the money paid to depend on the urgency of the need of the party when paying it. The plaintiffs wished a license. They were at liberty to take it or not, as they saw fit. They paid the fee demanded, knowing all the facts in the case. A refusal to pay would have resulted merely in their not being licensed. They must be held to have paid voluntarily, and not under coercion.'

"The argument of the court in the above case is a complete answer to the plaintiff's claim in the case at bar. The plaintiff had the same knowledge of the law that the village board had. He either construed the law as the board did, and acknowledged the legality of their claim, or, if he construed the law as we now construe it, he knew, or was bound to know, that the demand made on him was an illegal demand. Knowing that fact, and desiring to engage in the business of selling intoxicating liquors in the village, he submitted to what he knew or might have known was an illegal demand, and paid his money in order to enjoy the profits of his business. In either case the payment was clearly voluntary, and he cannot, after he has enjoyed the benefits of the license received, recover the money back. Had he refused to pay the money, it is apparent he would not have obtained the license.

"This case does not come within the rule of the cases which treat of the receipt of illegal fees for official services. The money in this case is demanded for the public use, it is in the nature of a tax for revenue, and is in no sense received as fees for official service." *Compare Catoir v. Watterson*, 38 Ohio St. 319; *Harvey v. Olney*, 42 Ill. 336.

Licenses.—Payments to the State for licenses, if made voluntarily, cannot be recovered; but if made under duress or menace equivalent to duress by public officers, they constitute a valid claim against the State. *Noyes v. State*, 46 Wis. 250; *Van Buren v. Downing*, 41 Wis. 122; *Custin v. Viroqua*, 67 Wis. 314; *Matheson v. Mazomanie*, 20 Wis. 191; *Kellogg v. Supervisors*, 42 Wis. 97; *Allen v. Burlington*, 45 Vt. 202; *Atwell v. Zeluff*, 26 Mich. 118; *Bank v. Mayor*, etc., 43 N. Y. 184; *Union Bank v. Mayor*, etc., 51 N. Y. 638; *Cook v. Boston*, 9 Allen (Mass.), 393; *Lee v. Templeton*, 13 Gray (Mass.), 476; *Emery v. Lowell*, 127 Mass. 138; *Robinson v. Charleston*, 2 Rich. (S. Car.) 317; *Cahaba v. Burnett*, 34 Ala. 400; *Claffin v. McDonough*, 33 Mo. 412; *Irving v. St. Louis Co.*, 33 Mo. 575; *Brazil v. Kress*, 55 Ind. 14; *Ligonier v. Ackerman*, 46 Ind. 552; *Garrison v. Tillinghast*, 18 Cal. 404.

Payment of a water license under threat of turning off the water in case of continued refusal is payment under compulsion, and if the charge is excessive, the excess may be recovered, and that without tendering the amount really due. *Westlake v. St. Louis*, 77 Mo. 47; s. c., 1 Am. & Eng. Corp. Cas. 581.

Defendants were large brewers, and had a contract with an ice company to supply them with ice during the season of 1880 at one dollar seventy-five cents a ton, or two dollars if the crop was short. The contract was made in November, 1879. The following winter was so mild that the ice crop was a failure. In May defendants were notified by the ice company that no more ice would be furnished them under the contract. Defendants had then on hand a considerable amount of beer that would be spoiled without ice, and under stress of the circumstances they made a new arrangement with the ice company, and agreed to pay \$3.50 per ton for the ice. At this rate ice was received and paid for afterwards. A note given for ice at this rate in October being sued, defendants disputed its validity, claiming that it was obtained without consideration and under duress. *Held*, that the refusal of the ice company to perform its contract, and the exaction of a higher price, was not legal duress. *Goebel v. Linn*, 47 Mich. 489; s. c., 41 Am. Rep. 723. *Compare Hibbard v. Mills*, 46 Vt. 243.

the financial embarrassment which compelled him to submit to the extortion.¹

1. *Hackley v. Headley*, 45 Mich. 569; *Vyne v. Glenn*, 41 Mich. 112; *Miller v. Coates*, 4 Thomp. & C. (N. Y.) 429; *Miller v. Miller*, 68 Pa. St. 486; *Silliman v. U. S.*, 101 U. S. 465. Compare *Peyser v. Mayor*, 70 N. Y. 497; s. c., 26 Am. Rep. 624.

In *Hackley v. Headley*, 45 Mich. 569, the facts were as follows: On August 3, 1875, H. went to Muskegon, the place of business of *Hackley & McG.*, for the purpose of collecting the balance which he claimed was due him under the contract. The amount he claimed was upwards of \$6200, estimating the logs by the Scribner scale. He had an interview with *Hackley* in the morning, who insisted that the estimate should be according to the Doyle scale, and who also claimed that he had made payments to others amounting to some \$1400 which H. should allow. H. did not admit these payments, and denied his liability for them if they had been made. *Hackley* told H. to come in again in the afternoon, and when he did so *Hackley* said to him: "My figures show there is 4260 and odd dollars in round numbers your due, and I will just give you \$4000. I will give you our note for \$4000." To this H. replied: "I cannot take that; it is not right, and you know it. There is over \$2000 besides that belongs to me, and you know it." *Hackley* replied: "That is the best I will do with you." H. said: "I cannot take that, Mr. *Hackley*," and *Hackley* replied: "You do the next best thing you are a mind to. You can sue me if you please." *Headley* then said: "I cannot afford to sue you, because I have got to have the money, and I cannot wait for it. If I fail to get the money to-day, I shall probably be ruined financially, because I have made no other arrangement to get the money only on this particular matter." Finally he took the note and gave this receipt:

"Received from *Hackley & McGordon* their note for four thousand dollars, payable in thirty days, at First National Bank, Grand Rapids, which is in full for all claims of every kind and nature which I have against said *Hackley & McGordon*.

"JOHN HEADLEY."

"Witness: THOMAS HUME."

because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered

him, or paper by means of which the money might be obtained.

In delivering the opinion of the court, reversing the judgment for plaintiff, *Cooley, J.*, said: "In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money, and might be financially ruined in case he failed to obtain it. It is not pretended that *Hackley & McGordon* had done anything to bring *Headley* to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment, except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligations. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

"The case of *Vyne v. Glenn*, 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined finan-

7. Refusal to Deliver Property.—A refusal to deliver the property of another until a claim about which there is a dispute is paid does not constitute duress;¹ but—

8. Illegal Detention of Property.—If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion.²

cially; that plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment, and the same great need of money which is claimed existed in this case, and the same withholding of moneys lawfully due; but it showed over and above all that, an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods."

Where the person making the claim fixes the amount under protest, and accepts the allowance because he is in need of the money, this will not amount to duress. *Cicotte v. Wayne* (Mich.), 26 N. W. Rep. 686.

The refusal of a purchaser to pay the contract price of mining property on the ground of false representations, and the acceptance by the seller of a less sum on account of financial embarrassment, does not constitute duress, if the purchaser had done nothing unlawful to cause such financial embarrassment. Acceptance by a seller of a certain sum for his interest in mining property, because of financial embarrassment, and of his co-owners pressing him to pay his share of improvements made on the land, does not constitute duress, so as to invalidate the sale, or the settlement made by the seller with his co-owner, the latter being willing to take a mortgage on the seller's interest in the mine for his claim, and the sale and receipt of the purchase-money by the seller being made with the understanding that such claim was to be paid out of the money received from the sale. *Adams v. Schiffer* (Colo.), 17 Pac. Rep. 21.

1. *Hibbard v. Mills*, 46 Vt. 243; *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445; *Hall L. Co. v. Gustin*, 54 Mich. 624. Compare *Stenton v. Jerome*, 54 N. Y. 480.

There is no duress, as matter of law, when one who, with full knowledge of all facts, releases his claim of equities to those who refuse to recognize it and insist upon an adverse claim, does so in order to induce them to surrender property, the right to which is disputed and which they have detained under a claim of ownership. *Hall L. Co. v. Gustin*, 54 Mich. 624.

A sold to B, a married woman, certain property, agreeing to give her time for the payment of the balance of the purchase-money. Subsequently he (A) refused to deliver possession of the property unless B would execute to him, as security for said balance, a mortgage of her separate property. This at first she refused to do, but finally she and her husband acceded to A's request, and executed the mortgage. Held, that there was neither fraud nor coercion in the demand for the mortgage, and that B could not complain of a result which she might have avoided by insisting upon performance of the original contract. *Zents v. Shaner* (Pa.), 7 Atl. Rep. 197.

2. *Harmony v. Bingham*, 12 N. Y. 99; *Peyser v. Mayor*, 70 N. Y. 495; s. c., 26 Am. Rep. 624; *Scholey v. Mumford*, 60 N. Y. 498; *Stenton v. Jerome*, 54 N. Y. 480; *White v. Heylman*, 34 Pa. St. 142; *Chase v. Dwinall*, 7 Me. 134; *Beckwith v. Frisbie*, 32 Vt. 559; *Chandler v. Sanger*, 114 Mass. 364; *Spaids v. Barrett*, 57 Ill. 289; *Hackley v. Headley*, 45 Mich. 569; *Sasportas v. Jennings*, 1 Bay (S. Car.), 470; *Collins v. Westbury*, 2 Bay (S. Car.), 211; *Crawford v. Cato*, 22 Ga. 594; *Maxwell v. Griswold*, 10 How. (U. S.) 242; *Tutt v. Ide*, 3 Blatchf. (U. S.) 249; *Shaw v. Woodcock*, 7 Barn. & Cress. 73; *Astley v. Reynolds*, 2 Strange, 915.

In *Cobb v. Charter*, 32 Conn. 358, the court said: "Wherever money is paid through a necessity to obtain possession of goods illegally withheld, and where the detention is fraught with great imme-

9. Refusal of Personal Services.—The refusal to fulfil a contract for personal services, unless a sum not rightly due is paid, renders the payment compulsory.¹

10. Compulsion of Legal Process.—Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.²

diate hardship or irreparable injury, the payment is held to be compulsory." See *Chamberlain v. Reed*, 13 Me. 357; s. c., 29 Am. Dec. 506; *Briggs v. Boyd*, 56 N. Y. 289; *Shaw v. Woodcock*, 7 Barn. & Cress. 73.

In *Harmony v. Bingham*, 12 N. Y. 99, Ruggles, J., said: "Where the owner's goods are unjustly detained on pretence of a lien which does not exist, he may have such an immediate want of his goods that an action at law will not answer his purpose. The delay may be more disadvantageous than the loss of the sum demanded. The owner in such case ought not to be subjected to the one or the other, and, to avoid the inconvenience or loss, he may pay the money, relying on his legal remedy to get it back again."

The holder of perishable goods refused to surrender them on payment of what was actually due, demanding more than twice that amount, and in addition a release from all damages for his wrongful acts. The owner paid the money and gave the release. *Held*, in action on case for damages, that the release could be avoided for duress. *Spaids v. Barrett*, 57 Ill. 289.

Complainant agreed to convey to defendant an interest in certain mining property by a deed passing a good and perfect title. In pursuance of such agreement, he gave the defendant a quit-claim deed, which defendant accepted. A third party made an unfounded claim to the property, which defendant voluntarily bought up. At the time of such claim complainant was a depositor in defendant's bank, and defendant compelled him, by refusing to honor his checks, to settle for part of the sum paid to such third party. *Held*, that, as by accepting the quit-claim deed defendant had waived all rights to a covenant against incumbrances, he had no right to demand a repayment of such sum even if the claim had been valid, and such settlement was in duress of complainant's property, and void. *Adams v. Schiffer* (Colo.), 17 Pac. Rep. 21.

1. *Dana v. Kemble*, 17 Pick. (Mass. 545.

2. *Marriat v. Hampton*, 7 T. R. 269; 2 Smith's Lead. Cas. (8th Ed.) 436, and note; *Bragdon v. Somerby*, 55 Me. 92; *Weeks v. Thomas*, 21 Me. 465; *Nettleton v. Beach*, 107 Mass. 499; *McMurtrie v. Keenan*, 109 Mass. 185; *Carter v. Canterbury*, 3 Conn. 461; *Supervisors v. Briggs*, 2 Denio (N. Y.), 26; *White v. Ward*, 9 Johns. (N. Y.) 232; *Loomis v. Pulver*, 9 Johns. (N. Y.) 244; *Peyser v. Mayor*, 70 N. Y. 497; *South v. Grant*, 2 Halst. (N. J.) 26; *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333; *Federal Ins. Co. v. Robinson*, 82 Pa. St. 357; *Ford v. Brownell*, 13 Minn. 184; *Greenabaum v. Elliott*, 60 Mo. 25; *Bailey v. Paullina*, 69 Iowa, 463; *Kirklan v. Hickson*, 4 Humph. (Tenn.) 174. Compare *People v. Vischer*, 9 Cal. 365; *McMillan v. Vischer*, 14 Cal. 232; *Laterrade v. Kaiser*, 15 La. Ann. 296.

The general principle undoubtedly is, that money collected or paid upon lawful process of execution cannot be recovered back though not justly or lawfully due by the defendant in the execution to the plaintiff; but where the judgment which supported the execution has not only been reversed, but on a re-trial final judgment has been entered in favor of the opposite party, the principle does not apply. *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333. See *Scholey v. Halsey*, 72 N. Y. 578; *Raun v. Reynolds*, 18 Cal. 275.

Where the court has no jurisdiction the money may be recovered. *Gordon v. Baltimore*, 5 Gill (Md.), 231.

A. was imprisoned until he paid a fine and costs under a void judgment. *Held*, that he could recover the amount paid. *Durr v. Howard*, 6 Ark. 461. Compare *Bragdon v. Somerby*, 55 Me. 92.

F. being convicted on a criminal charge before B., a justice of the peace, for the purpose of appeal, voluntarily, in ignorance of his legal rights, paid to B. the costs of the prosecution, and two dollars as his fee for making the return. *Held*, that he could not recover back the costs so paid without a previous demand, or after the

(a) *Improper Use of Process of Court.*—Where money is extorted by the improper use of the process of courts, it will not be held a voluntary act.¹

(b) *Attachment.*—A payment by a person to free his goods from an attachment, put on for the purpose of extorting money, by one who knows that he has no cause of action, is a payment under duress.²

magistrate had honestly paid it over to those entitled to receive it. *Ford v. Brownell*, 13 Minn. 184.

One who is arrested and tried on a plea of "not guilty" to a charge of violating a town ordinance which is void, but without disputing its validity, and who is found guilty, fined, and pays his fine without protest, cannot recover the amount of the fine in an action against the incorporated town imposing the penalty. *Bailey v. Paullina*, 69 Iowa, 463.

One who pays a judgment which is a lien on his real estate, because his financial circumstances are such as to compel him to make a loan upon the property, which he cannot do without paying the judgment, cannot say that he pays under duress. *Hipp v. Crenshaw*, 64 Iowa, 404.

Money levied by a regular execution under a judgment, valid on the face of it, cannot be recovered back on the ground that judgment was signed or execution issued fraudulently for the whole sum named in the judgment, when part had been already paid. *De Medina v. Grove*, 10 Q. B. 152. See *Federal Ins. Co. v. Robinson*, 82 Pa. St. 357.

The fact that costs which have been paid had been regularly taxed, is an answer to a prosecution for treble damages upon the statute against extortion, as well as to an action at common law to recover back the money. *Supervisors v. Briggs*, 2 Denio (N. Y.), 26.

Where a party being harassed by suits pays under protest money which is claimed in violation of a city ordinance, he is entitled to maintain an action for its recovery. *Laterrade v. Kaiser*, 15 La. Ann. 296.

Where money is paid under terror of inceptive legal proceedings instituted or pretended to be instituted for the purposes of extortion, it may be recovered in *assumpsit*. *Sartwell v. Horton*, 28 Vt. 370.

1. *Thurman v. Burt*, 53 Ill. 129; *Seiber v. Price*, 26 Mich. 518; *Soule v. Bonney*, 37 Me. 128; *Richardson v. Duncan*, 3 N. H. 508; *Taylor v. Jaques*, 106 Mass. 291; *Chandler v. Sanger*, 114 Mass. 364; *Watkins v. Baird*, 6 Mass. 506; *Sartwell v. Horton*, 28 Vt. 370; *Stauffer v. Lat-*

shaw, 2 Watts (Pa.), 167; *Adams v. Reeves*, 68 N. Car. 134; *Duke de Cada-val v. Collins*, 4 Ad. & El. 858. Compare *Clark v. Turnbull*, 47 N. J. 265; s. c., 54 Am. Rep. 157.

A mere apprehension of legal proceedings is not sufficient to make a payment compulsory. *Ligonier v. Ackerman*, 46 Ind. 552.

A judgment was entered by agreement, with a stay of execution for a certain time. Before that time elapsed the plaintiff sued out an execution upon the judgment, and placing it in the sheriff's hands went with him to the defendant's place of business, threatening to make a levy and close up his store unless he settled the debt at once. The defendant fearing such a course would prove ruinous to his business, and to avoid the threatened levy, paid a part of the debt, and gave his notes for the balance with security payable at a shorter time than that fixed for the stay of execution. *Held*, that the notes were obtained by the improper use of process, and were without consideration. *Thurman v. Burt*, 53 Ill. 129.

A payment made on the demand of an officer under legal process is not voluntary, although made before any levy; a party is not bound to await an arrest or seizure, but may assume that the officer will execute the process on which he makes demand. *Atwell v. Zeluff*, 26 Mich. 118; *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333.

2. *Chandler v. Sanger*, 114 Mass. 364; *Carew v. Rutherford*, 106 Mass. 1; *Benson v. Monroe*, 7 Cush. (Mass.) 125; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Watkins v. Baird*, 6 Mass. 506; *Sartwell v. Horton*, 28 Vt. 370; *Richardson v. Duncan*, 3 N. H. 508; *Colwell v. Peden*, 3 Watts (Pa.), 327; *Adams v. Reeves*, 68 N. Car. 134; *Spaids v. Barrett*, 57 Ill. 289.

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11. **Colore Officii.**—The exaction of extortionate or illegal sums by an officer under color of office is duress.¹

12. **Illegal Seizure.**—Money paid by a person to prevent an illegal seizure of his property by an officer claiming authority to seize the same, or to liberate it from illegal detention by such officer, is paid under compulsion.²

13. **Public Duty.**—Where an excessive charge or fee for the performance of a public duty is paid, the payment is not voluntary, and may be recovered.³

Mich. 497; *Detroit v. Martin*, 34 Mich. 170; *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333.

Payments unlawfully exacted upon process against the property are made under compulsion. *Gebhart v. East Saginaw*, 40 Mich. 336; *First Nat. Bank v. Watkins*, 21 Mich. 483; *Swanston v. Ijams*, 63 Ill. 165.

B.'s goods had been assigned to trustees for the benefit of creditors. While the goods were in the possession of the trustees, a sheriff's officer entered and claimed the goods under a *fi. fa.*, but made no seizure; and the trustees remained in possession of the goods, until a messenger took possession under a *fiat* of bankruptcy issued against B. Afterwards the sheriff's officer broke open the door, made an inventory of the goods, and threatened to sell. The assignees of B. having thereon paid under protest the amount of the levy, *held*, that the payment was not voluntary, and might be recovered back. *Valpy v. Manley*, 1 C. B. 594.

1. *Clinton v. Strong*, 9 Johns. (N. Y.) 370; *Townsend v. Dyckman*, 2 E. D. Smith (N. Y.), 224; *Amer. Exch. Ins. Co. v. Britton*, 8 Bosw. (N. Y.) 148; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454; *Taylor v. Board of Health*, 31 Pa. St. 73; *Amer. S. Co. v. Yong*, 89 Pa. St. 186; *Breck v. Blanchard*, 22 N. H. 303; *Shaw v. Spooner*, 9 N. H. 197; *Walker v. Ham*, 2 N. H. 241; *Magnolia v. Sharman*, 46 Ark. 358; *Drew Co. v. Bennett*, 43 Ark. 364; *Durr v. Howard*, 6 Ark. 461; *Greenbaum v. King*, 4 Kan. 332; *Voiers v. Stout*, 4 Bush (Ky.), 572; *Robinson v. Ezzell*, 72 N. Car. 231; *Alston v. Durant*, 2 Strob. (S. Car.) 257; *McMillan v. Vischer*, 14 Cal. 232; *Laterrade v. Kaiser*, 15 La. Ann. 296; *Maxwell v. Griswold*, 10 How. (U. S.) 242; *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 319.

A protest is not necessary. *Amer. S. Co. v. Yong*, 89 Pa. St. 186; *Laterrade v. Kaiser*, 15 La. Ann. 296.

Where the officers of a town threatened prosecution and fine under an invalid

town ordinance, and the money was paid under protest, *held*, that the payment was compulsory. *Harvey v. Olney*, 42 Ill. 336.

Where a payment was made under an illegal order of a county judge, *held*, that the payment was not made under duress. *Bailey v. Buell*, 50 N. Y. 662.

2. *Lamborn v. Dickinson Co. Comr's*, 97 U. S. 181; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201; *Clinton v. Strong*, 9 Johns. (N. Y.) 369; *Harmony v. Bingham*, 12 N. Y. 99; *Chase v. Dwinal*, 7 Me. 134; *Sartwell v. Horton*, 28 Vt. 370; *Richardson v. Duncan*, 3 N. H. 508; *Chandler v. Sanger*, 114 Mass. 364; *Colwell v. Peden*, 3 Watts (Pa.) 327; *Ewing v. Peck*, 26 Ala. 413. *Compare Bingham v. Sessions*, 6 S. & M. (Miss.) 13.

Defendant, charged with the duty of enforcing payment of license fees, demanded of plaintiff payment of such fees in pursuance of a statute, which had not then been, but was shortly afterward, adjudged invalid. Defendant threatened to seize plaintiff's property for the fees if not paid immediately. Thereupon plaintiff paid them, and they were afterwards paid into the State treasury as the statute required. Plaintiff did not deny his liability to pay the fees, nor inform defendant at any time that he should bring suit to recover back the amount, and defendant acted in good faith, in the discharge of what he believed to be his official duty. *Held*, that no action will lie against defendant to recover the money. *Van Buren v. Downing*, 41 Wis. 122.

3. If a statute prescribes certain fees for certain services, and a party assuming to act under it insists upon having more, the payment cannot be said to be voluntary. *Steel v. Williams*, 8 Exch. 625. See *Amer., etc., Ins. Co. v. Britton*, 8 Bosw. (N. Y.) 148; *Walker v. Ham*, 2 N. H. 241; *Townsend v. Dyckman*, 2 E. D. Smith (N. Y.), 224; *Alston v. Durant*, 2 Strob. (S. Car.) 257.

A payment may be, under circumstances, involuntary, and an action be

brought to recover back the money, when the position or interests of the party are such as to require from another the performance of a duty enjoined by law, and he is illegally compelled to pay the money to induce such performance. *Baker v. Cincinnati*, 11 Ohio St. 534.

In the case of *Swift Co. v. United States*, 111 U. S. 22, the commissioner of internal revenue had acted upon a wrong basis in charging stamps for friction matches. The Swift Co. gave orders for stamps, and paid for each purchase within sixty days from the delivery of the stamps, and thus dealt from 1870 to 1878. No protest had been made by the company, though years before, in 1866, a member of the company "made repeated protests to the officers of the Internal Revenue Bureau against the methods of computing commissions" in similar cases.

The court held: "A course of business and a periodical settlement between the commissioner of internal revenue and a regular periodical purchaser of revenue stamps, entitled by statute to commission on his purchases, payable in money, which shows that the commissioner asserted and the purchaser accepted that the business should be conducted upon the basis of payments of the commissions in stamps at their par value instead of in money, does not preclude the purchaser from asserting his statutory right, if he had no choice, and if the only alternative was to submit to an illegal exaction, or discontinue his business." And the court also held: "When the commissioner of internal revenue adopted a rule of dealing with purchasers of stamps, which deprived them of a statutory right to be paid their commissions in money, and obliged them to take them in stamps, and made known to those interested that the rule was adopted and would not be changed, the rule dispensed with the necessity of proving, in each instance of complying with it, that the compliance was forced."

Mr. Justice Matthews said: "No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted."

Common Carriers.—In general, where a shipper has been compelled to pay more than a legal rate of freight in order to have his goods transported, the payment is not considered as voluntary, but under compulsion, and the excess is recoverable in an action instituted for that purpose. *McGregor v. Erie R. Co.*, 35

N. J. L. 89; *Mobile, etc., R. Co. v. Steiner et al.*, 61 Ala. 559; *Chicago, etc., R. Co. v. C. V. & W. Coal Co.*, 79 Ill. 121; *Parker v. Great Western R. Co.*, 7 Mann. & Gr. 253; *Lafayette, etc., R. Co. et al. v. Pattison*, 41 Ind. 312; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa, 187; *Herrman v. B., C. R. & N. R. Co.*, 57 Iowa, 187; s. c., 9 Am. & Eng. R. R. Cas. 339; *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa, 732; s. c., 16 Am. & Eng. R. R. Cas. 46; *Peters v. Marietta, etc., R. Co.*, 42 Ohio St. 275; s. c., 18 Am. & Eng. R. R. Cas. 492. See *Colwell v. Peden*, 3 Watts (Pa.), 327; *Harmony v. Brigham*, 19 Ind. 99; *Boston & S. Co. v. Boston*, 4 Metc. (Mass.) 181; *Chandler v. Sanger*, 144 Miss. 364; *Stephens v. Daniels*, 27 Ohio St. 527; *Tuttle v. Everett*, 51 Miss. 27; *Howe v. State*, 53 Miss. 57; *Robinson v. Ezzell*, 72 N. Car. 231; *First National Bank v. Watkins*, 21 Mich. 483; *Atwell v. Zeluff*, 26 Mich. 118; *McKee v. Campbell*, 27 Mich. 497; *Carew v. Rutherford*, 106 Mass. 1; *L. & J. R. Co. v. Pattison*, 41 Ind. 311; *Railroad Co. v. Lockwood*, 17 Wall. 357-379. Compare *Potomac Coal Co. v. C. & P. R. Co.*, 38 Md. 226; *Kenneth et al. v. South Carolina R. Co.*, 15 Rich. L. (S. Car.) 284; *Dubose v. Georgia R. & B. Co.*, 50 Ga. 304; *Steever v. Illinois Cent. R. Co.*, 16 Am. & Eng. R. R. Cas. 53.

In *Parker v. Great Western R. Co.*, 7 M. & Gr. 253, the court held that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Mr. Justice Matthews, in *Swift Co. v. United States*, 111 U. S. 29, approves the doctrine, and calls it a "wholesome principle." In *Baker v. City of Cincinnati*, 11 Ohio St. 534, *Gholson, J.*, approves the same authority. In *Maxwell v. Griswold*, 10 How. (U. S.) 242, the court said: "Now it can hardly be meant, in this class of cases, that to make a payment involuntary, it should be by actual violence, or any physical duress." To the same effect are *American Steamship Co. v. Yong*, 89 Pa. St. 186; *Cunningham v. Munroe*, 15 Gray (Mass.), 471; *Carrew v. Rutherford*, 106 Mass. 1; *Preston v. Boston*, 12 Pick. (Mass.) 7.

In case of *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 379, Mr. Justice Bradley says: "The carrier and his customer do not stand on a footing of equality. The latter is only one of a million. He cannot afford to higggle or stand out and seek redress in courts. His business will not admit of such a course. He prefers

rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business."

In *Beckwith v. Frisbie*, 32 Vt. 559, it was said: "To make the payment a voluntary one, the parties should stand upon an equal footing."

In *McGregor v. Erie R. Co.*, 35 N. J. L. 89, plaintiff recovered back from defendant certain moneys unlawfully demanded and taken for transportation of merchandise from Paterson to Jersey City. *Bedle, J.*, said: "In these cases there was no express refusal, but I do not consider it necessary that the refusal should be express. It is sufficient if the person has just and reasonable ground to apprehend that, unless the money is paid, his goods will not be carried, or will be withheld. Where a corporation or person has the power to refuse a right to which a party is entitled, unless he complies with an unjust demand, they do not stand on an equal footing." And the court held: "But when they are not on an equal footing and money is paid, not by compulsion of law, but by compulsion of circumstances,—as when it is paid to release goods from illegal restraint, which cannot otherwise be reasonably effected, or to compel the performance of a duty by others in order to enjoy or obtain a right,—it may be recovered back. Under this head may be classed moneys paid under color of title or charges on turnpikes and railroads."

"Courts will not be illiberal in allowing a person to act upon his reasonable apprehension of such refusal, where the circumstances fairly show that, unless he does so submit to the demand, his right will be withheld."

In *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312, the facts were as follows: During the rebellion A. had a contract to furnish the government with a certain number of beef cattle during two months, and for the purpose of filling such contract went to Chicago, and made a contract with a railroad company to ship cattle for him to Indianapolis at sixty-five dollars per car; and, leaving an agent to ship, he returned to Indianapolis to receive the cattle. The cattle of the first shipment of two car-loads were sent to the cattle-yard of A., and after a few days a bill for \$201.2 was sent to A., which he refused to pay, and informed the agent of the railroad company that he had a contract for the shipment at sixty-five dollars per car; the agent

denied knowledge of any such contract, and insisted that the bills must be paid as presented, and that he would not deliver any future car-loads of cattle until the freight was paid, as he made it up from the way-bills, and that the bills included other things besides freight, which he could not itemize. It was agreed that A. should pay under protest, and also future freight, and the cattle should be delivered as they arrived, and A. should reserve the right to recover any sum so paid unjustly. In pursuance of this agreement, the agent delivered the cattle at the yard of A. as they arrived from time to time, and as soon as the bills were prepared, they were paid by A. *Held*, that the payments were not voluntary, and that A. could recover all sums so paid in excess of his contract price. And *Bushkirk, J.*, says: "We are of opinion that the money so paid could be recovered back if there had been no valid agreement that it might be. While the appellants were not in the actual possession of the cattle of the appellee, they possessed such power and control over the shipment and delivery thereof as gave them an undue advantage over the appellee, and the necessity of the appellee was so great and pressing as to deprive him of the freedom of his will."

"The case of *Chicago & Alton R. Co. v. C., V. & W. Coal Co.*, 79 Ill. 121, is as follows:

"Certain individuals constructed a railroad twelve miles long, extending from a coal-mine, belonging to a coal company, to a station on the Illinois Central Railroad, and, on the 30th of April, 1869, they sold the same to a railroad company, and turned it over to them, and, on the same day, the company purchasing it turned it over to another railroad company. The last-named company operated the road in pursuance of the contract of sale between the first owners and the purchasers from them, for three years, complying with the terms of said contract as to the rates of freight to be charged to the coal company for the transportation of its coal. The individuals building and selling the road and the coal company were the same. *Held*, that the railroad company last purchasing, by taking the road and reorganizing the rates of freight established by the contract of sale, adopted the contract, and were bound by its terms, and that the coal company could maintain an action against them for a breach of it."

"In such a case, where the coal company had no other outlet for its coal, and the railroad company exacted more

14. Of Agent.—A principal may avoid the obligation of his agent made while under duress.¹

freight than, by the terms of the contract, they were entitled to, the coal company should be considered as under a kind of moral duress, and the payment by them of the freight demanded, under such circumstances, could not be considered voluntary, and they would have the right to sue upon the contract, and recover back the excess of freight paid over the contract rate."

Mr. Justice Breese said: "It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of 'life or death' with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which, in equity and good conscience, they ought not to retain."

In *W. Va. Trans. Co. v. Sweetzer*, 25 W. Va. 434; s. c., 22 Am. & Eng. R. R. Cas. 469, the court held that if a person be engaged in buying oil in an oil region and shipping it over a railroad, and there is no other outlet for this oil except over this railroad, and under these circumstances he agrees to pay to the railroad company more than its legal rates of charge for the freight of such oil, and does make such payments from time to time, in order that he may get his oil transported to market in the only manner in which he can transport it, though such payments are made after each shipment of oil has been made and the oil delivered, such person must be considered as making such payment not voluntarily but by compulsion, and he has a right, in an action for money had and received for his use, to recover back the excess of freight so paid by him over the amount which the railroad company had a legal right to charge, or to offset this excess against the railroad company's charge if it brings an action of *assumpsit* against such shipper. In such action to recover back such excess of payments made beyond the legal rates of charge there is no necessity for the plaintiff to prove that he demanded the repayment of such excess by the railroad company before instituting such suit.

In *Mobile, etc., R. Co. v. Stiner*, 61 Ala. 559, illegal charges for transporting cotton were recovered back. The court held: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges of transportation; and if

the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge."

Protest Unnecessary.—To the objection that the payments were voluntarily made, and therefore could not be recovered back, *Stone, J.*, said, in *Mobile, etc., R. Co. v. Stiner*, 61 Ala. 559: "Railroads have so expedited and cheapened travel and transportation, have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have their established rates of charges, and these the shipper must pay, or forego their facilities and benefits. To object or protest would be an idle waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service is not voluntarily paid, as the law interprets that phrase."

Exceptions.—A station agent who, as such, receives for a railroad company and ships his own goods at a higher rate than is allowed by law, cannot maintain an action for the overcharges of freight paid by him. *Steever v. Illinois Cent. R. Co.*, 62 Iowa, 371; s. c., 16 Am. & Eng. R. R. Cas. 53.

When, in view of unexpected difficulties in transportation, the consignor pays a sum greater than originally agreed upon, he cannot recover the excess. *Detroit, etc., R. Co. v. McKenzie*, 9 Am. & Eng. R. R. Cas. 15.

Common-law Right.—The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa, 732; s. c., 16 Am. & Eng. R. R. Cas. 46. See *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56; *Burlington v. B. & M. R. Co.*, 41 Iowa, 134; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *Gooch v. Stephenson*, 13 Me. 371; *Candee v. Hayward*, 37 N. Y. 653.

1. The plaintiff being confined in a lunatic asylum, and an inquisition under

15. Marriage.—A court of equity is empowered to declare a marriage procured by duress a nullity, by virtue of its general jurisdiction in matters of fraud affecting contracts.² (See also MARRIAGE.)

16. Deeds.—What will constitute such a duress as to avoid a deed made while under its influence, is a question which is determined by the facts of each case. It must be such a duress as will seriously interfere with or take away the will-power of the grantor.¹

a commission of lunacy being held upon her, and attended by her counsel, before any verdict was given an agreement was signed by her counsel, and counsel attending for the promoters of the commission, that she should be released from confinement, that certain arrangements should be made as to property which she claimed; that the title-deeds relating thereto, which had been taken from her when she was confined, and now were in the hands of the promoters, should be given up and placed in the hands of H.; and that the commission should be superseded. Accordingly, the plaintiff was released, and the deeds handed over to H. The plaintiff then brought detinue against H. for the deeds; an interpleader rule was obtained on the claim of the promoters, by which the proceedings were stayed, and a feigned issue brought by the plaintiff against the promoters, to try whether she was entitled to the deeds, notwithstanding the arrangement. *Held*, that it was rightly left to the jury, on evidence of the state of the plaintiff's mind and health at the time of the agreement being made, to say whether the consent of her counsel was obtained by constraint, and without her free will; and the jury having so found, that the plaintiff was entitled to the verdict, and that the legality of the restraint, assuming it to have been legal, and the consent of counsel, furnished no conclusive proof that the agreement was not void by duress. *Cumming v. Ince*, 11 Q. B. 112.

Plaintiff chartered defendant's vessel for a voyage from Charleston to Liverpool or Havre, for a sum named; bills of lading were to be signed by the master, but without prejudice to the charter. It was agreed that any difference between the bills of lading and the charter-party was to be settled at Charleston before the vessel sailed, in accordance with the rates of freight, weight, etc., expressed in the bills of lading, if in the charterer's favor, "by the captain's bill, payable ten days after arrival at the port of discharge." Plaintiff furnished a cargo of cotton consigned to Liverpool. By the custom at that port, which was well

known to plaintiff and the master, freight is only collectible on net weight of cotton. Plaintiff calculated the freight upon the gross weight of the cotton covered by the bills of lading, and after the vessel was laden ready for sea he demanded of the master a bill of exchange for the difference; the latter objected, on the ground that the tare should be allowed. Plaintiff was agent for the owners of the vessel, and he alone could get clearance for her at the custom-house; he refused to clear and allow her to proceed unless the master would sign the bill and an agreement that the question in dispute should abide the decision of the "United States court at Charleston" in a case then pending. The captain thereupon signed. In an action upon the bill so given, *held*, the unlawful refusal of plaintiff to allow the vessel to leave the port until the bill was signed constituted duress. *McPherson v. Cox*, 86 N. Y. 473.

A employed B to purchase certain land warrants for him. A sold the land represented by the warrants, and agreed to convey by a certain day. B had procured the patent to be issued to C, who had given B a blank transfer. B demanded a certain amount of money to release the patent, which A paid in order to complete his contract. *Held*, that the payment was compulsory. *White v. Heylman*, 34 Pa. St. 142.

2. Le Brun v. Le Brun, 55 Md. 496; *Sloan v. Kane*, 10 How. Pr. (N. Y.) 66; *Finn v. Finn*, 62 How. Pr. (N. Y.) 83; *Clarke v. Clarke*, 11 Abb. Pr. (N. Y.) 228; *Tilby v. Hayes*, 27 Hun (N. Y.), 251; *Keyes v. Keyes*, 22 N. H. 553; *Barnes v. Wyethe*, 28 Vt. 41; *Pyle v. Pyle*, 10 Phila. 58; *Stevenson v. Stevenson*, 7 Phila. 386; *Bassett v. Bassett*, 9 Bush (Ky.), 696; *Lyndon v. Lyndon*, 69 Ill. 43; *Robertson v. Cole*, 12 Tex. 356. See *Breach of Promise*, Vol. II. p. 524.

1. Tiedeman on Real Prop. § 796. See 3 Wash. Real Prop. (5th Ed.) 276; *White v. Heylman*, 34 Pa. St. 142; *Eadie v. Slimmon*, 26 N. Y. 12; *Worcester v. Eaton*, 11 Mass. 368; s. c., 13 Mass. 371; *Motz v. Mitchell*, 91 Pa. St. 114; *Fisk v. Stubbs*, 30 Ala. 335.

If A obtains possession of a deed and uses it for the purpose of extorting money from B as the price of its preservation or of permission to use it in defending his title, and by threats, express or implied, gives B to understand that the deed would be withheld or destroyed unless his demand were complied with, the payment is to be deemed involuntary, and the wrong-doer shall be compelled to make restitution. *Motz v. Mitchell*, 91 Pa. St. 114.

Where one falsely and maliciously, and without probable cause, arrests and imprisons another on a process, legal and regular in form, and obtains a deed from the party so arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. *Watkins v. Baird*, 6 Mass. 506.

Mere vexation and annoyance, leading to the execution and acknowledgment of a conveyance of land in trust for the grantor and his heirs, is not sufficient to establish such duress as to avoid the deed, unless it be further shown that the grantor's mind was in that condition that by reason of such vexation and annoyance a state of insanity was produced, which existed at the time of the execution and acknowledgment. So where a party who induces the owner of land to convey the same in trust, by threatening to have a conservator of the grantor appointed, and instituting proceedings to have the grantor adjudged insane, and dismisses such proceeding upon the executing of such deed, will be estopped from afterwards avoiding the deed on the ground that its execution was procured by duress. *Brower v. Callender*, 105 Ill. 88.

Where the evidence shows the conveyance was an intelligent, voluntary act, the facts that the deed was executed reluctantly, and after some threats had been made, are insufficient to establish undue influence or duress. *Hamilton v. Smith*, 57 Iowa, 15.

To set aside a deed made by a married woman, on the ground of duress or undue influence, where it appears from the proof that she was a lady of good intelligence and capacity, in full possession of her mental faculties, and the deed shows upon its face that she appeared with her husband before a justice of the peace, and solemnly acknowledged it to be her act, requires the clearest and most satisfactory evidence. *Linnenkemper v. Kempton*, 58 Md. 159.

A willing mind on the part of the wife is requisite to the validity of a deed made by her. To avoid the deed of the wife on account of threats of the husband, it

is not necessary that they should put the wife in fear of physical injury. If he threatens an abandonment of her if she refuses to sign a deed conveying the homestead, and she, having reasonable apprehension that he would carry out his threat, signs the deed, this will be sufficient to avoid it. *Kocourek v. Marak*, 54 Tex. 501; s. c., 38 Am. Rep. 623. See *Tapley v. Tapley*, 10 Minn. 498; *Lane v. Blizzard*, 70 Ind. 23.

In *White v. Heylman*, 10 Casey (Pa.), 142, money had been paid and a note given to procure the reconveyance of land, the title to which had been vested in a stranger by the wrongful act of an agent. After stating that the defendant was forced to pay his faithless agent money and give him the note in suit, in order to procure a transfer to himself of what was in reality his own, the court proceeded to say: "Neither the payment of the cash nor the giving of the note was voluntary, but both were extorted from the defendant and come within that class of cases in which money illegally claimed and paid has been recovered back, where goods, deeds, or papers have been wrongfully detained until the money has been paid."

A, who was the holder of title bond to land, sold it to B, who was urgent for a deed, and threatened to rescind the sale. C, the vendor of the land, refused to deliver a deed unless a sum larger than that legally due was paid to him by A. In order to obtain the deed, A paid this sum under protest. *Held*, that the payment was compulsory. *Pemberton v. Williams*, 87 Ill. 15. Compare *Gilpatrick v. Sayward*, 5 Me. 465.

A bill to set aside a deed for duress, alleged to have been practised twelve years before, dismissed; the complainant being without sufficient excuse for the delay, and the defendant having made costly and permanent improvements upon the property. *Murphy v. Paynter*, 1 Dill. (U. S.) 333.

A testator gave to A. "all my interest and claim on household property in W., on which I have a mortgage of £1500." At the time of his death, debts were due in respect of repairs done in his lifetime to the mortgaged premises; these were paid by the executrix. The executrix having compelled A. to pay her the interest, and the debts above mentioned, before she would give up the title-deeds of the mortgaged premises to him, *held*, that (assuming the executrix to have assented to the bequest) A. was entitled to recover back the amount. *Gibbon v. Gibbon*, 13 C. B. 205.

17. Lease.—A lease obtained by duress is voidable, but not void.¹

Deeds of the plaintiff were placed by A. in the hands of the defendant, her attorney, and upon application A. declined to give any information about them unless upon payment of a sum of money which she claimed to be due to her from the person who had devised to the plaintiff's wife the property to which the deeds related, and ultimately referred the plaintiff to the defendant. He also refused to give them up; and the plaintiff, in order to obtain them, paid the amount claimed, saying at the same time to the defendant, "You shall hear of this again." *Held*, that this was not a voluntary payment, and that the amount was recoverable as money had and received. *Oates v. Hudson*, 6 Exch. 346.

A. mortgaged, with a proviso for repayment, and a covenant for conveyance at the costs and charges of the mortgagor. Upon notice to repay the sum borrowed, the mortgagor's solicitor sent the solicitors for the mortgagee a draft reconveyance, which was approved by them; but they refused to redeliver up the title-deeds unless their bill of costs was paid. One of the charges in the bill was in respect of the reconveyance; the others arose exclusively from the relation of the mortgagee and the defendants, as client and solicitor. In an action by A. to recover the money so paid, *held*, first, that the defendants were not entitled to withhold the deeds from the mortgagor. *Held*, secondly, that the mortgagor might maintain this action against the defendants, for money extorted under duress of his goods, and paid by him under protest to the defendants for their own benefit. *Wakefield v. Newbon*, 6 Q. B. 276.

A deed or other written obligation or contract, procured by means of threats to take the life of the person executing it, is inoperative and void. *Baker v. Morton*, 12 Wall. (U. S.) 150.

An uncle, who was tenant of a farm from year to year, devised his real estate to his nephew, and authorized his trustees to give up the tenancy of the farm in favor of his nephew, provided the landlord would accept him as tenant, and in that event he bequeathed to him all the stock upon the farm; and he directed his trustees to set apart a certain sum out of his personal estate in favor of his nieces. On his death it turned out that if a mortgage to which the real estate was subject was paid out of the personal estate, and if the nephew took the farming stock, nothing would remain for the nieces. Accordingly one of the trustees, who was

also agent to the landlord, informed the latter of the state of the testator's affairs, whereupon the landlord said that unless the nephew acted fairly and honorably in the matter, he would refuse to accept him as tenant of the farm. The trustee afterwards wrote to the nephew offering to put him in possession of the farm, and to give him £200 if he would give up his right to the real estate in favor of his sisters, and stating that the landlord would do as the trustees thought fit concerning the tenancy of the farm. Thereupon the nephew, without having had any independent advice, executed a deed whereby, in consideration of £200 paid to him by the trustees, and also in consideration of the natural love and affection which he bore towards his sisters, he conveyed the real estate to the trustees to sell and to hold the proceeds upon the trusts of the will, and he was afterwards accepted as tenant of the farm. On a bill by the nephew to set aside the deed, *held*, that the execution of the deed had been obtained from the nephew by coercion, and that it must be set aside with costs as against the trustees. *Ellis v. Barker*, 25 L. T. N. S. 688; 7 L. R. Ch. 104.

Plaintiff's son, about to abscond, executed to him a conveyance to secure liabilities incurred by his father for him. Defendant W., a justice of the peace, who had often acted as plaintiff's conveyancer, was employed in the transaction. At the time, plaintiff, a farmer, was nearly seventy years old. Immediately thereafter, defendant W., by continued threats to have the conveyance set aside as in fraud of creditors, induced plaintiff, who was distressed by his son's failure, to execute a conveyance securing defendants, his son's other creditors. Plaintiff was not personally liable to pay such creditors, and the value of the property conveyed to him by his son was less than his actual liabilities incurred in his behalf. *Held*, that the conveyance to his son's creditors was void, as executed under undue pressure. *Fisher v. Bishop* (N. Y.), 15 N. East. Rep. 331.

Where those who refused to receive Confederate money were threatened with fine, imprisonment, and confiscation of property, *held*, that a deed was given under duress where the owner was also threatened with death if he refused to take the money and execute the deed. *Bogle v. Hammons*, 3 Heisk. (Tenn.) 136. See *Jones v. Rogers*, 36 Ga. 157.

1. 1 Washb. Real Prop. (5th Ed.) 487; *Worcester v. Eaton*, 13 Mass. 371.

18. Mortgage.—If a mortgagee of land, who is in possession for condition broken, require that the mortgagor or his assignee pay more than is legally due, in order to redeem, and it is paid accordingly, for the purpose of preventing a foreclosure, it is such a compulsory payment as entitles the party who so pays to recover it back.¹

1. *Cazenove v. Cutler*, 4 Met. (Mass.) 246; *Fraser v. Pendlebury*, 31 L. J. C. P. 1.

A mortgagee foreclosed his mortgage under the power, claiming in the notice of sale twice as much as was actually due upon any calculation based on the terms of his note or mortgage, and at the sale bid in the property at the full amount claimed in the notice. A subsequent mortgagee applied to him to redeem, offering to pay the amount actually due on the mortgage. This was refused, and the subsequent mortgagee finally paid him the full amount of the bid under protest. *Held*, the subsequent mortgagee may recover back the excess. *Bennett v. Healey*, 6 Minn. 240; *Freeman v. Etter*, 21 Minn. 3. *Compare* *Mariposa Co. v. Bowman*, Dearly (U. S.), 228.

The maker of a note secured by a mortgage with power of sale paid the interest due thereon, and the mortgagee promised to indorse the payment on the note, but did not do so, denied that interest had been paid, demanded it again, and threatened to sell under the mortgage unless the interest was again paid. The mortgagor then paid the interest a second time, under protest. *Held*, that he could maintain an action of contract to recover back the amount which the mortgagee promised to indorse. *McMurtrie v. Keenan*, 109 Mass. 185.

In foreclosure of a real estate-mortgage securing a note, the answer, to show that the instruments were executed under duress, averred that plaintiff, holding the title to the property, refused to convey it as he had agreed, unless defendant would include in the note and mortgage (which were to be executed by him to plaintiff simultaneously with such conveyance) certain unjust and fraudulent claims for moneys unjustly and fraudulently expended upon the property, etc. The answer, however, showed that, by previous written agreement between the parties, plaintiff was to advance moneys for the erection of a building on the premises, and defendants were to execute a note and mortgage to secure repayment of such moneys; and that, after an accounting between the parties, the instruments in suit were executed pursu-

ant to such agreement. *Held*, that the answer shows no defence.

Said written agreement provided that if the mortgagor should be unable to get a certain judgment set aside and discharged, and plaintiff should be of opinion that it was necessary, for the purpose of protecting his interest under certain leases, that the judgment should be discharged of record, he might satisfy it, and include the amount in the note and mortgage which were to be executed to him. Plaintiff having paid such judgment, and the amount having been included in the instruments in suit, *held*, that mere general averments in the answer, that the mortgagors permitted its inclusion under "duress and compulsion," etc., do not show that they were entitled to have the instruments reformed by omitting the amount of such judgment.

The answer further avers that, "under like duress and compulsion," defendants were compelled to allow plaintiff to include in the note and mortgage certain expenses in finishing off said building, which are alleged to have been unnecessary; but no reason is shown for defendants' allowing plaintiff's claim for such expenses in the accounting between them; nor are any further facts alleged to show that the claim was fraudulent, or that the execution of the instruments for an amount including such claim was done under duress. *Held*, insufficient to impeach the instrument for fraud or duress. *Macloon v. Smith*, 49 Wis. 200.

Duress of the wife, practised by the husband to obtain her signature to a mortgage, does not affect the validity of the mortgage, when the mortgagee was not privy to such duress, and did not connive at it, or in any way participate in it. *Rogers v. Adams*, 66 Ala. 600; *Lane v. Blizzard*, 70 Ind. 23.

Redemption of Land.—Where A agreed to buy in the land of B which was to be sold on execution, and reconvey it to him on payment of the money advanced, and a reasonable compensation for his trouble; and A having bought the land refused to reconvey it to B unless he paid \$300 in addition to the principal and interest of the sum advanced by A and B in order to obtain his land, paid the \$300;

19. Taxes.—Where a tax illegally assessed is paid under protest or compulsion, such payment may be recovered back.¹ (See also TAXATION.)

held, that B could not recover the money back so paid in an action for money had and received to his use. *Hall v. Shultz*, 4 Johns. (N. Y.) 240. See *McMillan v. Vischer*, 14 Cal. 232.

The payment of money to the county clerk to redeem lands from sales for pretended school-district taxes which are void, even though the county, at the time thereof, may be threatening to issue tax-deeds upon such sales. *Powell v. Supervisors*, 46 Wis. 210. See *Shane v. St. Paul*, 26 Minn. 543; *Dickinson Co. v. National L. Co.*, 23 Kan. 196; *Phillips v. Jefferson Co.*, 5 Kan. 412; *Wabaunsee Co. v. Walker*, 8 Kan. 431; *Fleetwood v. New York*, 2 Sandf. (N. Y.) 475; *Lamborn v. Dickinson Co.*, 97 U. S. 181.

1. *Erschine v. Vanarsdale*, 15 Wall. (U.S.) 75; *Briggs v. Lewiston*, 29 Me. 472; *Grimm v. School District*, 57 Pa. St. 433; *Atwell v. Neluff*, 26 Mich. 118; *Hubbard v. Brainard*, 35 Conn. 563; *Callaway v. Milledgeville*, 48 Ga. 309; *Carleton v. Ashburnham*, 102 Mass. 348; *Supervisors v. Manny*, 56 Ill. 160; *Allen v. Burlington*, 45 Vt. 202; *Hicks v. Westport*, 130 Mass. 478; *Peyser v. Mayor*, 70 N. Y. 595; s. c., 26 Am. Rep. 624; *Savannah v. Fleecy*, 66 Ga. 31; *Parcher v. Marathon Co.*, 52 Wis. 388; *Ruggles v. Fond du Lac*, 53 Wis. 436.

This whole question will be found treated at length under TAXATION. See *Dillon's Municipal Corporations*, § 939; *Cooley on Taxation*, Ed. 1876, p. 565; *Burroughs on Taxation*, § 108, where large numbers of cases are cited.

In view of the conflict of opinion that there, appears we prefer to set forth the question in its latest development rather than trace its progress to its present stage, thereby saving the reproduction of what is usually accessible, and presenting, perhaps, other references that are not.

General Principles.—In examining the authorities the following general principles will be frequently met with: Under the ancient and well-known rule of the common law, a tax voluntarily paid cannot be recovered back. This is true even where the tax has been illegally laid, or the law under which it was laid is unconstitutional. This rule is so well established, that modifications of it form exceptions, in which each case stands upon its own merits. It seems to be generally acknowledged, however, that when the following conditions coexist a recovery may be had without infringing the rule:

1. The authority to levy the tax, or to levy it upon the property in question, must be wholly wanting, or the tax itself wholly unauthorized, in which cases the assessment is not simply irregular, but absolutely void.

2. The money sued for must have been actually received by the defendant corporation, and received by it for its own use, and not as an agent or instrument to assess and collect money for the benefit of the State, or other public corporation or person.

3. The payment by the plaintiff must have been made upon compulsion, to prevent the immediate seizure of his goods or the arrest of the person, and not voluntarily.

Unless these conditions concur, paying under protest will not give a right of recovery. The leading authorities will be found in the above-mentioned text-books. See also *Chicago v. Fidelity Savings Bank*, 11 Ill. App. 165; *Lamborn v. Dickinson Co.*, 97 U. S. 181; *Union Pac. R. v. Dodge Co.*, 98 U. S. 541; *McCrickart v. Pittsburgh*, 88 Pa. St. 133; *Jackson v. Atlanta*, 61 Ga. 228; *Cade v. Perrin*, 14 S. Car. 1; *Savannah v. Feeley*, 66 Ga. 31; *Camp v. Algansee*, 50 Mich. 4.

Denials or Modifications of the General Doctrine.—The following authorities will be found to deny or modify, with greater or less force of logic, the doctrine above mentioned: *Galveston v. Snyder*, 39 Tex. 236; *Marshall v. Snediker*, 25 Tex. 460; *Baker v. Panola Co.*, 30 Tex. 86; *Louisville v. Zanone*, 1 Met. (Ky.) 151; *Covington v. Powell*, 2 Met. (Ky.) 226; *Underwood v. Brockman*, 4 Dana (Ky.) 309; *Ray v. Bk. of Ky.*, 3 B. Mon. (Ky.) 510; *Tuttle v. Everett*, 51 Miss. 27; *Worsley v. Municipality*, 9 Rob. (La.) 324; *Catholic Society v. New Orleans*, 10 La. Ann. 73. But see *Campbell v. New Orleans*, 2 La. Ann. 34; *Factors', etc., Co. v. New Orleans*, 25 La. Ann. 454; *Northrop v. Graves*, 19 Conn. 648; *Bank of Comm. v. Mayor*, 43 N. Y. 184; *Article*, 7 Cent. Law Jour. 23, 43.

When Payment is Held to be Voluntary.—In *Oceanic Steam Navigation Co. v. Tappan*, 16 Blatchf. C. Ct. 296, the principle upon which these cases rest is well stated: "An action does not lie to recover back moneys claimed without right, if the payment was made voluntarily, and with a full knowledge of the facts upon which the claim was predicated. It is not enough that payment was made

under protest by the party paying. The payment must have been compulsory; that is, it must have been made under coercion, actual or legal, in order to authorize the party paying to recover back. In the absence of such coercion, the person of whom payment is demanded must refuse the demand; and he will not be permitted, with knowledge that the claim is illegal and unwarranted, to make payment without resistance, where resistance is lawful and possible, and afterwards to select his own time to bring an action for restoration, when, possibly, his adversary has lost the evidence to sustain the claim. Where, however, the demandant is in a position to seize or detain the property of him against whom the claim is made, without a resort to judicial proceedings, in which the validity of the claim may be contested, and payment is made, under protest, to release the property from such seizure or detention, the party paying can recover back his payment."

The point thus strongly urged in the last paragraph as above is that upon which the decision is expressly placed, viz.: That money paid upon a demand, to prevent the seizure of property which can only take place by judicial proceedings, where the party paying may have his day in court and defeat the proceeding, is not paid under legal compulsion, and cannot be recovered back, although paid under protest. *Mayor v. Lefferman*, 4 Gill (Md.) 425; *Cahaba v. Burnett*, 34 Ala. 400; *Cook v. Boston*, 9 Allen, 393; *Taylor v. Board of Health*, 31 Pa. St. 73; *Mays v. Cincinnati*, 1 Ohio St. 268.

It seems to be the commonly accepted doctrine that payment of taxes where there is no legal duress will be deemed to have been voluntary, and the money cannot be recovered back. *Wills v. Austin*, 53 Cal. 152; *Merrill v. Austin*, 53 Cal. 379; *De Freenery v. Austin*, 53 Cal. 380; *Hayford v. Belfast*, 69 Me. 63; *Shaw v. St. Paul*, 26 Minn. 543.

Cases Illustrating Voluntary Payments.

—In *Knowles v. Boston*, 129 Mass. 551, the plaintiff, upon paying a tax, stated orally to the treasurer's clerk that the amount of the tax was paid under protest, and that he wished the clerk to make a note of it. The clerk, acting under instructions from the treasurer to make a note of all protests, written or oral, wrote upon the receipt that the tax was paid under protest, and also made a memorandum to that effect upon the treasurer's books. But it was held that this did not constitute "a protest in writing" within Mass. Gen. Stat. ch. 12, § 56.

So in *Raisler v. Athens*, 66 Ala. 194, a tax-payer paid a tax which he considered illegal, before any demand by the collector or any threat or step on his part indicating an intention to levy, and such payment was held to be voluntary, though accompanied with a protest and notice of an intention to sue, and the money could not be recovered.

In *Americus Bank v. Americus*, 68 Ga. 119, it was held that one cannot recover back the amount of a tax paid voluntarily, though under protest. There must have been compulsion, either in a threatened seizure or arrest. See also *Lester v. Baltimore*, 29 Md. 415; *Cook v. Boston*, 9 Allen, 393; *Fellows v. School District*, 39 Me. 559; *Phillips v. Jefferson Co.*, 5 Kas. 412; *Ligonier v. Ackerman*, 46 Ind. 552; s. c., 15 Am. Rep. 323; *Detroit v. Martin*, 34 Mich. 170; *Waubunsee Co. v. Walker*, 8 Kan. 431. But see *Kan. Pac. R. v. Comm. of Wyandotte Co.*, 16 Kan. 587; *Meek v. McClure*, 49 Cal. 623; *Drake v. Shurtliff*, 24 Hun (N. Y.), 422; *Shane v. St. Paul*, 16 Minn. 543; *Savannah v. Feeley*, 66 Ga. 31; *Raisler v. Athens*, 66 Ala. 194; *Galveston City Co. v. Galveston*, 56 Tex. 486; *San Francisco, etc., R. v. Dinwiddie*, 8 Sawy. C. Ct. 312; *Americus Bank v. Americus*, 68 Ga. 119; s. c., 45 Am. Rep. 476.

When Payment is Held to be Involuntary.—The principle applied to this line of cases is thus stated by Shaw, C. J., in *Preston v. Boston*, 12 Pick. (Mass.) 14: "When a party not liable to taxation is called upon peremptorily to say upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily, and, by showing that he is not liable, recover it back as money had and received." "This, we think," says Waite, C. J., in *Union Pac. R. v. Dodge Co.*, 98 U. S. 541, "is the true rule."

Cases Illustrating Involuntary Payments.

—In *Vicksburg v. Butler*, 56 Miss. 72, it was held that payment of a tax under a city collector's threat to shut up the payer's shop is not voluntary, and the tax may be recovered back from the collector on timely notice.

Payment under protest of an illegal tax, on demand by the sheriff to prevent levy and sale, is not voluntary, although there was no present threat of levy. *Parcher v. Marathon Co.*, 52 Wis. 388; s. c., 38 Am. Rep. 745; *Howard v. Augusta*, 74 Me. 79.

Where the tax-payer placed the amount of the tax claimed against him in a pack-

20. Protest.—Unless required by statute, or the payment is made to an agent or subordinate officer, and the action is against him, a protest is not essential.¹

age upon his counter, before the collector, forbade his taking it, and notified him that his warrant was defective, and that he would be held responsible for the taking, and the collector did take the package, such payment was not voluntary. *Bellinger v. Gray*, 51 N. Y. 610. See also *Preston v. Boston*, 12 Pick. (Mass.) 7; *Boston Glass Co. v. Boston*, 4 Metc. (Mass.) 181; *Grim v. School Dist.*, 57 Pa. St. 434; *Henry v. Chester*, 15 Vt. 460; *Babcock v. Granville*, 44 Vt. 326; *Allen v. Burlington*, 45 Vt. 202; *Fellows v. School Dist.*, 39 Me. 559; *Gachet v. McColl*, 50 Ala. 307; *Jersey City v. Ricker*, 9 Vroom (N. J.), 225; *Robinson v. Burlington*, 50 Iowa, 240; *Galveston Gas Co. v. Galveston Co.*, 54 Texas, 287; *Harrison v. Milwaukee*, 49 Wis. 247; *Loring v. St. Louis*, 10 Mo. App. 414; *Hward v. Augusta*, 74 Me. 97; *Borland v. Boston*, 132 Mass. 89; *Hardesty v. Fleming*, 57 Tex. 395; *Indianapolis v. McAvoy*, 86 Ind. 587; *Dickey v. Polk Co.*, 58 Iowa, 287; *Maguire v. State Savings Ass.*, 62 Mo. 344.

Cases Bearing More or Less Directly Upon the General Subject.—See, generally, *Union Ry. & Transit Co. v. Skinner*, 9 Mo. App. 189; *Scott v. Chickasaw Co.*, 53 Iowa, 47; *Brownlee v. Marion Co.*, 53 Iowa, 487; *Shane v. St. Paul*, 26 Minn. 543; *Hick v. Westport*, 130 Mass. 478; *Champaign Co. v. Reed*, 100 Ill. 304; *Lyons v. Cook*, 9 Ill. App. 543; *Cerbat Mining Co. v. State*, 29 Hun (N. Y.), 81; *Dickey v. Polk Co.*, 58 Iowa, 287; *Sears v. Marshall Co.*, 59 Iowa, 603.

1. *Peyser v. Mayor*, 70 N. Y. 495; s. c., 26 Am. Rep. 624; *Flower v. Lance*, 59 N. Y. 603; *Fleetwood v. New York*, 2 Sandf. (N. Y.) 475; *Amer. S. Co. v. Young*, 89 Pa. St. 186; *Atwell v. Zeluff*, 26 Mich. 118; *Robinson v. Burlington*, 50 Iowa, 240; *Van Buren v. Downing*, 41 Wis. 122; *Meek v. McClure*, 49 Cal. 624; *Latterade v. Kaiser*, 15 La. Ann. 296; *U. S. v. Clement*, *Crabbe* (U. S.), 499; *Schlesinger v. U. S.*, 1 Ct. of Cl. 16.

A payment made under protest does not become involuntary, or under duress, by reason of such protest. *Fleetwood v. City of N. Y.*, 2 Sandf. (N. Y.) 475; *Flower v. Lance*, 59 N. Y. 603; *Trinity Church v. Mayor*, 10 How. Pr. (N. Y.) 138; *Forrest v. Mayor*, 13 Abb. Pr. 350; *Union Ins. Co. v. Allegheny*, 101 Pa. St. 250; *Marietta v. Slocumb*, 6 Ohio St. 471; *Forbes v. Appleton*, 5 Cush. (Mass.)

115; *Benson v. Monroe*, 7 Cush. (Mass.) 125; *Cook v. Boston*, 9 Allen (Mass.), 393; *Emmons v. Scudder*, 115 Mass. 367; *Lester v. Mayor of Baltimore*, 29 Md. 415; *Awalt v. Eutaw Building Association*, 34 Md. 435; *Mayor, etc., v. Lefferman*, 4 Gill (Md.), 425; *Patterson v. Cox*, 25 Ind. 261; *Detroit v. Martin*, 34 Mich. 170; *McMillan v. Richards*, 9 Cal. 365; *Bucknoll v. Story*, 46 Cal. 589; *Phillips v. Jefferson Co.*, 5 Kan. 412; *Kansas Pacific R. W. Co. v. Wyandotte*, 16 Kan. 587; *Ladd v. Souther C.P.Co.*, 53 Tex. 172.

Where the payment is made to an agent, or officer authorized to collect the money, a protest or notice of an intention to reclaim the money should be given. *Van Buren v. Downing*, 41 Wis. 122; *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179; *Erskine v. Van Arsdale*, 15 Wall. 75. See *McCrickar v. Pittsburgh*, 88 Pa. St. 133; *Jackson v. Atlanta*, 61 Ga. 228; *Hall v. U. S.*, 9 Ct. of Cl. 270. See AGENCY, Vol. I. p. 405.

Where payment is made without protest, no interest can be claimed until after demand or suit. *Atwell v. Zeluff*, 26 Mich. 118; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181.

A person paying a tax stated orally to the clerk of the treasurer of a city that he paid it under protest, and wished the clerk to make a note of it. The clerk, acting under instructions from the treasurer to make a note of all protests, written or oral, wrote upon the receipt given for the tax that it was paid under protest, and made a memorandum to that effect on the books of the treasurer. *Held*, that there was not "a protest in writing" by the person paying, within the Gen. Sts. c. 12, § 56. *Knowles v. Boston*, 129 Mass. 551.

In *Fleetwood v. New York*, 2 Sandf. (N. Y.) 475, the court said: "When a man pays under duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right enforced by the adverse party. But where there is no legal compulsion, a party yielding to the assertion of an adverse claim cannot detract from the force of his concession by saying 'I object' or 'I protest' at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim."

21. Ratification.—Where a contract is sought to be avoided as procured under duress, the party wronged must proceed promptly. If he remains silent, keeps the property received, or recognizes the contract by making payments thereon, he will be held to have waived the duress.¹

In *Heiserman v. Burlington, etc.*, R. Co., 63 Iowa, 732; s. c., 16 Am. & Eng. R. R. Cas. 46, the court said: "The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements. For another reason they are not required: Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names or where to find them. Their places of business are usually in cities, distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest when they would be unavailing and vain. The doctrines we have expressed are supported by the following authorities: *Chicago, etc., R. Co. v. Coal Co.*, 79 Ill. 121; *Mobile, etc., R. Co. v. Steiner*, 61 Ala. 550; *Parker v. Great Western R. Co.*, 7 Man. & Gr. 253; *Harmony v. Birmingham*, 12 N. Y. 99; *Chandler v. Sanger*, 114 Mass. 364; *Stephan v. Daniels*, 27 Ohio St. 527; *Robinson v. Ezzell*, 72 N. Car. 231; *Carew v. Rutherford*, 106 Mass. 1; *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312; *Philanthropic Building Ass. v. McKnight*, 35 Pa. St. 470; *Wood v. Lake*, 13 Wis. 84; *Wheaton v. Hibbard*, 20 Johns. (N. Y.) 290; *Thomas v. Shoemaker*, 6 W. & S. (Pa.) 173; *Palmer v. Lord*, 6 Johns. Ch. (N. Y.) 95; *State Bank v. Ensminger*, 7 Blackf. (Ind.) 105."

1. *Lyon v. Waldo*, 36 Mich. 345; *Schultz v. Culbertson*, 46 Wis. 313; *Baldwin v. Murphy*, 82 Ill. 485; *Davis v. Fox*, 59 Mo. 125; *Doolittle v. McCullough*, 7 Ohio St. 299; *Schee v. McQuilkin*, 59 Ind. 269; *Evans v. Montgomery*, 50 Iowa, 325; *Hampstead v. Plaistow*,

49 N. H. 84; *Eddy v. Herrin*, 17 Me. 338; *Fellows v. School Dist.*, 39 Me. 559; *Cunningham v. Boston*, 15 Gray (Mass.), 468; *Hunt v. Hardwick*, 68 Ga. 100; *Bazemore v. Freeman*, 58 Ga. 276; *Murphy v. Paynter*, 1 Dill. (U. S.) 333. *Compare Ormes v. Beadel*, 2 De G. F. & J. 333; *Heckman v. Swartz*, 50 Wis. 267.

A contract made under duress is not, strictly speaking, void, but only voidable; because it may be ratified and affirmed by the party upon whom the duress was practised. *Parson's Contracts* (7th Ed.), 446.

If a person has been induced by duress to settle a groundless suit against him, by indorsing a sum of money upon a note which he holds against the plaintiff therein, and he has taken a discharge of the suit, it is not necessary for him to give notice or to return the discharge in order to entitle himself to avoid his contract. *Foss v. Hildreth*, 10 Allen (Mass.), 76.

By duress of imprisonment on a criminal charge, with threats of future prosecution if a certain sum of money be not paid him, and promise to dismiss the prosecution on such payment being made, A induces B to procure for him negotiable promissory notes for said sum from X, a friend of B, and then causes the prosecution to be dismissed, and B discharged. B thereupon gives X his (B's) own notes secured by mortgage for the same amount, and X pays his notes to A when due. B is not guilty of said offence, and the warrant against him fails to charge him with any offence; the warrant on which he was arrested is void on its face; and both complaint and warrant are colorable only. *Held*, if B, after his release from duress, might by suit have restrained payment of the money by X to A, and rescinded the whole contract, yet his failure to do so is no defence to his action against A for the amount. *Heckman v. Swartz*, 50 Wis. 267.

The court said: "It is immaterial that X paid the money he had assumed to pay, after the duress had ceased. The transaction was finished and complete, so far as the plaintiff was concerned, when the defendant took the notes in full payment of the sum so demanded, while the plaintiff was under duress,

22. Crimes.—An act which, if done willingly, would make a person a principal, or an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because, during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm, if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.¹

and in consideration of his discharge from such arrest and imprisonment. The plaintiff did no act, and by the arrangement was required to do none, afterwards, in respect to such payment, by which he can properly be said to have paid or caused the payment of the money at any other time. The plaintiff may have been negligent to his own cost and expense in not enjoining the payment of the money by X to the defendant, and in not seeking to rescind the whole contract; but the defendant cannot take advantage of such laches."

Delays.—Where a party relies upon duress in equity as a ground for avoiding his security, he is bound to move promptly, and must not sleep on his rights. Where there has been a delay on the part of the party pleading duress, clear and conclusive evidence will be required to explain the failure to proceed. *Lyon v. Waldo*, 36 Mich. 345; *Davis v. Fox*, 59 Mo. 125; *Hunt v. Hardwick*, 68 Ga. 100. So a bill to set aside a deed for duress alleged to have been practised twelve years before was dismissed, the complainant being without sufficient excuse for the delay, "and the defendant having made costly and permanent improvements upon the property. *Murphy v. Paynter*, 1 Dill. (U. S.) 333. So where the complainant for two years recognized a contract as valid. *Lyon v. Waldo*, 36 Mich. 345. See *Doolittle v. McCullough*, 7 Ohio St. 299; *Evans v. Montgomery*, 50 Iowa, 325; *Marston v. Simpson*, 54 Cal. 189; *Grymes v. Sanders*, 93 U. S. 55.

1. Illustrations.—A, B, and C, engaged in a rebellion, forced D to join the rebel army and to do duty as a soldier by threats of death continuing during the whole of his service. D's act is not a crime. A mob employed in breaking threshing-machines force several persons to go with them, and force each person to give each threshing-machine a blow with a sledge-hammer; A, one of the persons so forced, runs away as soon as he can. A's act is not a crime. *Stephen's*

Dig. Cr. L. art. 31; R. v. McGrowther, 18 St. Tr. 394; *R. v. Crutchley*, 5 C. & P. 133. See *Wharton's Cr. L.* (9th Ed.) § 94; *Bishop's Cr. L.* (7th Ed.) § 346 *et seq.*

A boy twelve years old who is coerced is not an accomplice. *Beal v. State*, 72 Ga. 200; *People v. Miller*, 66 Cal. 468.

Plea of Guilty Made Under Duress.—Where the accused is forced, through fear of mob violence, to enter a plea of guilty, he has a right to relief from the judgment entered on such plea. In April, 1878, Josephine Sanders, the wife of the appellant, was slain with a pistol-shot, at the time she was in the room alone with her husband, and he did not and could not give any account of her death; he was then and had been for many years addicted to the use of alcoholic liquor and opium to such an extent that he had partially become insane; he was arrested shortly after the death of his wife. His case came on for trial; his counsel and many witnesses of unquestionable veracity testify that at the time of his trial he was insane. The homicide had aroused an intense feeling in the vicinity of the county-seat, where the killing was done, and the case put to trial; threats were made of lynching by a mob; counsel prepared an affidavit for delay, but feared to present it lest the mob should seize and hang the accused; the sheriff of the adjoining county came to the county-seat and warned the sheriff of imminent danger from an armed mob. A jury had been impanelled and a plea of not guilty entered, but so great was the threatened danger, that counsel, to save, as they believed, their client's life, withdrew the plea of not guilty, entered a plea of guilty, and a life sentence was immediately given, and the accused was at once conveyed to the State prison. The court, in a very elaborate and able opinion, held that the plea of guilty was procured by duress and vacated the judgment, and permitted the appellant to withdraw the plea of guilty, and have a new trial. *Sanders v. State*, 85 Ind. 318; s. c., 38 Am. Rep. 29.

23. Actions and Defences.—Duress at common law, when no statute is violated, is a personal defence that can only be set up by the person subjected to the duress.¹

Superior Orders to Employ Force.—In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior; but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders.

Illustrations.—A, a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him for that purpose. Boats persisting after repeated warnings in approaching the ship, A fires at one and kills B. This is murder in A, although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship (though desirable for the maintenance of discipline). A, the driver of an engine, orders B, the stoker (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C is killed. B is justified by A's order. (Submitted.) A, a civil magistrate, directs B, a military officer, to order his men to fire into a mob. B gives the order. It is obeyed, and C, a common soldier, shoots D dead. The question whether A, B, and C respectively committed any offence, depends on the question whether each of them respectively had reasonable grounds to believe, and did in fact believe, in good faith, that what they did was necessary to suppress a dangerous riot. A's direction to B, and B's order to C, would not necessarily justify B or C in what they did, but would be facts relevant to the question whether they believed, upon reasonable grounds, as aforesaid. Stephen's Dig. Cr. L. art. 202. See *Harmony v. Mitchell*, 1 Blatchf. (U. S.) 549; s. c., 13 How. (U. S.) 115; *U. S. v. Jones*, 3 Wash. (U. S.) 209; *Com. v. Blodgett*, 12 Met. (Mass.) 56; *State v. Sparks*, 27 Tex. 627; *Weatherspoon v. Woody*, 5 Coldw. (Tenn.) 149; *R. v. Thomas*, 4 M. & S. 441; *R. v. Trainer*, 4 F. & F. 105.

Master and Servant.—The command of

a superior to an inferior to commit a tort excuses the latter in no case but that of a wife. Such inferior, as servant, is bound to perform only the lawful commands of his superior. 2 Dane's Abr. 316; *Com. v. Hadley*, 11 Met. (Mass.) 66; *Com. v. Drew*, 3 Cush. (Mass.) 279; *Curtis v. Knox*, 2 Denio (N. Y.), 341; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *State v. Bugbee*, 22 Vt. 32; *State v. Bryant*, 14 Mo. 340; *Schmidt v. State*, 14 Mo. 137; *Hays v. State*, 13 Mo. 246; *State v. Bell*, 5 Port. (Ala.) 365; *Kliffield v. State*, 4 How. (Miss.) 304; *State v. Sutton*, 10 R. I. 159; *State v. Mathis*, 1 Hill (S. Car.), 37; *Com. v. Gillespie*, 7 S. & R. (Pa.) 469.

1. *Hazard v. Griswold*, 21 Fed. Rep. 178; *Lewis v. Bannister*, 16 Gray (Mass.), 500; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Plummer v. People*, 16 Ill. 358; *Spaulding v. Crawford*, 27 Tex. 155; *Jones v. Taylor*, 5 Litt. (Ky.) 147; *McClintick v. Cummins*, 3 McLean (U. S.), 158; *Martin v. Broadbudd*, 1 Freem. 35; *Mantel v. Gibbs*, 1 Brownlow, 64; *Wayne v. Sands*, 1 Brownlow, 351; *Huscombe v. Standing*, Cro. Jac. 187; s. c., *Ewell's Lead. Cas.* 787. See as to defence of duress by sureties on statutory bonds. *Governor v. Williams*, *Dudley* (Ga.), 244; *State v. Brantley*, 27 Ala. 44; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Jones v. Turner*, 5 Litt. (Ky.) 147; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256.

If a man executes a deed by duress, he cannot plead *non est factum*, for it is his deed, though he may void it by special pleading judgment *is actio*. Bacon's Abridg. tit. Duress (D).

In *Fairbanks v. Snow*, 13 N. East. Rep. (Mass.) 596, Holmes, J., said: "A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. *Master v. Miller*, 4 Term. R. 320, 338; *Masters v. Ibberson*, 8 C. B. 100; *Sturge v. Starr*, 2 Mylne & K. 195; *Pulsford v. Richards*, 17 Beav. 87, 95. The authorities with regard to duress, however, are not quite so clear. It is said in *Thoroughgood's Case*, 5 Coke, 241, that, 'if a stranger menace A to make a deed to B, A shall avoid the deed which he made by such threats, as well as if B himself had threatened him,

as it is adjudged, 45, E. 3, 6a.' *Shep. Touch.* 61, is to like effect. See also *Fowler v. Butterly*, 78 N. Y. 68. But in 43 Year Book, E. 3, 6 pl. 15, which we suppose to be the case referred to, it was alleged that the imprisonment was by the procurement of the plaintiff; and we know of no distinct adjudication of binding authority that threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them. In *Keilway*, 154a, pl. 3, 'the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment (on the part) of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress.' In *Taylor v. Jaques*, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note 'under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested.' See also *Green v. Scranage*, 19 Iowa, 461, 466; *Talley v. Robinson's Assignee*, 22 Grat. 888; *Bazemore v. Freeman*, 58 Ga. 276. *Loomis v. Ruck*, 56 N. Y. 462, was decided on the ground that, if the non-negotiable note in suit was in the first instance a contract between the plaintiff and the defendant, it was obtained through the agency of the defendant's husband in such a way as to make the plaintiff answerable for his conduct. Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, etc., by the party's own hand, and acts done by letter of attorney, regarding the latter as wholly void. 2 Co. Inst. 483; *Finch*, Law, 102. It has been held in *New York* and some other States, as well as in *England*, that a power of attorney given by an infant is void. *Fonda v. Van Horne*, 15 Wend. 631; *Knox v. Flack*, 22 Pa. St. 337; *Saunderson v. Marr*, 1 H. Bl. 75. And if this analogy were followed, the contracts in all the *New York* cases which we have cited would be void by the law of that State for want of a personal delivery by the defendant to the plaintiff."

A bill of sale cannot be impeached by the seller's creditors, nor by an officer attaching on their behalf, on the ground of duress. *Lewis v. Bannister*, 16 Gray (Mass.), 500.

The doctrine that where a debtor himself, or a near relative, out of compassion for him, pays money exacted by a creditor as a condition of his signing a composition, he may be regarded as having paid under duress, and is not equally

criminal with the creditor, and so that he may recover it back, if sound (as to which *quare*), cannot be invoked, in favor of one remotely related by marriage to the debtor; it can only be asserted in favor of the debtor himself, and the wife, husband, or near relative of the blood of the debtor. Plaintiff, who was a brother-in-law of N., of the firm of N. & Co., to induce the defendants, who were creditors of that firm, to unite with the other creditors in a composition of its debts, secretly agreed to and did give them his promissory note for a portion of their debt beyond the amount to be paid by the composition agreement. Defendants transferred the note before due to a *bona fide* holder, and plaintiff was compelled to pay. *Held*, that the agreement was a fraud upon the other creditors; that it was not divested of its fraudulent character by the fact that it was made, not by the debtor, but by a third person; and that an action was not maintainable to recover back the amount so paid. *Solinger v. Earle*, 82 N. Y. 393.

Where one person suffers damage by reason of duress inflicted upon another, the person receiving the damage may recover therefor. *Koehler v. Wilson*, 40 Iowa, 183. See *Cummings v. Ince*, 11 Q. B. 112.

Agents.—*Prima facie*, the right of action to recover payments is in the agent who paid for the license, and not in the person who may have employed him; and the duress or menace which made the payment involuntary should apparently be of the agent himself. *Noyes v. State*, 46 Wis. 250.

The person against whom redress is sought must be a party to the act of duress. *Talley v. Robinson*, 22 Gratt. (Va.) 888. See *Green v. Scranage*, 19 Iowa, 461; *Jones v. Rogers*, 36 Ga. 157; *Hogan v. Moore*, 48 Ga. 156; *Lester v. Union Mfg. Co.*, 1 Hun (N. Y.), 288; *Lane v. Blizzard*, 70 Ind. 23; *Humphrey v. Humphrey*, 79 N. Car. 396; *Clarke v. Peace*, 41 N. H. 414; *Deputy v. Stapelford*, 19 Cal. 302; *Rogers v. Adams*, 66 Ala. 600. Compare *Mann v. Lewis*, 3 W. Va. 215; *Bogle v. Hammons*, 2 Heisk. (Tenn.) 136; *Weatherspoon v. Woodey*, 5 Coldw. (Tenn.) 1499; *Olivari v. Mengler*, 39 Tex. 76.

A note of married woman obtained by duress of husband is void in the hands of an innocent holder. *Loomis v. Ruck*, 56 N. Y. 462.

A threatened B, who was a debtor of C, with criminal prosecution. A had no authority from C to act for him. *Held*, that a note given by B for the debt due

C was not obtained by duress. *Cohoes v. Cropsey*, 55 N. Y. 685.

Equity.—Courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition, in such cases they will set the contracts aside. Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some oppression or fraudulent advantage or imposition attending upon it. *Story's Eq. Juris.* (13th Ed.) 250; *McDonald v. Neilson*, 2 Cow. (N. Y.) 139.

Where a person has been induced by threats of a groundless prosecution, to execute a note and mortgage, a court of chancery will grant relief and restrain their collection. *James v. Roberts*, 18 Ohio, 548; *Thurman v. Burt*, 53 Ill. 129.

The prosecutors in a trade-mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months. *Held*, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter. Where an offence is of such a nature that the offender may be proceeded against either civilly or criminally, there is nothing illegal or improper in a compromise of the criminal proceedings taken against him. *Fisher v. Apollinaris Co.*, 10 Ch. 297.

Exceptions to the Rule—Parent and Child.—A father may avoid his contract for duress to his son, and conversely. *Bacon's Abr.*, tit. Duress (b); *Osborn v. Robbins*, 36 N. Y. 365; *Southern Ex. Co. v. Duffey*, 48 Ga. 358; *Plummer v. People*, 16 Ill. 360; *McClintock v. Cummins*, 3 McLean (U. S.). 158; *Bayley v. Clare*, 2 Brownlow, 276; *Wayne v. Sands*, *Freem.* 351. *Compare* *Simmons v. Barefoot*, 2 Hayw. (N. Car.) 402.

In a note to *Bayly v. Clare*, 2 Brownl. 275, 276, in the common bench, Michaelmas term, 7 Jac. 1, it is said that "the husband may avoid the deed that he hath sealed by the duress of imprisonment of his wife or son, but not of his servant." This is evidently the same case stated by *Sergeant Rolle* in his *Abridgment*, as follows: "A servant shall not avoid his

deed made by duress to his master. *M.* 7 Ja. B. *per* Coke. But a son shall avoid his deed by duress to his father. *M.* 7 Ja. B. *per* Coke. The husband shall avoid a deed by duress to his wife. *M.* 7 Ja. B. *per* Coke." 1 Rol. Ab. 687, pls. 4-6.

Lord Bacon, under the maxim, *Persona conjuncta æquiparatur interesse proprio*, wrote: "So if a man menace me, that he will imprison or hurt in body my father or my child except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to mine own person." *Bac. Max. reg.* 18.

The same law is explicitly laid down without question by the author of *Bacon's Abridgment*, and by *Mr. Dane* and by *Mr. Justice McLean*. *Bac. Ab. Duress*, B.; 5 *Dane Ab.* 166, 375; *McClintock v. Cummins*, 3 McLean (U. S.), 158.

In *Wayne v. Sands*, 1 *Freem.* 351, the point decided was that a plea that one Robinson was jointly bound with the defendant, and that Robinson entered into the contract by duress, was bad. The reporter attributes to *Wylde, J.*, the remark that, "if the duress be to a father or brother, and a son enter into bond, this is a duress to the son;" and to *Twisden, J.*, the remark that "a man shall in no case avoid his deed by a duress to another, let him be related how he will."

A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son. *Harris v. Carmody*, 131 *Mass.* 51; s. c., 41 *Am. Rep.* 188. See *Williams v. Bayley*, 14 L. T. Rep. (N. S.) 802; *Scear v. Cohen*, 45 L. T. Rep. (N. S.) 589; *Coffman v. Lookout Bank*, 5 *Lea* (Tenn.), 232; s. c., 40 *Am. Rep.* 31; *Schultz v. Culbertson*, 46 *Wis.* 313; s. c., 49 *Wis.* 122; *National Bank v. Kirk*, 90 *Pa. St.* 49; *Peed v. McKee*, 42 *Iowa*, 689; *Allison v. Hess*, 28 *Iowa*, 389; *Shoener v. Lessauer* (N. Y.), 13 *N. E. Rep.* 741. *Compare* *Fulton v. Hyde*, 34 *Pa. St.* 365; *Catlin v. Henton*, 9 *Wis.* 476.

When a son had been guilty of embezzlement, and his mother made a note and executed a mortgage to the employer from whom he had embezzled, and the court was satisfied that the mother's controlling motive was to protect her son from exposure and prosecution, *held*, that she was not a free agent, and that the note and mortgage should be annulled and cancelled. *Foley v. Greene*, 14 *R. I.* 618; s. c., 51 *Am. Rep.* 419. See *Schultz v. Culbertson*, 49 *Wis.* 122.

The fact that a woman is induced to act by representations that such action

is all that will save her son from State prison, or by threats on his part to commit suicide, does not, in a legal sense, constitute duress. *Metropolitan Life Ins. Co. v. Meeker*, 85 N. Y. 614. See *Wright v. Remington*, 41 N. J. L. 48.

Husband or Wife.—A husband may avoid his contract by reason of duress to his wife, and conversely. *Eadie v. Slimmon*, 26 N. Y. 9; *Plummer v. People*, 16 Ill. 36; *Brooks v. Berryhill*, 20 Ind. 97; *Green v. Scranage*, 19 Iowa, 461; *Motes v. Carter*, 73 Ala. 553; *Currie v. Kerr*, 11 Lea (Tenn.), 138; *Kocourek v. Marak*, 54 Tex. 201; s. c., 38 Am. Rep. 623; *Bagby v. Emberson*, 79 Mo. 139; *Mars-ton v. Brittenham*, 76 Ill. 611; *Tapley v. Tapley*, 10 Minn. 448; *Wamboole v. Foote*, 2 Dak. 1; *Central Bank v. Cope-land*, 18 Md. 305; *Little v. Dodge*, 32 Ark. 453; *Bayley v. Clare*, 2 Brownlow, 276. *Bacon's Abr.* tit. Duress (B).

S. went to the house of E., who had been his clerk, accompanied by an attorney and a person whom he represented to be an officer, and charged E. with having embezzled his money while in his employment. S. demanded, among other things, that Mrs. E. should assign to him a policy held by her on the life of her husband, threatening that if his demands were not complied with E. should be arrested at once and taken to prison. S. was imperious in his demands, and, with his associates, was at the house of E. several hours—in fact, nearly all night—insisting on compliance and threatening arrest. Mrs. E. became almost frantic with grief and terror, and finally assigned the policy. The action was brought to cancel the assignment, and it was cancelled. The ground of the judgment is thus stated: "The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism, and coercion, which overcame free agency, in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint." *Eadie v. Slimmon*, 26 N. Y. 9. Compare *Smith v. Rowley*, 66 Barb. (N. Y.) 502.

In suit on a promissory note made by defendant and her husband to plaintiff's order, defendant alleged that her signature thereto was obtained by duress and threats on her husband's part. *Held*, that a ruling that, if she signed the note under duress, it was immaterial whether plaintiff knew when he received it that it was so signed, was properly refused. *Fair-*

banks v. Snow (Mass.), 13 N. Eastn. Repr. 596.

A note and mortgage given by a wife for the amount of a debt due by her husband, in consideration of her release from arrest and imprisonment under a charge of selling goods covered by a lien without notice, and of a discontinuance of such criminal prosecution, are illegal, and in action brought by her, the note and mortgage were ordered to be cancelled and surrendered. *Williams v. Walker*, 18 S. Car. 577.

A mortgage executed by a wife upon her separate estate, to secure a debt owing by the husband, for money embezzled by him, is not executed under duress, although done to prevent his being convicted and sent to the penitentiary. *Mundy v. Whittemore*, 15 Neb. 647. See *McGrory v. Reilley*, 14 Phila. 111; *McCoy v. Green*, 83 Mo. 626.

A executed a mortgage to secure a debt of B, her husband, under the inducement of false charges of embezzlement against B and threats of criminal prosecution. *Held*, that the mortgage was executed under compulsion. *Singer Mfg Co. v. Rawson*, 50 Iowa, 634.

Where a woman's husband was illegally restrained in the office of an attorney, who represented to her that unless she executed a mortgage on her homestead her husband would be arrested on a charge of felony, and she executed the mortgage solely to avoid his arrest, *held*, that the mortgage was obtained under duress, and was void. *First Nat. Bank v. Bryan*, 62 Iowa, 42.

A mortgage executed by a wife from fear, excited by threats made to her by the mortgagee, of a criminal prosecution against her husband is not invalid if the criminal accusation is well founded, or upon reasonable grounds believed to be so by the mortgagee. *Green v. Scranage*, 19 Iowa, 461. Compare *Gohegan v. Leach*, 24 Iowa, 509.

Where a husband threatened to commit suicide unless his wife signed his note as surety, *held*, that her signing was voluntary. *Wright v. Remington*, 41 N. J. L. 48. See *Metropolitan L. Ins. Co. v. Meeker*, 85 N. Y. 614.

A mortgage executed by a wife, on her separate property, to secure the separate debt of her husband, under threat by him to abandon her if she do not, may be avoided by her on the ground of duress, if the mortgagee be aware of such threat at the time of the execution of the mortgage. *Line v. Blizzard*, 70 Ind. 23; *Rogers v. Adams*, 66 Ala. 600.

In an action to foreclose a mortgage

against a husband and wife it is not a good plea of duress by the wife that she was induced to sign the mortgage by the threats of the mortgagee to pursue legal remedies against the husband (to collect the debt secured by the mortgage), and to sell them out of house and home. *Buck v. Axt*, 85 Ind. 512.

D., being a defaulter as county treasurer in the sum of \$6000, his sureties, to indemnify themselves against their liability, induced him to execute his notes for that amount, and have the same secured by a mortgage of \$12,000 worth of real property of his wife, including her homestead worth \$2000. The wife was reluctant to mortgage the homestead, though willing to mortgage the other property; but, after the husband had continued his importunities through a period of several days, she signed the mortgage of the whole. The husband stated correctly to her his situation, including his liability to a criminal prosecution, and also stated that "before he would go to jail, he would shoot himself through the brains," and urged that there was no way by which he could be relieved from his difficulties except by her executing the instrument. Afterwards a justice of the peace went to her house with an attesting witness, and presented the mortgage to her; and she took and examined it, admitted her signature thereto, and said that she knew all about the mortgage, and it was all right; and the justice thereupon took it, and retired, with the attesting witness; and he afterwards delivered the instrument, duly attested and with the usual certificate of acknowledgment written thereon, to D., who delivered it to the mortgagees. Soon after the justice and witness left the presence of Mrs. D., they were induced by other persons to return to the house, and she then, in their presence, again acknowledged her signature, but said that she was "forced to sign;" but it does not appear that the mortgage was then produced, or that Mrs. D. recalled any previous statement made by her to the justice. Neither of the mortgagees knew, until this action to foreclose the mortgage was commenced, nearly two years later, that Mrs. D. had hesitated about executing it. It does not appear that either of them ever threatened D. with a criminal prosecution, or that D. represented to his wife that such a prosecution was *threatened* by any person. *Held*, that the mortgage is valid. *Lefebvre v. Dutruit*, 51 Wis. 326; s. c., 37 Am. Rep. 833.

A charge to the jury, "that to constitute duress which would avoid the deed,

it is not necessary that the threats be of physical injury alone; but if the plaintiff, the wife of T., was induced to execute the deed by the threats of T., her husband, that he would separate from her as her husband and not support her, it is duress, and would avoid the deed," *held* correct. *Tapley v. Tapley*, 10 Minn. 448. See *Kocourek v. Marak*, 54 Tex. 201; s. c., 38 Am. Rep. 623; *Line v. Blizzard*, 70 Ind. 23.

A married woman, to save property owned by her from seizure on an execution against her husband, paid money to the marshal. *Held*, that the payment was not voluntary. *Coady v. Curry*, 8 Daly (N. Y.), 58.

A suit was brought to foreclose a mortgage made by husband and wife of land, a part of which belonged to him and a part to her. She answered, setting up that he obtained her signature by physical violence, and that he and the officer who took her acknowledgment, both of whom died before her answer was filed, represented to her that the mortgage did not cover her land. *Held*, that her testimony is not sufficient to impeach the mortgage. *Insurance Company v. Nelson*, 103 U. S. 544.

A was arrested upon a charge of embezzlement in Ohio and brought to Indiana. He was in the custody of the Ohio officer. The wife of A was induced by his importunities, and the threats of the officer to take him back to Ohio, to execute a mortgage upon her estate to secure the payment of the money alleged to be embezzled. *Held*, that the mortgage was void. *Brooks v. Berryhill*, 20 Ind. 97.

A married woman filed her bill to set aside her conveyance, upon the alleged ground that it was obtained from her by duress and undue influence. Her husband was charged by the defendant with embezzlement from him, to a large amount, and she claimed that she executed the deed in question, under an understanding and implied agreement that in case she executed the deed in question, the defendant would refrain from prosecuting her husband for the embezzlement. The husband's guilt was clear, and the deed was executed upon his request. The court said: "If her story is correct, the deed would seem to be void, on the ground that it was executed in consideration of compounding a criminal offence, and was contrary to the statute. But though the deed may be void for such reason, equity does not relieve the party who executed it upon or for such immoral and illegal consideration and pur-

pose." *Smith v. Rowley*, 66 Barb. (N. Y.) 503; *Compton v. Bunker Hill Bank*, 96 Ill. 301.

When the creditors of the husband induce the wife to join with her husband in giving a mortgage on her real estate to secure his debt, by telling her that her husband has been guilty of the crime of embezzlement, and can be imprisoned for it, and that another who was interested had just said he would see him in jail before he would do anything to relieve him, and it appears that such statements created fear or just apprehension, the reasonable conclusion is that the free agency of the wife was overcome, that the execution of the mortgage was obtained by undue pressure, and that it cannot be enforced against the wife's real estate. *Lomerson v. Johnson* (N. J.), 10 Cent. Rep. 868.

A, having been arrested at the instance of B on the charge of having committed the offence of larceny by a bailee, was brought up before a magistrate and remanded. A's wife then induced B to withdraw from the prosecution on A's wife agreeing to charge her separate real estate with the amount taken. The title-deeds of the property were deposited at a bank in the joint names of the solicitors of the parties. A being again brought before the magistrates, the latter, having been informed of the terms, allowed the prosecution to be withdrawn. A's wife afterwards refused to perform her agreement. B brought an action to enforce the charge, and A's wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her. *Held*, that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was entitled to the declaration for delivery of the deeds. Larceny by a bailee is a felony, but if it had been a misdemeanor the agreement to charge in consideration of the withdrawal of the prosecution would have been void. *Whitmore v. Farley*, 45 L. T. N. S. 99; 29 W. R. 825; 14 Cox C. C. 617.

Transactions with a wife, looking to the relief of a diseased husband, who is harassed in mind and in dread of criminal prosecution, from which she suffers detriment, without deriving corresponding benefit, in which she parts with property without receiving an adequate valuable consideration, the parties dealing with her having knowledge of her distressed condition, will be investigated vigilantly by courts of equity, and if there be any trace of undue influence from any source, or advantage taken of

her condition, it will undo them. Fraud need not be shown in such case, but if the wife acted hastily, without time and opportunity for deliberation, in the absence of disinterested advice, and without opportunity to obtain it, or if she was acting under the influence of the fear of punishment of her husband, or of extreme terror, or of apprehension of his impending death, and her motive was his relief, a court of equity must intervene and restore her to the condition in which she was when induced into the transaction. When it is shown that there was no haste, no want of deliberation on the part of the wife, no threat of prosecuting her husband criminally, but that she had the advice of friends (although she knew her husband's creditors were acting with the advice of counsel), and that her avowed purpose in transferring a policy of insurance on the life of her husband in payment of his debts was to save the good name of her husband and children, the law cannot condemn the fair and intelligent exercise of such a motive, and the transfer will not be disturbed. *Holt v. Agnew*, 67 Ala. 360.

A wife having been confined in a lunatic asylum, in consequence of mental disease induced by intoxication, before her discharge therefrom, and after her recovery, her husband told her that unless she consented to live away from him on an allowance of 12s. a week, she should be sent to another asylum, and she consented to the proposed arrangement. *Held*, no duress; and that so long as she remained away and the allowance was paid, she had no authority to bind him for necessities supplied to her. *Biffin v. Bignell*, 7 H. & N. 877.

Mayor and Commonalty.—A mayor and commonalty may avoid a deed by reason of a duress of the mayor. *Bagley v. Clare*, 2 Brownl. 276; 9 Vin. Abr. 320.

Practice—Assumpsit.—*Assumpsit* for money had and received lies for money received tortiously or by duress under color of office, the law implying a contract in such cases. *Kitchin v. Campbell*, 3 Wils. 304; *Dana v. Kemble*, 17 Pick. (Mass.) 545; *Dumond v. Carpenter*, 3 Johns. (N. Y.) 183; *Sturtevant v. Waterbury*, 2 Hall (N. Y.), 453; *Ripley v. Geltson*, 9 Johns. (N. Y.) 201; *Metropolis Bank v. Jersey City Bank*, 19 Fed. Rep. 301. And see *Carew v. Rutherford*, 106 Mass. 1; s. c., 8 Am. Rep. 287; *Sartwell v. Horton*, 28 Vt. 370; *Schultz v. Culbertson*, 46 Wis. 313; s. c., 49 Wis. 122; *Mobile, etc., R. Co. v. Steiner*, 61 Ala. 559; *Heckman v. Swartz*, 50 Wis. 267; *Lehigh Co. v. Brown*, 100 Pa. St.

(c) *Principal and Surety*.—Duress to the principal will not avoid the obligation of a surety, unless the surety at the time of executing the obligation is ignorant of the circumstances which render it voidable by the principal.¹

338; *Swift Co. v. U. S.*, 111 U. S. 22; *Westlake & Button v. St. Louis*, 77 Mo. 47. Compare *Hines v. Hamilton Co. Commrs.*, 93 Ind. 266; *Jones v. Inness*, 32 Kan. 177.

But not where it is the same amount one should have paid voluntarily. *McVane v. Williams*, 50 Conn. 348.

And not for merely gratuitous donations. *Wills v. Wells*, 8 Taunt. 264; *Crockford v. Winter*, 1 Camp. 124.

Nor where the amount to which plaintiff is entitled cannot be accurately determined in an action at law. *Douglass v. Skinner*, 44 Conn. 338; *Chaffee v. Franklin*, 11 R. I. 578. Compare *Pratt v. Bates*, 40 Mich. 37.

Where it is sought to recover back money paid under a claim of right, and the petition does not set forth facts which constitute legal duress, the facts will neither support an action for damages nor an action in *assumpsit* for money had and received, and the petition is demurrable as not setting forth constitutive facts. *Buchanan v. Sahlein*, 9 Mo. App. 552.

Miscellaneous Matters.—If a person has been induced by duress to settle a groundless suit against him, and he has taken a discharge of the suit, it is not necessary for him to give notice or to return the discharge, in order to entitle himself to avoid his contract. *Foss v. Hildreth*, 10 Allen (Mass.), 76.

Where it is claimed that a promise was obtained by duress, and it appears there was no arrest and no actual force used, but simply threats, the question as to duress is ordinarily one of fact, and may not be determined as one of law. It is not sufficient to establish duress to show that the threats were uttered; it must be shown that they constrained the will of the promisor, and so induced the promise. *Dunham v. Griswold*, 100 N. Y. 224.

Duress is not a defence to a note in the hands of a *bona fide* holder for valuable consideration paid before maturity. *Hogan v. Moore*, 48 Ga. 156; *Clarke v. Peace*, 41 N. H. 414. Compare *Loomis v. Ruck*, 56 N. Y. 462. Nor a deed. *Deputy v. Stapleford*, 19 Cal. 302. Nor a mortgage. *Rogers v. Adams*, 66 Ala. 600; *Lane v. Blizzard*, 70 Ind. 23. See *Green v. Scranage*, 19 Iowa, 461; *Talley v. Robinson*, 22 Gratt. (Va.) 888; *Moses v. Dode*, 58 Ala. 211.

In an action to impeach the deed of a married woman for duress, declarations made to her in the absence of the defendants are competent, when they go to show essential facts laid before her, which induced her to execute the deed. Where it is found by the jury that a mortgage executed by husband and wife, of the wife's property, was obtained by duress practised on the *feme*, it is error to cancel the instrument entirely, but it should still be left operative as to the husband's interest. *Ware v. Nesbit*, 94 N. Car. 664.

An answer in a suit to foreclose a mortgage, that the mortgage was executed under duress of the defendant's husband, is insufficient where it contains no averment connecting the mortgagee with the duress, or alleging knowledge on his part. *Gardner v. Case* (Ind.), 10 West. Rep. 800.

To use criminal process to enforce the payment of a civil claim is evidence of an improper purpose. *Taylor v. Jaques*, 106 Mass. 291; *Hackett v. King*, 6 Allen (Mass.), 58.

It is not sufficient to establish duress to show an imprisonment. It is necessary to show an unlawful imprisonment, or abuse of or oppression under lawful process or legal detention. *Heaps v. Dunham*, 95 Ill. 583; *Taylor v. Calhell*, 16 Ill. 93.

1. *Hazard v. Griswold*, 21 Fed. Rep. 178; *Griffith v. Sitgreaves*, 90 Pa. St. 161; *Harris v. Carmody*, 131 Mass. 51; *Bowman v. Hiller*, 130 Mass. 153; *Plummer v. People*, 16 Ill. 358; *Spaulding v. Crawford*, 27 Tex. 155; *McClintick v. Cummins*, 3 McLean (U. S.), 158. Compare *Osborn v. Robbins*, 36 N. Y. 365; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Ingersoll v. Roe*, 65 Barb. (N. Y.) 346; *Strong v. Grannis*, 26 Barb. (N. Y.) 122; *State v. Bruntley*, 27 Ala. 44; *Evans v. Huey*, 1 Bay (S. Car.), 13.

It is no defence to a promissory note made by A to B that it was given to release C from unlawful arrest. *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Bowman v. Hiller*, 130 Mass. 153. See *Hazard v. Griswold*, 21 Fed. Rep. 178; *Steinbaker v. Wilson*, 1 Leg. Gaz. Rep. (Pa.) 76.

The defence that a note was obtained from the principal by duress is available to the surety who united with him in its execution. *Osborn v. Robbins*, 36 N. Y. 365. See *Fisher v. Shattuck*, 17 Pick.

(Mass.) 253; *Evans v. Huey*, 2 Bay (S. Car.), 13; *State v. Brantley*, 27 Ala. 44; *Fay v. Oatley*, 6 Wis. 42.

Sureties upon a recognizance cannot plead the duress of their principal in discharge of their own liability. *Plummer v. People*, 16 Ill. 358; *Huggins v. People*, 39 Ill. 246; *Archer v. Com.*, 10 Gratt. (Va.) 627; *Toles v. Adees*, 84 N. Y. 222; *Oak v. Dustin*, 7 Atl. Rep. (Me.) 815. See *BAIL*, Vol. II., pp. 25, 32.

Where a sheriff illegally arrested defendant, and exacted a bond with sureties for his release, *held*, such bond was void as to all the parties for duress. *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256.

A joint obligor cannot take advantage of the fact that his co-obligor executed the bond while under duress. *Spaulding v. Crawford*, 27 Tex. 155.

A bond variant from that prescribed by law, extorted from the principal obligor and his sureties, under color of office, as the condition of his remaining in office, is void. *United States v. Tinney*, 5 Pet. (U. S.) 129. See also *Woolwich v. Forest*, 2 N. J. L. 118.

Duress of the maker of a promissory note is no defence as to an indorser, who signs the note voluntarily and upon a sufficient consideration. The defendant, Hiller, the financial secretary of the Marblehead Reform Club, took from the club the sum of \$123. Such sum was taken under circumstances that would reasonably justify the parties interested in the suspicion that it was taken fraudulently; Hiller was induced to make the note by threats of arrest and imprisonment; the other defendants, when they placed their names upon the note, were cognizant of the circumstances under which it was made. *Held*, the duress of the principal did not affect the free agency of the indorsers, and will not defeat the promise which they voluntarily made. *Bowman v. Hiller*, 130 Mass. 153; *Robinson v. Gould*, 11 Cush. (Mass.) 55.

A was a defaulter as town treasurer. One of the town officers visited B, who was the aunt of A, and induced her to sign a mortgage upon her property, by informing her that A would be liable to criminal prosecution and imprisonment. *Held*, that the contract of suretyship was void. *Sharon v. Gager*, 46 Conn. 189.

Where a promissory note was obtained by duress of the maker, and indorsed in good faith, without any knowledge of the duress on the part of the indorser, in a suit by the holder, who was guilty of the duress, against the indorser, the latter may set up the duress of the maker as a

defence to the action. *Griffith v. Sitgreaves*, 90 Pa. St. 161. In this case Paxton, J., said: "We are next to consider the question whether the defendant, who is sued as indorser of the notes, can take advantage of the duress practised upon the maker. In *Huscombe v. Standing*, Cro. Jac. 187, the defendant having been sued on a bond, on which he was surety for one Street, entered a plea that the bond was obtained by duress of his principal. The plaintiff demurred to this plea, and, without argument, it was held that 'it was not any plea for the surety, although it had been a good plea for the said Street; for none shall avoid his own bond for the imprisonment or duress of any other than himself.' The same doctrine is recognized in *Bacon's Abridg.*, title *Duress*, A., and 2 *Rolle's Abridg.* 124. *Mantel v. Gibbs*, 1 *Brownlow*, 62; *Robinson v. Gould*, 11 *Cush. (Mass.)* 55; *Plummer v. People*, 16 *Ill.* 358; *McClintick v. Cummins*, 3 *McLean (U. S.)* 158; and *Thompson v. Lockwood*, 15 *Johns. (N. Y.)* 259, were cited by plaintiffs as sustaining the doctrine that the duress which will avoid a contract must be offered to the party who seeks to take advantage of it. On the other hand, *Strong v. Grannis*, 26 *Barb. (N. Y.)* 122; *Osborn v. Robbins*, 36 *N. Y.* 365; and *Fisher v. Shattuck* 17 *Pick. (Mass.)* 252, were cited on behalf of the defendant as sustaining the opposite view. I have examined these cases with some care, and do not regard them as controlling authority on either side. They depend very much upon the pleadings or their special circumstances. I have no doubt of the correctness of the general principle laid down in the older cases, that duress, to be a good plea, must be offered to the person who seeks to take advantage of it. As in the case of two joint and several obligors in a bond, a plea by one defendant of duress practised upon the other would be a bad plea, for the reason that if his signature was obtained without duress, of what consequence is it to him that his co-obligor signed under duress? In all the cases cited, the duress was either upon the party seeking to avoid the instrument sued upon, or it was known to him. Thus, in *Robinson v. Gould*, *supra*, the action was on a note made by A to B to procure the release of C from an unlawful arrest, brought about by B. Here A entered into an independent contract, not as surety, but as principal, with a full knowledge of all the facts, and as the court said, upon a sufficient consideration. 'The case, therefore,' in the lan-

guage of the court, 'is exactly this: A promise by the defendant, upon a valid consideration, fully assented to by him without coercion or restraint of any kind.' *McClintick v. Cummins*, 3 McLean (U. S.), 158, decides nothing that affects the case in hand. The court said: 'It is not necessary to decide this question (the duress), as, from the facts, it does not appear that the imprisonment of Johnson was unlawful, or that he was detained until he executed the notes.' *Plummer v. People*, *supra*, was a suit upon a recognizance against the principal and the sureties. The principal was committed by a magistrate in the State of Illinois for a larceny committed in another State. Afterwards, the magistrate, in the absence of the accused, and without proof, made out a second *mittimus* for an offence committed within the State. The accused, to relieve himself from confinement, gave the recognizance in question. The defendants pleaded duress, and the court below gave judgment in their favor upon the plea. The court above affirmed the judgment as to the principal, and reversed it as to his sureties, saying: 'I do not hold that the same facts might not also have been made available by the sureties, at the proper time, and in a proper form of plea, but they cannot avail themselves of them by a plea of duress of their principal.' This case recognizes the doctrine I have already suggested, that duress, as a plea, is bad if the duress set up was upon some person other than the party pledging it. It also appeared that the sureties had knowledge of the duress when they signed the recognizance. This was also the case in *Strong v. Grannis*, *supra*, cited by the defendant. Here the action was against two persons as makers of a promissory note; the defence set up was that the note was executed under duress of imprisonment of one of the makers, and to procure his release therefrom, and was signed by the other as his surety. The court held that the surety might avail himself of the duress. This was a case in the supreme court. *Osborn v. Robbins*, *supra*, was in the court of errors and appeals. The note was given by a son, with his father as surety, in settlement of an arrest upon the charge of rape, under circumstances that indicated an abuse of legal process, for the purpose of oppression. The court held that the surety could avail himself of the duress. This case is not authority to the extent claimed for it by the defendant, for the reason that the surety was the father of the defendant. This is one of the

exceptions recognized in *Huscombe v. Standing*, *supra*, and most of the old authorities.

"It by no means follows that because duress of another is not a good plea, and that in some instances it may not even avail as a defence, that it cannot be set up successfully in any case. Had the defendant, after indorsing these notes, passed them to the plaintiffs and received the money therefor, it is very clear he could not set up the defence of duress of the maker; so if he had indorsed them with notice of the duress, or if the notes were in the hands of an innocent third party for value. In these and many other instances that might be named, the defence referred to would, for obvious reasons, be unavailing. The case in hand, however, differs materially from them and from all the cases cited. Here the defendant was the surety of the maker, nothing more, and defends under the broad plea of *non assumpsit*. The form of the transaction is not material, so long as the contention is between the original parties. The defendant's contract is to pay the notes, if his principal fails to do so; and he may be proceeded against immediately upon such failure. But upon payment of the money he has his remedy over against his principal. It is a recognized doctrine in the law of surety, that whatever discharges the principal debtor, also discharges the surety. There are exceptions to the rule, as where one had signed a joint and several note with a married woman as surety. 1 Pars. on Bills and Notes, 244. Nor will this rule apply to cases in which a surety is required, for the very reason that the principal may have a defence that will defeat the claim against him.

"In these and the like cases the surety knows when he binds himself that he has no remedy over. He is not, therefore, misled. The defendant indorsed the notes without any knowledge, or anything to put him upon inquiry, of the duress practised upon his principal. The result will be, if a recovery is had against the defendant, he will have no redress against the maker, and this by reason of the duress upon the maker, the act of the plaintiffs. He is therefore directly injured by it, and has a right to defend upon that ground. Had he signed the notes with knowledge of the duress, it would have been his own folly, and the consideration being good, the plaintiffs would have been entitled to recover. But they made the mistake of keeping the maker a *quasi* prisoner in New York by threats of an arrest, whilst the notes

(a) *Admissions*.—An admission made under duress is void, and the jury cannot inquire whether such admission was made because it is true, or because the party was under duress.¹

DURING.—See note 2.

were sent to the indorser for his signature, thus depriving him of his remedy over against his principal. In doing this the plaintiffs overreached themselves."

1. *Tilley v. Damon*, 11 Cush. (Mass.) 247. See *CONFESSIONS*, Vol. III. p. 469.

2. In construing the question "Is there a watchman in the mill during the night?" occurring in a survey which was a part of the conditions of a policy of insurance, *Ellsworth, J.*, said: "The word 'during' is to be construed with reference to the subject-matter. If one were to promise another that he would do some act, such as execute a deed or pay a sum of money, *during* the month of January, the word means a point of time between the first and last days of January; but in a deed conveying land to a woman during her widowhood, it means the whole time so long as the grantee shall remain unmarried. So a soldier enlisting into the army during the war is to serve throughout the war. But if we say a man was killed during the war, or that a certain battle was fought *during* the war, we mean some point of time between the commencement and end of the war. So in this survey what did the underwriters aim at in this interrogatory? We think they sought to know if there was a watch kept up all the night, not a part of it, or for one period of time in the hours of the night." *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 19.

An averment that one was "during his lifetime" owner of a certain piece of land was held to be a statement that he was the owner continuously throughout his lifetime, and consequently alleges an ownership at the time of his death, in *Riddell v. Harrell*, 71 Cal. 254; s. c., 12 Pac. Rep. 67.

A statement that a person was in certain employment for certain specified years, "during which years" he resided in C., imports a residence there for the whole of those years. The meaning "at some time in those years" is colloquial and incorrect. *The Queen v. Inhabs. of Anderson*, 9 Q. B. 663.

A requirement that a notice shall be published during at least four weeks in all the newspapers published in a town does not include monthly magazines or periodicals. Such a requirement can only be satisfied by weekly insertions in newspapers which

are published at least once a week. *York Borough Case*, 3 Pa. C. C. R. 514.

Where a statute requires that a sheriff's sale shall be advertised "once a week during three successive weeks," the advertisements must occupy from the first to the last, between the date of the first and the date of the sale, three whole weeks. *Francis v. Norris*, 2 Miles (Pa.), 150.

An act which provides that corporations that have not "during the preceding year" made profits of five per cent may commute for taxes, applies only to corporations which have been in existence a full year before the assessment. *Park Bank v. Wood*, 23 N. Y. 93.

During Pleasure.—A *habendum* to the lessees "for and during their pleasure," in a lease of a right to draw water from a canal, does not create a tenancy at will, but passes a perpetual right. *Cole v. Lake Co.*, 54 N. H. 242.

Where an officer is appointed "to continue in office during the pleasure of the governor for the time being," his term of office does not expire with that of the governor who appointed him. *Kaufman v. Stone*, 25 Ark. 336.

During their Lives.—An agreement to pay an annuity to a man and wife "during their natural lives," binds the promisor to pay it during their joint lives and the life of the survivor. *Douglas v. Parsons*, 22 Ohio St. 526; *Merrill v. Bickford*, 65 Me. 118; *Earle v. Fiske*, 103 Mass. 489.

During the Trial.—Under a statutory provision that no person indicted for any felony can be tried unless personally present during such trial, this expression "includes all proceedings had in impanelling the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, receiving and recording the verdict;" and as a part of the charge of the court it includes instructions given to the jury after they have once retired and have returned to the court-room to ask the court for information on particular points of the evidence. *Maurer v. People*, 43 N. Y. 1.

"After an issue of fact is joined in a criminal case, every step thereafter taken for the purpose of a determination of that issue in the court where the cause is pending, up to and including the verdict upon such issue, must be regarded as a step or proceeding arising during the course of

DUST.—See note 1.

DUTCH AUCTION.—See AUCTIONS AND AUCTIONEERS.²

DUTY.—(See also REVENUE LAW.)—An obligation to perform some act.³

DWELL.—A corporation may be said to “dwell” at the place where its business is carried on.⁴ The expression “dwells and has his home” designates some permanent abode, a residence with an intention to remain, or at least without an intention of removal,—something more than the habits and life of a wanderer who has no place where he has a right to continue, and call it and claim it as his rightful home.⁵ *Dwell* is not to be restricted in meaning to

the trial,” within a statute prescribing the grounds for which a new trial may be granted. *People v. Turner*, 39 Cal. 370.

During Term Time, in a rule of court providing that counsel shall not then be compelled to attend the taking of depositions except in the town where the court is held, does not cover all the time from the beginning to the final rising of the court without regard to the length of intervening adjournments. Where the court adjourned from the 22d to the 29th of a month, a length of time which enabled counsel to return to their homes and take depositions and return again to court at its reconvening, the 26th was not during term time. *Holmes v. Sawtelle*, 53 Me. 179.

During Widowhood.—An estate during widowhood is an estate for life, subject to forfeiture by marriage. *Bank of Alexandria v. Hooft*, 4 Cr. C. C. 323. And see *Cooper v. Pogue*, 92 Pa. St. 254.

During the Voyage can only apply to the time after the voyage commences. *Crow v. Falk*, 8 Q. B. 467.

1. Where an act “with respect to cleansing the streets” provides that commissioners “shall cause all the dust, ashes, and rubbish to be carried away from the houses and tenements of the inhabitants,” they are not bound to remove the dust, ashes, and rubbish produced by the consumption of coal and slack in a manufactory, but only such as arise from house occupation. *Lyndon v. Standbridge*, 2 H. & N. 45.

A power to make by-laws for removal by the occupier of “all dust, ashes, rubbish, filth, manure, dung, and, soil,” does not include a power to make a by-law for the removal of snow. *Regina v. Wood*, 5 E. & B. 49.

2. *Crandall v. State*, 28 Ohio St. 479.

3. *Allen v. Dickson*, 1 Ala. 120. This word is often used as synonymous with “debt.” *Fowler v. Fisher*, 3 Conn. 320;

Beach v. Boynton, 26 Vt. 725; *Fairbanks v. Benjamin*, 50 Vt. 99. But a distinction is made in *Allen v. Dickson*, 1 Ala. 120, where “debt” is defined to be a legal liability to pay money.

Where an act providing for the appointment and prescribing the duties of registrars of election requires them to take an oath before entering upon their office, and imposes a penalty for neglect to perform its duties, the taking of the oath is not a duty. That term includes only the official acts to be done by the officer after being duly sworn. *State v. Maynard* 41 Conn. 540.

The words “it shall be the duty” in ordinary legislation imply the assertion of the power to command and coerce obedience; but where that power does not exist, they are not mandatory and compulsory, but merely declaratory of a moral duty. *Kentucky v. Dennison*, 24 How. (U. S.) 66.

4. *Adams v. G. W. R. Co.*, 6 H. & N. 404. *Martin, B.*, said: “In my judgment, the word ‘dwell’ in this section, when applied to a corporation, means something analogous to what it means when applied to an individual, viz., a dwelling at some fixed known place, not on the whole line of the railway, but where its principal business is carried on.” See also *In re Brown v. Lond. & N. W. R. Co.*, 4 B. & S. 326.

One who resides in Scotland and carries on business in London by means of an agent, cannot be said to “dwell” in the latter place. *Sheils v. Rait*, 7 C. B. 116.

A person who has no permanent place of abode “dwells” within the meaning of 9 & 10 Vict. c. 95, s. 128, at the place at which he may be temporarily residing. *Alexander v. Jones*, L. R. 1 Ex. 133.

5. *Turner v. Buckfield*, 3 Greenl. (Me.) 231.

One may be considered as “dwelling

actual presence. Such is not the meaning attributed to it in common parlance or by the lexicographers. To dwell, is to reside, to inhabit, to have a fixed place of residence.¹

DWELLING.—See note 2.

DWELLING-HOUSE.—(See also ARSON; BURGLARY; LARCENY.) In its common acceptance, a man's dwelling-house is the house in which he resides—the house of his present abode;² the house in which the occupier and his family usually reside, or in other words, dwell and lie.³ For its meaning in statutes other than those relating to the subjects to which cross-reference is made, see note 5.

and having his home" in a certain town though he has no particular house there, as the place of his fixed abode. *Inhab. of Parsonsfield v. Perkins*, 2 Greenl. (Me.) 411.

Where a statute requires a will to be proved "in the same county where the deceased person *last dwelt*," the meaning is "in the same county of which the deceased person was an *inhabitant*, unless he were a stranger and had only a residence. The constitutional definition of habitation is the place where a man dwells or has his home; in other words, his domicile." *Harvard College v. Gore*, 5 Pick. (Mass.) 379.

1. *State v. Inhab. of Shrewsbury*, (N. J.), 4 Cent. Rep. 425; affirmed, 8 Cent. Rep. 339.

2. Where the owner of a store in which goods were insured slept in a small back room at the store with his clerk, but kept a kerosene lamp burning at night in the store for protection against burglars, *held*, that such use did not constitute the premises a "dwelling," so as to avoid a clause which prohibited the use of kerosene light in the store, but permitted it in "dwellings." *Cerf v. Home Ins. Co.*, 44 Cal. 320; s. c., 13 Am. Rep. 165.

A temporary or compulsory residence, at the time of the commencement of an action, in a jail, does not constitute it the "dwelling" of the party. "The statute refers to the place in which the party dwells, as affecting the question of convenience to suitors in attending the county court, and therefore must mean by the word 'dwelling' the *ordinary* dwelling of the party, and not a place like a jail, where a person is temporarily detained—it may be for a single day or night—in custody." *Dunston v. Pater-son*, 5 C. B. (N. S.) 267.

An allegation that complainants are owners in fee of certain described premises, that there is a building situated on the land, and that they have their residence in it, and occupy it as a homestead,

sufficiently alleges that there is a "dwelling" on the premises, within the meaning of a homestead act. *Lozo v. Sutherland*, 38 Mich. 168.

A lease providing that the demised premises shall be used "strictly as a private dwelling," *held* not to permit their use as a boarding-house. *Gannett v. Albree*, 103 Mass. 372. See *Wickenden v. Webster*, 6 El. & Bl. 387.

Where a husband had left the house which had been his dwelling, with no intention of returning, but had not removed his household effects therefrom, and his wife had remained, spending her days in the house, but her nights elsewhere, and was preparing to remove therefrom, it not being shown that the husband had acquired a dwelling elsewhere, *held*, that the house was the "dwelling" of the husband within the meaning of the section of the Code punishing the use of abusive language in or near a "dwelling" in the presence of a female or a member of the family. *Bragg v. State*, 69 Ala. 204.

3. *Bruce v. Cloutman*, 45 N. H. 37, where an officer's return that he left at "the dwelling-house" of a defendant a true and attested copy of the writ, was held a sufficient return that he left such copy at "the last and usual place of abode."

4. *State v. Clark* (Mo.), 5 West. Rep. 419, quoting from Whart. Crim. L. s. 781.

5. An act permitting the raising of wooden dwelling-houses within a city's fire limits was held to refer to "such buildings only as were used and occupied as dwelling-houses at the time the raising took place, and such as were, in good faith, to be so used and occupied." *N. Y. Fire Dept. v. Buhler*, 35 N. Y. 181; s. c., 33 How. Pr. (N. Y.) 378.

The word "dwelling-house" in an application for insurance was held to include a wooden kitchen attached thereto. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

The extent of territory included under the term "dwelling-house" in a statute, without any qualifying words, includes "no more land than is necessary for its complete enjoyment." *Avery v. House*, 2 O. C. Ct. Rep. 250.

Where it was provided that in locating railroads no corporation should take any "meeting-house, dwelling-house, or public or private burying-ground, without the consent of the owners thereof," it was held that "dwelling-house" meant only the house, and did not include any part of the garden, orchard, or curtilage. *Wells v. Som. & Ken. R. Co.*, 47 Me. 345.

An act provided that no ground not already used as a cemetery should be used for burials within the distance of one hundred yards from any dwelling-house without the consent of the owner, etc., thereof. *Held*, that the word "dwelling-house" did not, for the purposes of the act, include the curtilage, and therefore that the specified distance must be measured from the walls of the dwelling-house. *Wright v. Wallasey Local Board*, 18 Q. B. D. 783.

Where the sale of certain goods was prohibited by any person within certain limits "other than in his own dwelling-house, or in any shop attached and being part of any dwelling-house," a sale by an auctioneer in a yard attached to the dwelling-house of another was held an offence against the act. "The place of sale is not his own; nor is it to my mind a 'dwelling-house' within the statute. Though for some purpose all within the curtilage may be deemed part of the dwelling-house, I incline to think this means 'dwelling-house' in the popular sense. The intention was that the established traders of the district who carry on their business in their own dwelling-houses or shops should not be interfered with." *Llandaff, etc., Market Co. v. Lyndon*, 8 C. B. (N. S.) 517.

A "dwelling-house," partly finished, was conveyed, and an obligation given to finish it. There was an erection 1½ stories high, with rooms for the family, and in the rear of it and annexed to it was another erection, one story high, designed for a kitchen. Annexed to that was another unfinished erection, designed for a wash-room, etc. *Held*, that the obligation to finish the "dwelling-house" extended to this last erection. *Hovey v. Luce*, 31 Me. 346.

A billiard-saloon attached to a hotel, always used in connection with and as a part of the hotel, and used for no other purpose than hotel business, was held

part of a "dwelling-house" within the protection of a statute prohibiting the pulling down of a dwelling-house by virtue of any of its provisions. *State v. Troth*, 7 Vroom (N. J.), 422.

The homestead exemption of land and "the dwelling-house thereon" does not extend to a business block used as a dwelling. The question is not determined by occupation alone. "It [i.e., the statute] uses the word 'dwelling-house' in its common and ordinary sense, and to distinguish it from other kinds of buildings. . . . I do not mean by this to go so far as to hold that it must be exclusively used for that purpose, but in some reasonable sense it should be susceptible of being a dwelling-house. A building may be constructed for a store and dwelling-house, saloon and dwelling-house; but its construction should in some manner and to some extent manifest its character of dwelling-house so as to give some appearance of good faith in calling or claiming it as such. . . . I place my decision on the broader ground that this new block was not a 'dwelling-house' in fact, and the pretended occupancy of it as such was not in good faith, or intended to be permanent, and therefore no change in the real character of the building was effected by that attempt at occupation by the bankrupt." *In re Lammer*, 7 Biss. (U. S.) 269; s. c., 14 Bankr. Reg. 460.

A plea to trespass for assault and battery that defendant was disturbed by plaintiff in his possession of a "dwelling-house" and turned him out, *held* not sustained by proof that defendant was a lodger occupying one room in a house, the landlord keeping the key of the outer door. *Monks v. Dykes*, 4 M. & W. 567. But a furnished room, used by a single man as a lodging-room in the basement of a building, the upper part of which was occupied in the daytime by him and others as offices, was held a "dwelling-house" within the meaning of a statute providing for the punishment of "every person who shall steal in the daytime in any dwelling-house." *People v. Horrigan* (Mich.), 36 N. W. Rep. 236; s. c., 13 West. Rep. 149.

The question, under a homestead act, whether a building is a "dwelling-house" or "homestead," does not depend upon the fact of its situation, external appearance, or internal arrangement, or that it would be vastly more valuable as a place of business than as a residence; but upon the fact that it is really and truly occupied as a dwelling-house for the owner and his family; nor does the owner forfeit the

benefit of his exemption by devoting some, even the most valuable, portion of the building to another use than a mere residence of his family. *Phelps v. Rooney*, 9 Wis. 71.

Where a warrant commands an officer to search for liquors in a "dwelling-house," he is not thereby authorized to search in a "barn." *Jones v. Fletcher*, 41 Me. 254.

In an act allowing a water company to charge for water supplied to "dwelling-houses" on the ratable value of the premises, the word "dwelling-house" was held to include every building so far adapted to use as a dwelling-house as to require water for domestic purposes. It might be that only a part of the house required a supply for domestic purposes, and that the value of that part alone would be the basis of the rate. It was not decided whether the plaintiff's warehouse was a "dwelling-house" within the act, but for other reasons he was held excluded from the benefit of the act. *Cooke v. New River Co.*, 32 Solic. Jour. 255.

The testimony of architects and builders was held inadmissible to show that a building containing three distinct residences was a "single dwelling-house" within the meaning of an agreement. "Such a construction limits the right, as we think, to the erection of one house, designed and calculated only for the convenient accommodation of a single family. And we think that the mere fact that there were doors opening and connecting and leading through the whole building can make no difference." *Gillis v. Bailey*, 21 N. H. 149.

In Franchise Acts.—Though the term "dwelling-house" in the Representation of the People Act, 1867, is to mean part of a house separately occupied, yet in order to be entitled to the borough franchise as the occupier of a "dwelling-house," the person must have an occupation in respect of which he can be rated to the relief of the poor, and therefore he is not entitled to such dwelling-house franchise by reason of the occupation of part of a house as a lodger. The tenant of two rooms, which he took unfurnished at a weekly rent, had the exclusive use of such rooms, and a key of the outer door of the house. His landlord had also a key of the outer door, and resided in all the rest of the house, but supplied no attendance or service to such tenant. *Held*, that the latter did not occupy a "dwelling-house," within the meaning of the act. The tenant of two rooms, which he took unfurnished at a weekly rent,

had in common with the other tenants of the house, which was wholly let out on similar tenancies, the use of the passages, staircase, street door, and usual conveniences of the house. The landlord and not the tenant was rated, and the landlord did all repairs inside and out; but he did not reside in the house, nor did he, save as aforesaid, retain the control and dominion of the house, or render any services to any of the tenants. *Held*, that such tenant could acquire the dwelling-house franchise in respect of such occupation. *Bradley v. Baylis, etc.*, 8 Q. B. D. 195.

A claimed to be registered in respect of "a house." He occupied as tenant, at an annual rent, one room in a house consisting of nine rooms originally built for one family, though now let out in six several tenements. The passage and staircase and conveniences were common to all the tenants. There was an outer or street door to the passage, which was never closed, and was without lock or bolt. Each tenant had exclusive occupation of his room or rooms, and the owner did not reside upon the premises. *Held*, by a divided court, that the room so occupied was a "dwelling-house" under the Representation of the People Act, 1867. B occupied as tenant, at an annual rent, two rooms on two different floors in a house consisting of seven rooms, whereof the remaining five were occupied by another tenant. The passage and staircase were common to both tenants. The house had a front door to the street, which was generally kept open by day and shut by one or other of the tenants at night, and was fastened by an ordinary latch and bolt. Neither tenant had any right to exclude the other from the use of the front door, and the owner did not reside upon the premises. *Held*, likewise by a divided court, that the occupation of the two rooms was the occupation of a "dwelling-house." *Thompson v. Ward, Ellis v. Burch*, L. R. 6 C. P. 327.

The occupation for business purposes of a separate room forming part of a set of chambers in the Temple, was held not the occupation of a "dwelling-house," in *Cuthbertson v. Butterworth*, L. R. 4 C. P. 523.

But a set of rooms in a college at Oxford or Cambridge was held a "dwelling-house" in *Barnes v. Peters, etc.*, L. R. 4 C. P. 539.

And where, in a college conducted by a religious community, each teacher had, as such, the exclusive use of a separate bedroom in the college by virtue of his office or employment as a teacher in the

DWELLING-PLACE.—One's dwelling-place is his residence, his usual place of abode. It does not cease to be such because of temporary absences, whether for pleasure or for business, provided there exists and continues an intent to return to the abode as a dwelling-place.¹

college, serving under the supreme control of the superior-general of the community, who resided in Paris, the teachers were held entitled to the service franchise as occupiers of "dwelling-houses." *Alexander v. Bourke*, 22 Ir. L. T. Rep. 21. "The whole difficulty in these cases seems to have arisen from the extension of the word 'dwelling-house.' It was at first intended to give any man who had a dwelling-house a vote, but then there came up the case of a person living in a portion of a house, which portion was really his dwelling-house. How was that term extended? If a man occupies a bedroom, though he lives elsewhere during the greater part of the day, it is to be regarded as his dwelling-house." See *Alexander v. Bourke*, 22 Ir. L. T. Rep. 30.

A clerk in the employment of a company occupied as sole occupant a room in the company's building. No particular room was stipulated for by him, but when he entered on his employment a room was given to him which he had occupied for ten years, part of the furniture of which belonged to him. He took no meals in this room, and during about four months in winter left it and lived in a smaller and more comfortable room. No one occupied the other room in his absence; he was entitled to use it, and moved from one to the other of his own choice. The house-steward had a room in the building, set apart for him, but usually resided in a neighboring village. *Held*, that the clerk was by the Reform Act of 1884 entitled to the service franchise as inhabiting a "dwelling-house." *Ballingal v. Menzies*, 14 Ct. Sess. Cas. (Sc.) 127.

A soldier who had, in respect of his position in the army, lived in separate apartments in barrack for the qualifying period, and also commissioned officers who had for the same period each had exclusive occupation of a bedroom, but took their meals in a mess-room to which they had a common right, were respectively held entitled to be enrolled in the register of voters as inhabiting "dwelling-houses" under the Representation of the People Act, 1884. *Gay v. McGill*, 15 Ct. Sess. Cas. (Sc.) 90.

Where a person occupied an unfurnished room in a house at a weekly rent, other persons similarly occupying rooms

in the house, and the landlord residing in it, and the landlord and occupants used the hall door, hall, stairs, and yard so far as the circumstances of each required, the resident who came in last at night fastening the hall door, it was held that the tenant was not entitled to vote as occupying a "dwelling-house." *Fitz-Gibbon, L. J.*, said: "'Dwelling-house' in section 3 of the act of 1884 (48 Vict. c. 3) cannot be used in the sense of part of a house as in the definition contained in section 5 of the act of 1878, for it would then mean that a man would not be entitled to the service franchise if his employer dwelt in the same room, which is absurd. 'Dwelling-house' in section 3 must mean whole house, structure. The legislature in that third section fell into the very difficulty of confounding house and dwelling house, which is the origin of so much confusion." *McCay v. Chambers*, 21 Ir. L. T. Rep. 69.

A gardener occupied exclusively by virtue of his service and took his meals in a room over his employer's coach-house. The coach-house was in a yard which was surrounded by a wall with a gate in it, and separated from the employer's house by an avenue, but was included in the grounds surrounding it. *Held*, that the gardener was entitled to the franchise as the inhabitant occupier of a "dwelling-house." *Holly v. Bourke*, 21 Ir. L. T. 79, in which *Crossan v. Chambers*, 18 L. R. I. 68, a case where claimant was a domestic servant and took his meals in the house with the other servants, was distinguished.

"House," in an occupiers' list, was considered an insufficient description of a "dwelling-house" qualification, and accordingly amendable by the substitution of the latter word, in *Friend v. Towers*, 52 L. J. R. Q. B. 109.

So, in *Gillis v. Bailey*, 21 N. H. 159, it is said: "The terms 'house' and 'dwelling-house' are certainly not identically the same, as matter of descriptive language;" and the testimony of architects as to the meaning of the former word was held inadmissible on the question of the construction of the latter word in an agreement.

1. *State v. Inhab. of Shrewsbury* (N. J.), 4 Cent. Rep. 425; affirmed, 8 Cent. Rep. 339.

DYE.—See note 1.

DYING.—See **DIE**.

DYING DECLARATIONS.—(See also **ABORTION**; **HOMICIDE**.)

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1. **Definition.**—Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanctity of an oath. They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living.²

Dwelling-place or home means some permanent abode or residence with intention to remain, and is not synonymous with domicile, as used in international law, but has a more limited and restricted meaning. *Inhab. of Jefferson v. Inhab. of Washington*, 19 Me. 293.

An emancipated minor may have a different dwelling-place from his parents. *Lisbon v. Lyman*, 49 N. H. 553.

"**Own Dwelling-place or Shop.**"—Where a large hall was erected capable of holding a certain number of cattle, with a large open yard for the purpose of holding sheep, which hall and yard were A.'s private property and in his own occupation, his dwelling-house adjoining and communicating with the yard, it was held that the sale of sheep and cattle in the hall was not in A.'s "own dwelling-place or shop" within the meaning of the Markets and Fairs Clauses Act, 1847. "It is impossible to say that the sale took place in the dwelling-place of the respondent, for the place is entirely separated from his dwelling-house; and assuming (contrary to my opinion) that a distinction was intended by the use of the phrase 'dwelling-place' instead of 'dwelling-house,' which occurs in some of the other statutes, and that 'dwelling-place' may apply to somewhat larger and more extensive premises than the term 'dwelling-house' would apply to, yet I do not think that in any sense of the term can these premises be said to be the dwelling-place of the respondent, separated as they are from the place in which

he lives." *Fearon v. Mitchell*, L. R. 7 Q. B. 690.

Where A. was the tenant of a dwelling-house and shop, and a piece of ground in front of the shop, and there was a wooden shed affixed to the house and supported on wooden posts which had been erected over the piece of ground for 18 years, and previous to the erection of the shed stone flags had been built into and formed part of the house, which projected three feet from the house and helped to support the wooden shed; it was held that a sale upon the piece of ground and beneath the wooden shed was within a part of A.'s "own dwelling-place or shop." *Ashworth v. Heyworth*, L. R. 4 Q. B. 316.

1. Where an act defined "dyeing seeds" to mean the giving to seeds by any artificial process the appearance of seeds of another kind, it was held that selling old white clover-seed, previously subjected to sulphur smoking, as young white clover-seed did not come within the offence, as the appearance given was not of seeds of another kind, but of another quality. *Francis v. Maas*, 26 W. R. 422. See also **BERRIES**.

2. *People v. Olmstead*, 30 Mich. 431, *per Campbell, J.* See *Starkey v. People*, 17 Ill. 21.

The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is

2. When Admissible.—Dying declarations are admissible only in cases of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of such declarations.¹

silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. It is therefore evident that declarations, though proved to have been made by a person in a dying state, are not admissible, unless it also appears that the deceased himself apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. 3 Russ. on Cr. (9th Am. Ed.) *250; Whart. Cr. Ev. (9th Ed.) § 276.

1. Reynolds v. State, 68 Ala. 502; Johnson v. State, 50 Ala. 456; Hudson v. State, 3 Coldw. (Tenn.) 355; Lieber v. Com., 9 Bush (Ky.), 13; Wooten v. Wilkins, 39 Ga. 223; Hill v. State, 41 Ga. 484; State v. Medlicott, 9 Kan. 257; State v. Boban, 15 Kan. 407; Marshall v. Chicago, etc., R. Co., 48 Ill. 475; Barnett v. People, 54 Ill. 325; State v. Harper, 35 Ohio St. 78; Montgomery v. State, 80 Ind. 281; s. c., 41 Am. Rep. 815; State v. McCanon, 51 Mo. 160; Wright v. State, 41 Tex. 246; Dixon v. State, 13 Fla. 636; Hackett v. People, 54 Barb. (N. Y.) 370; People v. Davis, 50 N. Y. 95; Wilson v. Boerem, 15 Johns. (N. Y.) 286; Railing v. Com. (Pa.), 1 Atl. Rep. 314; Crookham v. State, 5 W. Va. 510; State v. Shelton, 2 Jones (N. Car.), 360; 1 Greenleaf's Ev. (14th Ed.) chap. ix.; Roscoe's Cr. Ev. (10th Ed.) 37; Whart. Cr. Ev. (9th Ed.) § 288; 3 Russell on Crimes (5th Ed.), 354. Compare Brownell v. Pacific R. Co., 49 Mo. 239; Montgomery v. State, 80 Ind. 338; s. c., 41 Am. Rep. 815.

Constitutional.—Dying declarations are not incompetent because of the constitutional requirement that the accused shall be confronted with witnesses against him. State v. Dickinson, 41 Wis. 299; State v. Nash, 7 Iowa, 347; Robbins v. State, 8 Ohio St. 131; People v. Glenn, 10 Cal. 32; Brown v. Com., 73 Pa. St. 321; Com. v. Cary, 12 Cush. (Mass.) 246; Woodsides v. State, 2 How. (Miss.) 655; Campbell v. State, 11 Ga. 353; Burrell v. State, 18 Tex. 713; Walston v. State, 16 B. Mon. (Ky.) 15; State v. Price, 6 La. Ann. 601; State v. Tilghman, 11 Ired. (N. Car.) 513; State v. Vasant, 80 Mo. 67; People v. Green, 1 Denio (N. Y.), 614.

While the admission in evidence of the dying declarations of one murdered is not regarded as an infraction of the constitutional provision that the accused shall be confronted by the witnesses against him, still such declarations are regarded in the light of hearsay testimony, and as admissible only from the necessity of the case and to prevent a failure of justice, and are, therefore, properly restricted to the identification of the prisoner and the deceased, and to the act of killing and the circumstances immediately attending said act and forming a part of the *res geste*. State v. Vasant, 80 Mo. 67; State v. Draper, 65 Mo. 335; Collins v. Com., 12 Bush (Ky.), 271; State v. Wood, 53 Vt. 560.

English Cases.—It is a general rule, that dying declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. *Per* Abbott, C. J., R. v. Mead, 2 B. & C. 605; 4 D. & R. 120. Therefore, where a prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion, and evidence of the woman's dying declarations was tendered, Bayley, J., rejected it, observing, that although the declarations might relate to the cause of the death, still such declarations were admissible in those cases only where the death of the party was the subject of inquiry. R. v. Hutchinson, 2 B. & C. 608 (n); Wilson v. Boerem, 15 Johns. (N. Y.) 286; Wooten v. Wilkins, 39 Ga. 223. Compare Montgomery v. State, 80 Ind. 338; s. c., 41 Am. Rep. 815; State v. Dickinson, 41 Wis. 299. A man having been convicted of perjury, a rule for a new trial was obtained, pending which the defendant shot the prosecutor, who died. On showing cause against the rule, an affidavit was tendered of the dying declarations of the prosecutor as to the transaction out of which the prosecution for perjury arose; but the court were of opinion that this affidavit could not be read. R. v. Mead, 2 B. & C. 605; 4 D. & R. 120. So evidence of the dying declarations of the party robbed has been frequently rejected on indictments for robbery. R. v. Lloyd, 4 C. & P. 233; also by Bayley, J., on the Northern Spring Circuit, 1822,

3. Situation of the Party who Makes Them.—They must be made, not merely *in articulo mortis*, but under the sense of impending death, without expectation or hope of recovery.¹

and by Best, J., on the Midland Spring Circuit, 1822; 1 Phil. Ev. 241 (10th Ed.).

In one case where A and B were both poisoned by the same means, upon an indictment against the prisoner for the murder of A., evidence was allowed by Coltman, J., after consulting Parke, B., to be given of the dying declarations of B.; the ground alleged being "that it was all one transaction." *R. v. Baker*, 2 Moo. & Rob. 53; *State v. Terrell*, 12 Rich. (S. Car.) 321; *State v. Wilson*, 23 La. Ann. 558. Compare *Brown v. Com.*, 73 Pa. St. 321; *Krebs v. State*, 3 Tex. App. 348; *State v. Westfall*, 51 Iowa, 142; *State v. Bohan*, 15 Kan. 407; *State v. Fitzhugh*, 2 Oreg. 227. But in *R. v. Hind*, 29 L. J., M. C. 148, a case similar to that of *R. v. Hutchinson*, 2 B. & C. 608 (n), Pollock, C. B. said: "The rule we are supposed to adhere to is that laid down in *R. v. Mead*; there Abbott, C. J., says that the general rule is that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration."

Manslaughter.—Dying declarations are admissible in prosecutions for manslaughter. *State v. Hanna*, 10 La. Ann. 131.

Civil Cases.—Although dying declarations are admissible in evidence, as such, only in cases of felonious homicide, yet they may, under certain circumstances, be admitted in civil actions as part of the *res gestæ*. *Brownell v. Pacific R. Co.*, 49 Mo. 239. See and compare *Entwhistle v. Feighner*, 60 Mo. 214; *Hariman v. Stowe*, 57 Mo. 93; *Marshall v. Chicago*, etc., R. Co., 48 Ill. 475; *Chicago*, etc., R. Co. v. *Howard*, 6 Bradw. (Ill.) 569; *State v. Fitzhugh*, 2 Oreg. 227; *Elkins v. McKean*, 79 Pa. St. 493; *Stern v. Railway Co.*, 1 W. N. C. (Pa.) 531; *Friedman v. Railroad Co.*, 7 Phila. 203; *Daily v. N. Y.*, etc., R. Co., 32 Conn. 356; *Waldele v. N. Y.*, etc., R. Co., 95 N. Y. 275; s. c., 19 Am. & Eng. R. R. Cas. 400; *Hackett v. People*, 54 Barb. (N. Y.) 370; *McFarland v. Shaw*, 2 Law Rep. (N. Car.) 102; *Wooten v. Wilkins*, 39 Ga. 223; *Hudson v. State*, 3 Coldw. (Tenn.) 355; *State v. Wilson*, 23 La. Ann. 558.

"Dying declarations are limited to criminal prosecution where the subject-matter of the investigation is the declarant's death; and there is sound reason in

this, for if the declarations of dying parties are introduced in all cases of physical injury, it would be difficult to exclude them from any other trial in which they should be offered." Whart. Cr. Ev. (9th Ed.) § 288.

1. *People v. Abbott* (Cal.), 4 Pac. Rep. 769; *People v. Hodgson*, 55 Cal. 72; s. c., 36 Am. Rep. 30; *People v. Gray*, 61 Cal. 164; *People v. Sow*, 51 Cal. 597; *People v. Ah Dab*, 49 Cal. 652; *People v. Taylor*, 59 Cal. 640; *People v. Vernon*, 35 Cal. 49; *People v. Sanchez*, 24 Cal. 17; *People v. Lee*, 17 Cal. 79; *State v. Garrard*, 5 Oreg. 216; *Dunn v. State*, 2 Ark. 229; *Hay v. State*, 40 Md. 633; *Swisher v. Com.*, 26 Gratt. (Va.) 963; *Hill's Case*, 2 Gratt. (Va.) 594; *State v. Blackburn*, 80 N. Car. 474; *Dixon v. State*, 13 Fla. 636; *State v. Patterson*, 45 Vt. 308; s. c., 12 Am. Rep. 200; *State v. Cantieny*, 34 Minn. 1; *State v. Cameron*, 2 Chand. (Wis.) 172; *Fitzgerald v. State*, 11 Neb. 577; *Rakes v. People*, 2 Neb. 157; *State v. Medlicott*, 9 Kan. 257; *State v. Wilson*, 24 Kan. 189; *State v. Mathes*, 90 Mo. 571; *State v. Kilgore*, 70 Mo. 546; *State v. McCanon*, 51 Mo. 160; *State v. Simon*, 50 Mo. 370; *State v. Draper*, 65 Mo. 335; *State v. Elliott*, 45 Iowa, 486; *People v. Knapp*, 26 Mich. 112; *People v. Simpson*, 48 Mich. 474; *Montgomery v. State*, 11 Ohio, 424; *Robbins v. State*, 8 Ohio St. 131; *Tracy v. People*, 97 Ill. 101; *Barnett v. People*, 54 Ill. 325; *Moock v. People*, 100 Ill. 242; s. c., 39 Am. Rep. 38; *Scott v. People*, 63 Ill. 508; *Starkey v. People*, 17 Ill. 17; *Ward v. State*, 8 Blackf. (Ind.) 101; *Powers v. State*, 87 Ind. 144; *Warren v. State*, 63 Ind. 548; *Jones v. State*, 76 Ind. 66; *Morgan v. State*, 31 Ind. 193; *Brakefield v. State*, 1 Sneed (Tenn.), 215; *Nelson v. State*, 7 Humph. (Tenn.) 542; *Smith v. State*, 9 Humph. (Tenn.) 9; *Walston v. Com.*, 16 B. Mon. (Ky.) 34; *Com. v. Haney*, 127 Mass. 455; *State v. Center*, 35 Vt. 378; *Brotherton v. People*, 75 N. Y. 159; *Hackett v. People*, 54 Barb. (N. Y.) 370; *People v. Perry*, 8 Abb. Pr. N. S. (N. Y.) 27; *People v. Knickerbocker*, 1 Park Cr. (N. Y.) 302; *Donnelly v. State*, 26 N. J. 463, 601; *Small v. Com.*, 91 Pa. St. 304; *Alison v. Com.*, 99 Pa. St. 17; *Dumas v. State*, 62 Ga. 58; *Thompson v. State*, 24 Ga. 297; *Brown v. State*, 32 Miss. 433; *Lewis v. State*, 9 S. & M. (Miss.) 115; *Jordan v. State*, 81 Ala. 20;

Walker v. State, 52 Ala. 192; Ward v. State, 78 Ala. 441; May v. State, 55 Ala. 39; Johnson v. State, 17 Ala. 618; *Exp. Nettles*, 58 Ala. 268; Benavides v. State, 31 Tex. 579; Edmondson v. State, 41 Tex. 496; State v. Brunneto, 13 La. Ann. 45; State v. Spencer, 30 La. Ann. 362; State v. Freeman, 1 Spear (S. Car.), 57; State v. Poll, 1 Hawks (N. Car.), 442; State v. Peace, 1 Jones (N. Car.), 251; Vass's Case, 3 Leigh (Va.), 786; Hill's Case, 2 Gratt. (Va.) 594; Bull's Case, 14 Gratt. (Va.) 613; R. v. Smith, 23 Up. Can. C. P. 312; R. v. Sparham, 25 Up. Can. C. P. 143; U. S. v. Woods, 4 Cranch (C. C.), 484; U. S. v. Veitch, 1 Cranch (C. C.), 115; State v. Quick, 15 Rich. (S. Car.) 342; 3 Russ. on Cr. (5th Ed.) 354.

It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. R. v. Peel, 2 F. & F. 21.

The belief of a speedy dissolution is the test by which the competency of dying declarations is to be measured. It is not error to admit evidence showing the condition of the deceased at the time such dying declarations were made. Sullivan v. Com., 93 Pa. St. 284.

"It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the expostions of the deceased's belief that his dissolution was or was not impending. It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declara-

tion is inadmissible." 1 Greenl. on Ev. (14th Ed.) § 158; 3 Russ. on Cr. (9th Am. Ed.) *250.

If it appear from the statement of the deceased, made after he was fatally wounded, that he knew or thought that he was *in extremis*, this would clearly be sufficient to authorize the introduction of his declarations made at such time. Reynolds v. State, 68 Ala. 502; Johnson v. State, 47 Ala. 9.

In Jones v. State, 71 Ind. 66, the court said: "The fact that the deceased was able, at the time the declarations were made, to get up out of bed, go to the window and explain the situation, and go back to bed without assistance, should not, as we think, exclude the declarations from the jury. We cannot say that the exhibition of so much physical energy and strength is inconsistent with a firm conviction of impending death. The fact however, was a proper one to be taken into consideration by the jury."

As to whether consciousness of death can be inferred from the nature of the wound, the party being speechless, see R. v. Morgan, 14 Cox C. C. 337; s. c., 28 Eng. Rep. (Moak's Ed.) 583; R. v. Bedingfield, 14 Cox C. C. 341; s. c., 28 Eng. Rep. (Moak's Ed.) 587.

It is not necessary that the declarations should be stated at the time that they were made under a sense of impending death. It is enough if it satisfactorily appears in any mode that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct or other circumstances of the case. People v. Taylor, 59 Cal. 640; People v. Gray, 61 Cal. 164. See Murphy v. People, 37 Ill. 447; Morgan v. People, 31 Ind. 193; State v. Gillick, 7 Iowa, 287; Dumas v. State, 62 Ga. 58; State v. Wilson, 24 Kan. 189; People v. Grunzig, 1 Park Cr. (N. Y.) 299; Ward v. State, 78 Ala. 441; State v. Tilghman, 11 Ired. (N. Car.) 513; Sullivan v. Com., 93 Pa. St. 284; State v. Nash, 7 Iowa, 347; Kilpatrick v. Com., 31 Pa. St. 198; Com. v. Murray, 2 Ashm. (Pa.) 41; Com. v. Williams, 2 Ashm. (Pa.) 69; McLean v. State, 16 Ala. 672; State v. Scott, 12 La. Ann. 274; Nelson v. State, 7 Humph. (Tenn.) 542.

It must be made to appear that it was made under a fixed belief and moral conviction that death was then impending and certain to follow almost immediately, and otherwise under such circumstances as to exclude the supposition that the

declarant in making it was influenced by malice, revenge, or any conceivable motive to misrepresent the real facts. *Tracy v. People*, 97 Ill. 101.

If it appears in any mode that there was a hope of recovery, however faint, still existing in the mind of the declarant, the declaration is not admissible. *People v. Gray*, 61 Cal. 164. See *Com. v. Roberts*, 108 Mass. 296. Compare *People v. Anderson*, 2 Wheel. C. C. (N. Y.) 398.

As to the proof of the existence of the sense of impending death, it may be gathered from any circumstance or from all the circumstances of the case. It need not be proved by the express statements of the declarant that such belief exists. *People v. Gray*, 61 Cal. 164.

Forty-eight hours after the shooting, the deceased clearly thought that he could not recover, and acted as if were to live but a short time, though the surgeons, to soothe him, assured him that he would live, and one of them thought they succeeded in thus deceiving him, and that he did entertain some hopes of his recovery, and it rather appeared that he did entertain some hopes; his declarations were not admitted. *State v. Nash*, 7 Iowa, 347.

In order to render a statement admissible as a "dying declaration," it is not necessary that the deceased should *state* in language, at the time of making it, that he was conscious of impending dissolution. It is sufficient if the facts and circumstances reasonably satisfy the judge that the declarant was *in extremis*, and laboring under the impression of impending, or almost immediate, dissolution. *Tip v. State*, 14 Lea (Tenn.), 502.

In this case the State introduced on the trial the widow of the deceased as a witness, who testified as follows: "He (the deceased) left home about eight o'clock that night. When I next saw him at the hospital he was nearly dead." She then describes his wounds, and continues: "He continued to grow worse. On Saturday he requested to be taken home. He was carried with the utmost care on a litter. Taking him home seemed to improve him some. On Sunday morning his left arm having mortified was amputated by Drs. Briggs and Blake. Almost his entire arm was taken off. He had every attention that could be bestowed upon him. . . . After the amputation he seemed to revive, and seemed to be better, but on Monday morning he was very weak, and continued to sink until his death, between eleven and twelve o'clock that night. He told me

not to be anxious about him. Up to twelve o'clock Monday he spoke hopefully of his condition and seemed to be more solicitous about me, as I was in very delicate health and very weak. About one o'clock Monday, he said: "If I must die, I will say Tip Curtis is the man who cut and killed me." He soon after called for the insurance policy on his life, which was made payable, the most part, to me, and had it read to him. He asked me if that was satisfactory. At six o'clock Monday evening he called me to his bedside and spoke of death, and seemed to be sinking rapidly. He said he was not doing anything to Tip Curtis when he cut him; that he and Hickman were standing in the street, when Curtis, without warning, commenced to cut him in the back; that he turned, put out his hands to defend himself, when Curtis inflicted the two wounds upon his arms."

A person mortally wounded as informed by his physicians that there was no hope, and that he must die. He said he knew it, and told all with whom he conversed upon the subject that he would die from his injuries. He then made certain declarations as to his murderer, and immediately after directed his will to be prepared. Upon the will being brought to him he inquired whether if he got well the will would amount to anything. Being told that it would not, he executed it, and afterwards died. *Held*, that his inquiry as to the efficacy of the will in the event of his recovery did not, of itself, in the face of the evidence, disclose any expectation of recovery on his part, and that therefore his declarations as to his murderer were admissible in evidence as dying declarations. *Allison v. Com.*, 99 Pa. St. 17.

A declaration of a wounded person is made and reduced to writing two hours before his death, when he believed he would recover. If afterwards, showing that he must die, he referred to the declaration and affirmed its truth, it becomes as competent evidence of the wounding as if originally made under the belief that death was then impending. *Mockabee v. Com.*, 78 Ky. 380.

Where the deceased said repeatedly, "I am bound to die; I am shot in the side and back, and am bleeding internally," and then said he was shot by the prisoner, and died of the wounds in a few days afterwards, *held* admissible as dying declarations, notwithstanding that a physician, between the time the declaration was made and the death, used language to the deceased calculated

to inspire the hope of recovery. *State v. Mills*, 91 N. Car. 581.

It is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony. *Fitzgerald v. State*, 11 Neb. 577.

It appeared that a priest of the Roman Catholic church had administered to L. the last rites of that church, prescribed for dying persons, in which L. had intelligently participated, as only one familiar with the rites of the church could do. At some time before the declaration was made, L., upon being asked whether he felt as though he was going to die, replied that he did; and said that he did not think he would live to see the trial. And shortly after the declaration in question he said that it was hard to die. The wound was of a nature to naturally cause in the mind of any person grave apprehensions that it might be fatal. *Held*, that the declaration was admissible. *State v. Cantieny*, 34 Minn. 1.

The declaration is admissible although the witness is not positive whether the consciousness of the deceased, that his death was inevitable, was expressed before or after his declaration. *State v. Peace*, 1 Jones (N. Car.), 251.

One of the witnesses testified in brief as follows: About seven o'clock at night the deceased came to witness' house; went in and sat down by the fire, and held his head with his hands; told witness that his head felt like it was fit to burst open; that he had been shot, and asked witness to get a light and see how badly he was hurt; the latter did so, and found that he was shot in the back of the head; in a few minutes he stated that a couple of darkies got into his wagon about Barnesville, and rode with him down the road, and shot him and jumped out. Shortly after this he swayed or leaned forward in his chair. Witness made a pallet, laid him on it, and went to a neighbor's for assistance. Deceased did not talk further, but afterwards became unconscious and died early next morning. *Held*, that the declarations of the deceased as to who shot him, made immediately after he had been shot and had fled to the nearest house, were admissible in evidence. *Dumas v. State*, 65 Ga. 471.

Dr. A., who was called to see deceased immediately after he was shot, stated that C. died in ten or fifteen minutes after he reached him, and C. said, "Oh! Doc., what will become of my poor wife and mother;" that he could not live, and

requested witness to lay him down, saying, "I must die; I cannot live;" that witness then asked him if he knew who killed him, and he replied the "Kidder man;" and upon then being asked if he knew his name, said "Rediker knows." *Held*, that the declaration was admissible. *State v. Johnson*, 76 Mo. 121.

Dying declarations must be made at the time and place of shooting in order to be admitted as part of the *res gestæ*; before such declarations, alleged to have been made some time after the shooting, will be admitted in evidence, it must be shown that the declarant was aware of his approaching death. *Kane v. Com.*, 109 Pa. St. 541.

A surgeon found a transverse wound across the throat of the deceased, which had passed through the trachea, and the point of the instrument had reached the vertebræ. Three days afterwards she stated to the surgeon that she did not think she could recover. He considered her in danger, but had a hope she would recover. To the nurse who attended her she had repeated several times, both before and after the surgeon had seen her, that she should die. The nurse told her she thought she would get better. She said she thought she would, if the surgeon could see in her throat as he could see on her hands. This she said many times, and all day she said she should get better if it was not for her throat. The surgeon spoke cheerfully to her, and she appeared cheerful after that, and in better spirits. She got a little better, and was easier after the surgeon dressed the wounds. A magistrate saw her, and told her of her condition, and that she was in very great danger. He repeated two or three times, in various forms, something of the same kind—that she was likely to die; that she might die; and added, "I hope it may please Almighty God to bring you round, but I believe you are in great danger. I think it very possible this will end fatally with you. I am come to hear you, and whatever you say, should you die, will be produced in evidence on the trial of the prisoner. You must therefore tell me the truth, and nothing but the truth, without any fear or reserve." She said nothing. He then said, "It would be a very sad and awful thing for you to go into the presence of your Maker, having told me anything, in your present situation, which is false." From her not having said anything to him, he told her he should administer an oath to her, which he did, and by means of questions to her he got her to tell him,

and what she said was reduced into writing, and read over to her; and he then said to her, "Now is that perfectly true, and the whole truth?" and she said "It is." She then put her mark to it. It was objected that this declaration was not made spontaneously, and not under a sense of immediate and impending death; but it was held that it must be taken on the whole that the statement was spontaneous, and that, looking at her state, and at her expressions, there was not the slightest hope in her mind of recovery. *R. v. Whitworth*, 1 F. & F. 382.

Where a governor of a workhouse took down a statement from the deceased, but at that time the deceased did not express any apprehension of death; and the next day the chairman of the Board of Guardians asked her whether she was aware of the state in which she was, and she said she felt she was dying, and satisfied him that she thought so. He then questioned her from the statement, sometimes putting the questions from it in a leading way, and sometimes taking her own words; and it was objected that the statement was inadmissible, because it was in answer to leading questions; but the objection was overruled; and, on a case reserved, the judges seem to have been of opinion that the statement was properly admitted; but the conviction was reversed on another ground. *R. v. Smith*, 12 Law T. 608; L. & C. 607.

Where a counsel, in opening a case, was proceeding to state declarations made by the deceased on his death-bed, when he believed that he should not recover, it was objected to the opening of these declarations; because, although the man believed himself to be past hope, yet at that time the surgeons who attended him were of opinion that his condition was not past hope of recovery. Willes, J.: "At present I am of opinion that the declarations are admissible, unless the surgeons should give very different evidence to that in their depositions." Subsequently a medical witness stated that, at the time the declarations were made, he considered the disease to be progressing favorably, and that there were fair hopes of recovery. It was then urged that a dying declaration must be made upon a belief of impending death, and that belief must be well founded. It is not sufficient that there is a *bona fide* belief which is afterwards verified by a death within a short time afterwards, if at the time of making the declaration the surgeons are treating the man as a recovering patient. Willes, J..

"It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall therefore admit the declarations." *R. v. Peel*, 2 F. & F. 21.

Where the deceased went to her sister's house on Friday, and asked to stay there, saying she was very ill, and then appeared very ill and shaking, and continued there till the next Wednesday, when her sister urged her to have a medical man; on which the deceased said, "Then I suppose you think me dangerous?" and the sister replied, "Yes, I do; we all think you dangerous;" she then consented to have a medical man. On this day also she wished to see her niece, and said to her. "Now, my dear niece, hear your aunt's dying words. I hope you will always act in accordance with your duty; you see what I am brought to." The medical man did not come; but sent some medicine and a mustard poultice, which was put on her side, and appeared to give ease. She was, however, very ill that night, had the rattles very bad, but did not seem to know what they were. The next morning she appeared very anxious to see the medical man. She also sent for a person to make her will, and expressed her fears, if he did not come immediately, she should be gone before he came. Seeing her sister in tears, she said, "Why are you crying? Are you crying because I am going to glory?" Her sister said, "No, but it is hard to part." Then said the deceased, "We must part. The Lord's will be done." She appeared very happy in the prospect of her dissolution, and her sister said to her, "This, my dear sister, is the victory." She replied:

"Oh, how happy I shall be
When I have gained the victory!"

The medical man came on the Thursday morning, but before any opinion had been expressed as to her state, she made a declaration. Coleridge, J.: "The principle is perfectly clear, that no declarations are admissible unless made by a party lying under the conviction of impending dissolution, and without the least hope of recovery. In this case four facts present themselves for my consideration. The first is the manifest strong sense which the deceased had of her danger. This, however, did not arise from any knowledge of her complaint, but was founded on her sense of pain. Such a sense of danger does not exclude a hope

that medical aid may afford relief. It is different from a case where a man knows that he has been shot through the lungs or in some other vital part, and, from a knowledge of the nature of the wound, must be aware that he could not live. The sense of danger by the deceased, I think, was not of a character to preclude some slight expectation that she might recover; and, therefore, on this ground I do not think the evidence admissible. The second fact is her anxiety about the surgeon's coming. I do not think that this is decisive one way or the other; for although it does certainly rather tend to the conclusion that some hope still lived in her mind, still, looking at it in connection with her other expressions, I cannot but think that the solution of it may be, that it resulted from an expectation that the medical man would be able to relieve her pain. The third fact is the character of her religious expressions. Religious expressions are very often made use of by pious people without their having lost a hope of their recovery. They often call their children and friends around their bed, under the apprehension that they may not be able again to do so from the progress of their disorder, and still cherish a lingering hope that the disorder may take a favorable turn, and they may recover. Still, language of this sort is evidence, and strong evidence, of the feelings and views of the party by whom it is made use of, and may in many cases be almost conclusive evidence of the abandonment of all hope. I think it assumes that character in this case. The deceased's expressions to her sister about going to glory, evidently refer to her belief that she was going to heaven; and when she repeated those lines—

"Oh, how happy I shall be
When I have gained the victory!"—

she plainly refers to the Scripture account of death, and shows that she was expecting death, and trusting that she should have its sting taken away. This evidence, therefore, weighs strongly in favor of receiving the declarations. Then there is the fourth fact—that of making a will. Now, in ordinary cases, the mere fact of making a will I should account as nothing; because any prudent man who felt himself ill would make a will on the mere chance that the illness might prove fatal, though he did not believe it would. But in this case there is not only the making the will, but the expression that if the party sent for did not quickly come, she should be gone before his

arrival. I think these facts put together import a thorough conviction on the part of the deceased that she had given up all hopes of life, and was expecting almost immediate dissolution; and I shall admit the declarations." *R. v. Thomas*, 1 Cox C. C. 52.

The deceased was shot in the thigh, and crawled to a house in a few minutes, and said, "I am shot; I am dying;" and being laid on a bed in the house, he repeated several times that he was dying, and wished a doctor to be sent for. He was in very great pain, and complained much. This was in the night, and between one and two in the morning a surgeon found him in a weak, fainting state; he was suffering very acutely; he never rallied from that weak state. Being removed to his lodgings and his wound dressed between four and five that morning, he said, "Oh dear, doctor, I will never get over this!" to which the surgeon made no observation. Between four and five the same afternoon, the deceased was no better; he did not seem less desponding. Another surgeon who had seen him from early the next morning till within an hour of his death, on first coming to him, said, "Mac, how are you?" He replied, "O doctor, I'll never get over this!" The surgeon endeavored to cheer him, and said, "Mac, I hope we shall soon see you out again." He said nothing, but shook his head, and did not seem at all cheered by the hope expressed. The surgeon said the deceased appeared to have received a severe shock to the nervous system, and that he never rallied from it. During two or three hours that he remained with the deceased, he again said, "O doctor, I'll never get over this!" and added, that he seemed in a desponding state. Between four and five the same afternoon he was not materially worse, and the surgeon then told him that he hoped he would get better, but the remark did not appear to raise him in cheerfulness. About eleven the next morning fatal symptoms had come on, and there were no hopes of recovery, and the surgeon said that at that time his spirits were much depressed. Being desired to explain what he meant by the word "desponding," the surgeon said, "When I said, 'Mac, I hope we shall see you out again,' he shook his head in a very desponding way. I collected from it that he thought he never should rally again. That was my impression at the time. From his speech and manner, deceased convinced me that he thought he should not recover. He was not a person of low spirits, but of firm

mind." A woman, with whom the deceased lodged, came into his room after the fatal symptoms had appeared, viz., about one o'clock, when he said, "Mother, I shall never be well more." She replied, "My dear, you have nothing to do but to pray to God to save your soul." He said nothing to that, but seemed as if he was going to expire—as if he had not power to speak. Another woman went to see him about two o'clock the same afternoon, and said, "O, Mac. I am sorry to see this!" He said, "Yes, Mrs., this will finish me." Her child was brought to the bed-side, and he took its hand and said, "My dear little boy, I shall never see you more." An inspector of police proved that he saw the deceased in the first part of the afternoon, and told him he would be provided for, not only in the present case, but also if he should be lame for life. He said, "It's of no use: I shan't want it." What was said about providing for him did not appear to cheer him. Towards six or seven the same evening the inspector gave him a chamber-pot, and he endeavored to pass water: after severe pain and struggle he did it, but it was chiefly blood. I supposed he saw it, because he made a motion with his hand to put the chamber-pot aside: he rested his head on my shoulder, and said, "It's all up with me." In some part of this conversation, but in what part it did not distinctly appear, the inspector said, "You are very severely wounded, and I believe mortally so." He said nothing, but slightly grasped the inspector's hand. The inspector waited a little time after the making the bloody water, and then began the conversation as to which the question arose. The inspector said the deceased was very serious at this time, and appeared to be sinking very fast; his manner was that of a man in a dying state. Soon after the conversation was over, the inspector proposed to fetch a priest. The deceased said, "That's not of much use." The inspector said, "Have you any objection to make a deposition to a magistrate?" He said, "No." The inspector said, "Mr. Clark (a magistrate) is in the next room." He replied, "Not yet." He then seemed very much suffering. The deceased was a Roman Catholic, and a Roman Catholic priest proved that if a Roman Catholic wishes to make his peace with God, he usually sends for a priest to receive extreme unction, having previously made confession, and received the holy communion, if there be time. "Except he be dead to all sense of religion, a person thinking

himself on the point of death would send for a priest. There are, of course, different degrees of seriousness and devotion in our Church, but people who may generally have neglected the ordinances invariably send for a priest. Extreme unction is not deemed by our Church necessary for salvation, but if a priest were at hand and offered his services, and a person at the point of death refused them, I should say either he was no Catholic, or not in the way of salvation. Attending Protestant places of worship is considered to be a proof of being a Christian and Catholic." The nearest place where a Catholic priest resided was fourteen miles from the deceased, and he had attended the parish church and an independent meeting more than once, there being a Roman Catholic chapel in the neighborhood. It was urged, on a case reserved, that neither the approach of death, nor the apprehension of its approach, were enough taken alone: there must be an entire abandonment of all hope of recovery. The nature of the wound here would not lead to the abandonment of all hope, as it was not in a vital part. The surgeon gave hope here in the last words that passed between him and the deceased. The policeman's offer would lead the deceased to entertain hope. There was nothing said as to the disposal of property, and no farewell of his friends. Declining the attendance of the priest amounted to declining confession, absolution, and extreme unction, and therefore the answer respecting the priest showed that the deceased did not think that his end was approaching. The deceased put off having his deposition taken; therefore he contemplated making another declaration; but a dying declaration must be a final declaration. Lord Denman, C. J.: "We all think the case beyond all doubt. Danger existed. The deceased clearly thought he was dying, and had no hope of recovery. There is no ground for holding his declaration inadmissible." *R. v. Howell*, 1 Den. C. C. 1.

It is not necessary that the declarant state that he is expecting immediate death; it is enough if from all the circumstances it satisfactorily appears that such was the condition of his mind at the time of the declarations. *State v. Wilson*, 24 Kan. 189; s. c., 36 Am. Rep. 257.

Declarations Not Admissible.—Any hope of recovery, however slight, existing in the mind at the time of the declarations made will render the declarations inadmissible. 3 Russ. on Cr. (9th Am. Ed.) *252. Upon an indictment for murder,

it was proposed to give in evidence a declaration of the deceased, and a surgeon proved that he had told the deceased that she would not recover, and that she was perfectly aware of her danger. She said she hoped the surgeon would do what he could for her for the sake of her family; he told her there was no chance of her recovery. Bosanquet, J.: "This shows a degree of hope in her mind. To render a declaration of this kind admissible, the deceased must have had the impression on her mind of an almost immediate dissolution. This will not do." *R. v. Crockett*, 4 C. & P. 544. So where upon an indictment for murder it appeared that, after the surgeon had examined the wound, the deceased inquired whether he was in danger, to which the surgeon answered that he was, and the only chance of his living was keeping himself quite quiet; upon which it was contended that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements, but that upon the surgeon's statement he must be taken to have had some hope of recovery. On which Tindal, C. J., observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, would undoubtedly render the evidence of such declarations inadmissible. But upon further examination of the surgeon it appeared, that before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previous to his receiving his declarations, desired him as a dying man to tell the truth, and that the deceased replied that he would. Upon this further evidence the declarations were held admissible. *R. v. Hayward*, 6 C. and P. 157. So where, upon an indictment for manslaughter, it was proposed to give in evidence a declaration of the deceased, and a surgeon was called, who stated that he saw the deceased on the evening of the day on which the injury was inflicted, and that the deceased appeared to think that he should never recover. He said: "I feel that I have had such an injury in the bowel that I think I shall never recover;" the surgeon endeavored to encourage him, as his symptoms were not then such as to lead the surgeon to consider him in danger of dying; but his expression was that he felt satisfied that he should never recover. This was on the 10th of May, and the deceased died on the 17th. *Hullock, B.*:

"The principle in which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately 'never recover,' but still that would not be sufficient to dispense with an oath. I must reject the evidence." *R. v. Van Burchell*, 3 C. & P. 629.

In order to render a dying declaration admissible, it must be shown to have been made under such circumstances as necessarily exclude the supposition that the deceased might at the time entertain some hope of recovery. On an indictment for murder the clerk of the magistrates, who had taken down a statement made by the deceased while at an infirmary, a short time previous to his death, proved that he asked the deceased how he was, and he answered, "I think myself in great danger;" and *Simpson's Case*, 1 Lew. 78, being cited, Patteson J., said, "No man can have a higher respect for the opinion of Mr. J. Bayley than I have, but I have always considered that, in order to a statement being received as a dying declaration, it must be shown that at the time the deceased made it, not merely that he considered himself in danger, but that he was without hopes of recovery. It does not appear to me that the words 'I think myself in danger' necessarily exclude the suspicion that the deceased might have, nevertheless, entertained some hope." *Errington's Case*, 2 Lew. 148.

The absence of any settlement of affairs—of directions as to his funeral—of taking leave of his friends and relations, and such like—tends to show that all hope of recovery is not vanished from the mind, and may sometimes exclude a dying declaration. Upon an indictment for murder, it was proposed to give in evidence a declaration of the deceased, and his widow stated that she went to fetch the deceased home after he was hurt. He took to his bed the day after, and on that evening she asked him how he was, and he said he was worse, and that he should die this time. He died on Sunday, seven days after that. He was sometimes light-headed, and sometimes not. He several times had his children in to take leave of them before the Saturday. The brother proved that the deceased at times thought that he should recover, and at other times thought he should not. Another witness proved that on the day before he died he said he thought he should not recover; he was delirious at times on that day. On the

Wednesday before his death he said he thought he should recover; he was then very ill, but sensible; on the day before he died, he was not sensible when the witness first saw him; he became sensible at twelve, and remained so for an hour. The witness asked him if he thought he should recover, and how he was; he said he thought he should not recover; he was so very ill. He did not take leave of his wife or give any orders about his funeral or his will, nor did he say any prayers. The surgeon proved that he was delirious from Thursday, but was sensible on Friday. The surgeon considered him in danger on the Thursday, but his opinion was not communicated to the deceased. The declaration was held not admissible. *R. v. Spilsbury*, 7 C. & P. 187.

In *People v. Hodgdon*, 55 Cal. 76; s. c., 36 Am. Rep. 30, a paper was offered and admitted in evidence in the court below as a dying statement of Emma Downs. It began in these words: "Believing that I am very near death, and that I may not recover;" then followed the dying declaration. This court held the ruling of the court below error, on the ground that the words above quoted were "a clear indication that the deceased, at the time of making the declaration, had not abandoned all hope of recovery."

Upon the trial of a person on the charge of murder, it appeared that the deceased, some days before his death from the wound he had received, made a statement to the effect that the defendant shot him. The preliminary proof to the court showed that at the time of making the statement the deceased had not been informed by his physician or any one else that his wound was mortal, though he said at the time he would not live three days. It further appeared that he made no preparation of any kind in view of death, often used profane language, and spoke about being able to resume business and of getting married in a few days. *Held*, that the statement of the deceased was not admissible as a dying declaration, it not appearing it was made in view of impending death, and under the sanction of a moral sense of certain and just retribution. *Digby v. People*, 113 Ill. 123; s. c., 55 Am. Rep. 402.

Statements relating to her death—wound made by the deceased eighty-two days before her death, but not in the immediate apprehension of dissolution—are not admissible in evidence against her accused murderer. *State v. Belcher*, 13 S. Car. 459.

Evidence of the wife of the deceased, that after he had gone two hundred yards

from the place where he was shot and called her, and she had gone to him, travelling one hundred yards, he said to her, "Oh hun, he has killed me," or "Oh hun, he has shot me," is not admissible as part of the *res gestæ*; nor as a dying declaration, from the uncertainty of the witness as to which of the two expressions was used by the deceased. If the latter exclamation was used, there is nothing to show that it was made under a sense of impending death. *State v. Rider*, 90 Mo. 54. See *Lewis v. State*, 9 S. & M. (Miss.) 115; *Adwell v. Com.*, 17 B. Mon. (Ky.) 310.

Dying declarations are not admissible in evidence if the declarant had the slightest hope of recovery, although he dies within an hour afterwards. *People v. Hodgdon*, 55 Cal. 72; s. c., 36 Am. Rep. 30.

The declaration was put in writing and read over to the declarant, and she was asked to correct any mistake; it was written down: "I have made the above statement with the fear of death before me, and with no hope of my recovery." She then said, "No hope at present of my recovery." The clerk thereupon inserted the words "at present." She died the next morning. *Held*, that, under the above circumstances, the declaration so taken was inadmissible, inasmuch as the conduct and acts of the deceased rendered it at least doubtful whether she had an unqualified belief that death was immediately impending, and absolutely devoid of hope of recovery. *R. v. Jenkins*, L. J. M. C. 82. See *Jackson v. Com.*, 19 Gratt. (Va.) 656.

Where the deceased was found lying on her back with her throat cut, and bleeding profusely, and a witness said in her hearing, "My God, the woman will bleed to death before assistance comes;" and added, "She is dying," which she heard. A policeman whispered something in her ear, and admitted that he might have said, "If you do not send for assistance, she will bleed to death." When the exclamations respecting her danger were used, she looked in the policeman's face, as though she wanted to say something, and he stooped down and put questions to her, and she answered them. Her answers grew fainter, but she talked distinctly, but low, as if she were faint, and died in five minutes. It was held that the safer course was to reject a statement made to the policeman. There must not only be an actual nearness of death, but an absolute conviction of it in the mind of the individual. No case had gone the length of saying that the latter could be dispensed

with. The decision of points of this kind must always rest on the circumstances of each individual case; but here there was nothing but a mere inference that the deceased was probably aware that she could not recover. *R. v. Dalmas*, 1 Cox C. C. 95.

Where the deceased went to a hospital, and the doctor told her she was dangerously ill, and ordered that the clergyman should be sent for; but no person told her expressly that she was dying; the clergyman warned her to prepare for death; but she had not told any person that she knew she was dying, though she had been heard recommending her soul to God,—it was held that her declaration was not admissible, as it was not proved to the satisfaction of the court that she was under a clear impression that she was in a dying state. *R. v. Mooney*, 5 Cox C. C. 318.

So where a surgeon proved that he had been called in at first to attend the deceased, but had not attended till his death, and that he considered the case was hopeless, but did not tell him so; on the contrary, he told him to have a good heart; and there was nothing in his state to show that he must have felt that he was a dying man. But a policeman proved that he had found the deceased in bed, and that he spoke about his condition, saying he was a murdered man, and it would have been better if they had killed him on the spot than left him to linger; he never expressed any hope of recovery; and being told by the policeman that he thought he would get better, he replied, "I cannot say; I don't think I shall ever get over it." —*Wightman, J.*, was disposed to receive the declaration. But the policeman further proved that the expression "I am a murdered man" was often used by persons without their meaning that they were going to die immediately, and he thought the words used by the deceased were not used in any other sense. He asked him many questions which he would not have done if he had seen anything to indicate that he apprehended he was going to die. The question did not distress him, and from the way in which he answered them the constable did not think there was any immediate fear of death on his mind, or that he thought he was in danger of his life. *Wightman, J.*, then thought that the case was without the principle on which such declarations were admissible. *R. v. Qualter*, 6 Cox C. C. 357.

So where a constable proved that "from appearances I should judge that the deceased was dying. He was making his statement to me about a quarter of a hour. I believe he knew he was dying. I can-

not recollect that he said anything about dying before he began his statement. As he finished he said, "O God! I am going fast; I am too far gone to say any more." The deceased died a few hours afterwards of a wound in the abdomen that penetrated the stomach. *Cresswell, J.*, having consulted *Williams, J.*, said: "My brother *Williams* confirms the doubts I had on this subject; that it being possible the man did not discover the extent of his weakness till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast; there is not, consequently, that clear ascertainment of his consciousness of his state, before he made it, to render it admissible." *R. v. Nicolas*, 6 Cox C. C. 120.

Hope of Recovery, Afterwards Abandoned.—If hope he expressed, but afterwards, when hope is gone, the declarations are made, such declarations will be admissible. *Swall v. Com*, 91 Pa. St. 304. The following are the facts in this case. About one o'clock on the morning of the 16th of January, 1879. *Jacoby* was shot in the street in Pittsburgh. He was immediately removed to his house, and a physician summoned, who found him in a very critical condition. On the afternoon of Saturday, the 18th of January, the deceased was informed by one of his physicians that he could live but a few hours. In reply "he remarked he didn't feel as if he were going to die." He grew rapidly worse, however, and about two hours after the above conversation, two other attending physicians informed him "that he was dying, and that it was important, in order that justice should be done to all, that he should make a dying declaration, and state all the facts exactly as they occurred in relation to his death." The mayor of the city was then sent for, who testified in regard to what occurred at the house of deceased: "When I went there, from the physician in attendance I understood that he was dying. I asked one physician if they had informed him of his condition. I think he said they had not. I told him he had better do it. He went to Mr. *Jacoby* and told him that he was rapidly sinking, and if he had any statement to make he had better make it at once. Then I said, 'If you think you are dying, and have any statement to make, I will take it. But I want to know first whether you consider yourself as dying?' He said, 'am satisfied I am dying.' Then I took his statement."

Previous Declarations, Affirmed under Sense of Impending Death.—A person mortally wounded, at the time he made

the declarations offered as evidence, said he did not believe the wound would kill him; but afterwards repeated the declarations, and said he believed he would die, and explained why he said at first that he believed he would not die. The court held that his declarations were admissible. *Young v. Com.*, 6 Bush (Ky.), 317; *State v. McEvoy*, 9 S. Car. 208; *Mockabee v. Com.*, 78 Ky. 380; *R. v. Steele*, 12 Cox C. C. 168.

A statement was made by Y. some two hours before he died, and when he expressed the opinion that he would recover. It was reduced to writing at the dictation of Y., and at the time read over to and approved by him. A few minutes before the death of Y. the witness who had reduced the statement to writing returned to his bedside and found him speechless. The witness rubbed his hands and temples, and in a few minutes Y. recovered his speech and said to the witness: "Jim, I'll die in a few minutes," to which the witness replied, "Yes, you will," and then said, presenting the written statement, "Jim, I have in my hand the statement you made awhile ago of how you were killed. I now want to know whether it is true." To this Y. responded, "It is." The witness then said, "Shall I sign it for you?" to which Y. nodded assent, and the paper was signed in his presence. *Held*, admissible. *Mockabee v. Com.*, 78 Ky. 380.

Subsequent Hope of Recovery.—A hope of recovery subsequently entertained will not affect the admissibility of a declaration made under the consciousness of impending death. *State v. Kilgore*, 70 Mo. 546; *R. v. Hubbard*, 14 Cox C. C. 565; *Swisher v. Com.*, 26 Gratt. (Va.) 963. *Compare Jackson v. Com.*, 19 Gratt. (Va.) 656.

A., when under sense of impending death, declared that the shooting was accidental; a week afterwards, while in cheerful spirits, said her former statement was a "story." *Held*, that her last statement was not admissible. *Stewart v. State*; 2 Lea (Tenn.), 598.

A man was wounded in a fight with the defendant, and on the same day, while expecting to die, made certain statements in relation to the fight. He lived ten days longer, and his physicians expressed the hope to him that he would recover, and he said, "I hope so too;" but at last died of the wounds. It was held by the court that evidence of his statements was admissible on trial of defendant for murder. *Swisher v. Com.*, 26 Gratt. (Va.) 963.

Where a man, who was fatally wounded by another, declared, just before he died, while under a sense of impending dissolu-

tion, that the person who was arrested for the murder had killed him, and in reply to a remark of his wife said, "Save me if you can," it was held, that to make a declaration admissible as a dying declaration, it was not necessary that the person be *in articulo mortis* if he be under an apprehension of impending death; that in this case the remark to his wife did not show in the deceased such a hope of life as rendered his declaration incompetent, for a declaration which is competent evidence when made, will not be rendered incompetent by a subsequent revival of strength in the dying person; and further, in determining the condition of the dying person, the opinion of a witness that the deceased did or did not think he should die of his wounds is not admissible, but the facts are to be given, and the court is to decide what he thought of his condition. *State v. Tilghman*, 11 Ired. (N. Car.) 513.

The case of *Rex v. Mosley, R. & M. C. C. C. R.* 97, affords an example that if it sufficiently appear that a consciousness of impending death existed, it is immaterial that death did not ensue until a considerable time after the declarations were made. Upon an indictment for murder, a question arose respecting the admissibility of certain declarations, which were received in evidence, as the dying declarations of the deceased, as to the circumstances attending the commission of the crime, and as to the number of persons by whom he had been attacked. The injury that caused the death was done on the 30th of September, in consequence of which he was brought home and put to bed, and a surgeon was sent for on that evening to attend him. When the surgeon arrived, the deceased immediately complained to him of great pain in the chest, and particularly of his side, and of great difficulty of breathing. The surgeon continued to attend him until his death on the evening of the 10th of October following. The surgeon in his evidence said, "I think the deceased did not speak to me of his prospects of dying during that time; I thought his state dangerous; I thought his complaint was of that nature that it might terminate in death. The last day that I saw him (the 10th of October), I was certain he would die that forenoon; I communicated to him his state; I told him the case was hopeless; I made no communication to him till then; I did not consider the case quite hopeless till then; I always told him there was danger, but I hoped he would be better; I held out hopes to him of his recovery; I do not know whether he entertained hopes or not; he never expressed any opinion either of

hope or apprehension to me; I thought there was a probability of his recovering the day before he died; I at first thought the probabilities were against him; I did not communicate that to him." In consequence of this evidence of the surgeon, the learned judge confined the counsel for the prosecution, in their examination of the witnesses, to inquiries whether any and what declarations were made by the deceased on this subject, after the time the surgeon made the above communication to him of his hopeless state; but no such subsequent declarations could be proved. This failing, it became material to inquire further as to the prior hopeless state of the deceased, and his consciousness of it from the commencement of, or during his illness, in order to ascertain whether declarations alleged to have been made by him during his illness, but prior to the above communication to him by the surgeon, were admissible in evidence or not. To this point a witness, of the name of Anne Newton, stated, "That she was sent for to the deceased on the evening of the 30th of September, near eight o'clock; that he was in a very ill state indeed; that he said he was robbed and killed; that he should not get the better of it; that she assisted in putting him to bed, and continued to attend him till his death; that during that time he spoke of dying, and said he would not continue long, a few days would finish him; this he said about Tuesday; that he complained all along he was sure he would not get better; that he all along said he never would get better; that he never missed saying so one day before the latter end; that the deceased was sixty-eight years of age, and was in a very good state of health considering his years; she was a nurse accustomed to attend sick people, and very often found them low-spirited, and had known many persons to say they should never get better, who have got better; the deceased talked in that way; that about the Tuesday before his death he said he should not continue many days; it was before that he told her all about it; that the first night he said he should not get better, and he continued to say so, till the last day." The learned judge was not disposed to receive on this evidence the declarations of the deceased, made previous to the surgeon's notifying to him his hopeless state as above mentioned; but on its being intimated that the proof would be otherwise insufficient for the conviction of the prisoners, he allowed them to be given in evidence. Accordingly, evidence was received of the deceased's declarations made by him after he was on the Thursday

evening brought home, and had said that he was robbed and killed, and should not get the better of it; and also at different times afterwards during his illness, and previous to the surgeon's communications to him of his hopeless state, as above mentioned; and upon that and other evidence the prisoners were convicted of the murder. The judges, upon a case reserved, were unanimously of opinion that the dying declarations of the deceased were properly received in evidence.

Where the deceased had had the last rites of the Roman Catholic Church administered to him, and the surgeon, at the request of a magistrate, had asked him whether he had any hope of recovering, and he answered, "I think I shall die," he then made a statement. The surgeon stated that at the time he considered the deceased in a most dangerous state; but two or three days afterwards the deceased had expressed a belief that he should recover. Pattenon, J., held that it would be hardly right under such circumstances to admit the declaration of the deceased. *R. v. Taylor*, 3 Cox C. C. 84.

Mr. Roscoe's Review of English Cases.

—Dying declarations are only admissible when made by a person who is under the influence of an impression that his dissolution is impending. There must be no hope, not only of ultimate recovery, but of a prolonged continuance of life. If that impression exist in the mind of the sufferer, it will not render the statement inadmissible that death does not in fact take place till some time afterwards. In order to judge whether or not such is the state of the mind of the person in question, the whole of the circumstances must be looked at. It may be as well shortly to state in chronological order some of the cases in which the statements have been admitted or rejected; premising, however, that it is by no means suggested that they can become precise precedents for any future cases that may arise; it being impossible to bring before the mind by a verbal relation, however minute, many circumstances which take place at a trial by which the mind of the presiding judge would be influenced. Without such precaution a perusal of the reports of these cases, and still more so of the abridgment which is here given, might lead to serious error, but with it they will be useful as showing the aspect under which the question has been hitherto viewed. Roscoe's *Cr. Ev.* (10th Ed.) 34.

In *R. v. Woodcock*, 1 Leach, 503; and *R. v. John*, 1 East, 357; 1 Leach, 504, (n), this kind of evidence was received under circumstances which would not now be

considered sufficient to render it admissible. In the first, the surgeon distinctly stated that he did not think the deceased was aware of her situation; in the second, the deceased had never expressed the slightest apprehension of danger; and in neither case were there any circumstances which led to a different conclusion. In *R. v. Woodcock*, *supra*, no case was reserved by Eyre, C. B., for the opinion of the judges; but in *R. v. John*, *supra*, the judges, on a case reserved, held that the evidence was wrongly received. These cases have been frequently misquoted.

In *R. v. Christie*, Carr. Suppl. C. L. 202, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been an instance where a person had recovered from such a wound, he replied, "I am satisfied," and after this made a statement; it was held by Abbott, C. J., and Park, J., to be inadmissible. In *R. v. Van Butchell*, 3 C. & P. 631, the deceased said, "I feel that I have received such an injury in the bowel that I shall never recover;" and, on his doctor trying to cheer him, he said that he felt satisfied he should never recover; Hullock, J., rejected the evidence, saying that a man might receive an injury from which he might think that he should ultimately never recover, but still that would not be sufficient to dispense with an oath. See *R. v. Reaney*, D. & B. C. C. 151. In *R. v. Crockett*, 4 C. & P. 544, the surgeon said, "I had told the deceased she would not recover; and she was perfectly aware of her danger. I told her I understood she had taken something, and she said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do what I could for her for the sake of her family. I told her there was no chance of her recovery." Bosanquet, J., thought a degree of hope was shown, and struck out the evidence. In *R. v. Hayward*, 6 C. & P. 157, Tindal, C. J., observed that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made would undoubtedly render the evidence of such declarations inadmissible." In *R. v. Spilsbury*, 7 C. & P. 187, Coleridge, J., said: "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that, if received, it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless

I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover, as he was very ill. Now people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there is not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence." In *R. v. Perkins*, 9 C. & P. 395; 2 Moo. C. C. 135, a boy between ten and eleven years of age was severely wounded by a gun loaded with shot, and died the next morning. On the evening of the day upon which he was wounded, he was seen by two surgeons. One of them, who was then of opinion that he could not survive many days, said to him, "My good boy, you must know you are now laboring under a severe injury, from which, in all probability, you will not recover, and the effects of it will most likely kill you." The other surgeon told him, "You may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The boy made no reply, but his countenance changed, and he appeared distressed. From questions put to him, he seemed fully aware that he would be punished hereafter if he said what was untrue. He then made a statement to the surgeons. All the judges, except Bosanquet, Patteson, Coleridge, JJ., thought the statements made under the apprehension and expectation of immediate death. In *R. v. Megson*, 9 C. & P. 418, two days before the death of the deceased, the surgeon told her she was in a very precarious state. On the following day, being much worse, she said to him that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken place. She then proceeded to make a statement. Rolfe, B., held that this statement was not ad-

Dying declarations are admissible even though others may not have thought the person making them would die.¹

4. How Made.—The declaration may be by signs or other appropriate modes of communication.²

missible, as it did not sufficiently appear that, at the time of making it, the deceased was without hope of recovery. In *R. v. Howell*, 1 Den. C. C. 1, the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. He was a Roman Catholic, and an offer was made to fetch a priest, which he declined. This was insisted on as showing either that the deceased had no sense of religion, or that he did not expect immediate death; but the judges, upon a case reserved, were unanimously of opinion that the evidence was properly received. In *R. v. Reaney*, Dears. & B. C. C. 151, the prisoner, eleven days before his death, signed a statement concluding with the words, "I have made this statement believing I shall not recover." On the same day he said, "I have seen the surgeon to-day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover." The evidence was received by Willes, J., the point being reserved for the consideration of the court of criminal appeal. All the judges present were of opinion that the evidence was properly received. Much reliance was placed by the counsel for the prisoner on the word "ultimately," but Pollock, C. B., said, "No doubt, in order to render the statement admissible in evidence as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death, but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the person's mind at the time of making the declaration, than upon the interval between the declaration and the death." Wightman, J., said that the statement must be made under an impression "that death must in a comparatively short lapse of time ensue." Martin, B., thought the question one for the judges at the trial exclusively, and not for the court of appeal, but that opinion stands alone. The case is also reported in 26 L. J. M. C. 143, and more fully in 7 Cox Cr. Ca. 209, and there are some important discrepancies between the reports, but on the whole there does not seem to be any alteration of the law, as it previously stood, arising out of this case. Willes, J., in both the two last-mentioned reports, is said to

have expressed his opinion that the deceased could not, consistently with the expression he used, have supposed that he was about to linger a long time. There must be, said Lush, "a settled hopeless expectation of immediate death." *R. v. Osman*, 15 Cox C. C. 1. Erle, C. J., refused to infer from the nature of the wound alone (a gun-shot through the body), that a man must have known as soon as he had received it that he was about to die. *R. v. Cleary*, 2 F. & F. 851. It would seem, however, that in some circumstances it may be conceived possible to draw such an inference. *R. v. Morgan*, 14 Cox C. C. 337; *R. v. Bedingfield*, 14 Cox C. C. 341. In *R. v. Pickersgill*, Leeds Summer Assizes, 1869, the deceased, who was suffering from the effects of poison and died the same night, said: "I am getting worse. I am going to die." The doctor asked her if she thought she should get better, and she said, "No, I shall die." Cleasby, B., after consulting Brett, J., said the "evidence satisfied them that the woman was in a dying state, and that she believed it. When she said she was going to die, she meant that death was imminent." In *R. v. Bernadotti*, 11 Cox C. C. 316, where the deceased had received a knife-stab in the neck, and the bleeding having been stopped, had recommenced, so that his life was in danger, though not in immediate danger, and a magistrate was sent for, the deceased said, "Be quick, or I shall die," just before making the declaration. Brett, J., after consulting Lush, J., admitted the deposition. See also *R. v. Jenkins*, L. R. 1 C. C. R. 187; 38 L. J. M. C. 82. Where a woman who had received severe injuries was standing at a neighbor's door fainting and apparently dying, and she said, "I'm dying; look to my children," and she died in the course of the night, Hawkins, J., after consulting Baggallay, L. J., admitted her dying declaration. *R. v. Goddard*, 15 Cox C. C. 7.

The question is, what was the belief of the person making the declaration at the time of making it, and it is immaterial that such person afterwards took a more hopeful view of his condition. *R. v. Hubbard*, 14 Cox C. C. 565.

1. *People v. Simpson*, 48 Mich. 474; *R. v. Mosley*, 1 Mood. C. C. 97; *R. v. Peel*, 2 F. & F. 21.

2. T. being at the point of death, and

It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the case, though any departure from the mode may affect the value and credibility of the declarations. Therefore it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation.¹

conscious of her condition, but unable to speak articulately, in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds; and, if so, she was requested to squeeze the hand of the person asking the question. Thereupon she squeezed the hand of the person making the inquiry. *Held*, that the evidence was admissible as against C. *Com. v. Casey*, 11 Cush. (Mass.) 417. In this case, Shaw, C. J., said: "If the injured party had but the action of a single finger, and with that finger pointed to the words yes and no, in answer to questions, in such a manner as to render it probable that she understood, and was at the same time conscious that she could not recover, then it is admissible testimony."

The facts that the deceased at the time the declarations were made was unable to speak intelligibly on account of his wound, which was in the mouth, but communicated by signs or by writing, and was able to get out of bed, go to a window and explain the situation when injured, and go back without assistance, are not valid objections to the admissibility of such declarations. Where such declarations are communicated by signs to one, and reduced to writing by another, but afterward read over to and signed by the deceased, who said they were correct, such written statement is competent evidence to go to a jury. *Jones v. State*, 71 Ind. 66.

Where an attorney, being present on the night when one who had witnessed a murder was dying, propounded questions to him which he tried to answer, but could not; and his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head;" the statement consisting of the answers thus made was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto, by nodding his head;" "he spoke but a few words afterwards, and had frequently to be aroused; and seemed, while the statement was being read to him, to be in a stupor." *Held*, not to be admissible evidence. *McHugh v. State*, 31 Ala. 317.

In *R. v. Morgan*, 14 Cox C. C. 337; s. c., 28 Eng. Rep. (Moak's Ed.) 583, on a trial for murder, the death having been caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately afterwards, a declaration having been made by the deceased by writing upon a paper, which he motioned for, he having no power to speak, about five minutes before death, when he was actually dying, it was held by Denman, J., after consulting Cockburn, C. J., that the declaration might be admissible, and that they were not prepared to hold that it was not so; but if admitted they would grant a case for the court of crown cases reserved. See *R. v. Bedingfield*, 14 Cox C. C. 341; s. c., 28 Eng. Rep. (Moak's Ed.) 587.

1. 3 Russ. on Cr. (5th Ed.) 360; *Com. v. Casey*, 11 Cush. (Mass.) 417; *Com. v. Haney*, 127 Mass. 455; *Vass v. Com.*, 3 Leigh (Va.), 786; *Ingram v. State*, 67 Ala. 67; *Jones v. State*, 71 Ind. 66; *People v. Sanchez*, 24 Cal. 17; *People v. Callaghan*, 6 Pac. Rep. (Utah) 49; *State v. Wilson*, 24 Kan. 189; *State v. Trivas*, 32 La. Ann. 1086; *R. v. Fagent*, 7 C. & P. 238; *R. v. Reason*, 1 Strange, 499; *R. v. Woodcock*, 2 Leach, 561. Compare *R. v. Osman*, 15 Cox C. C. 1.

An instruction, that dying declarations given in evidence on the part of the State are to be received with the same degree of credit as if testified to under oath on examination, is erroneous. *State v. Mathes*, 90 Mo. 571; *State v. Vansant*, 80 Mo. 67; *Lambeth v. State*, 23 Miss. 322. Compare *People v. Knapp*, 1 Edm. Sel. Cas. (N. Y.) 177.

Exclamations not part of the *res gesta* are not admissible. *Luby v. Com.*, 12 Bush (Ky.), 1.

The admissibility of dying declarations as evidence is a blended question of law and of fact. They are not incompetent because made in answer to questions by the wife and the physician of the deceased. *State v. Trivas*, 32 La. Ann. 1086.

The competency or sufficiency of dying declarations cannot be objected to on the ground that the deceased did not give a complete narrative of all that occurred or

5. Interval of Time Between the Declaration and Death.—They must be uttered under a sense of impending dissolution, and it does not matter that death failed to ensue until a considerable time after such declarations were made.¹

might be legitimately supposed to have occurred, if it does not appear but that he said all he desired to say, and fully completed his declarations. *State v. Nettleshush*, 20 Iowa, 257; *State v. Patterson*, 45 Vt. 308; *Vass v. Com.*, 3 Leigh (Va.), 786; *People v. Chin*, 51 Cal. 597.

A person, having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval which elapsed before his death, to speak at all, and, when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death, was asked, "Did A. strike you first?" to which he answered, "Yes, sir;" "Did A. stab you?" to which he also answered, "Yes, sir;" "Do you think you are going to die?" to which he again answered, "Yes, sir." He was then asked a fourth question, but it did not appear what it was, or whether it had any relation to the subject, or at what interval after the three first it was put. *Held*, that these were such death-bed declarations, being distinct and competent in themselves, as were competent evidence on the trial of A. for the homicide. But if it had appeared that the declarations were designed by the dying man to be connected with and qualified by other statements, and with them to form an entire, complete narrative, and that, before the disclosure was fully made, it had been interrupted, and the narrative left unfinished, such partial declarations would not have been competent evidence. *Com. v. Vass*, 3 Leigh (Va.), 786.

Where the dying man said that his declaration "was as right as he could recollect," it was held admissible. *State v. Ferguson*, 2 Hill (S. Car.), 619.

A wife may testify to the dying declarations of her husband. *State v. Ryan*, 30 La. Ann. Pt. II., 1176.

Statements made behind the back of the prisoner are not admissible in evidence as dying declarations unless the person making them entertains at the time a settled hopeless expectation of immediate death. Answers in the affirmative to the following questions: "'Do you think you are in bodily danger, and in fear of death?" "You are not expecting to recover; are you aware that you will die?" "Do you fully and clearly understand what I am saying to you?"

and the use of the expression, "I am sure I am going to die,"—do not indicate such a state of mind. *R. v. Osman*, 15 Cox C. C. 1.

1. 3 Russ. on Cr. (5th Ed.) 355; *Reynolds v. State*, 68 Ala. 502; *Oliver v. State*, 17 Ala. 587; *McDaniel v. State*, 8 S. & M. (Miss.) 401; *State v. Wilson*, 24 Kan. 189; s. c., 36 Am. Rep. 257; *Com. v. Haney*, 127 Mass. 455; *Com. v. Cooper*, 5 Allen (Mass.), 495; *Com. v. Roberts*, 108 Mass. 301; *Jones v. State*, 71 Ind. 66; *People v. Simpson*, 48 Mich. 474; *Rakes v. People*, 2 Neb. 157; *State v. Kilgore*, 70 Mo. 546; *Swisher v. Com.*, 26 Gratt. (Va.) 970; *State v. Oliver*, 2 Houst. (Del.) 585; *State v. Tilgham*, 11 Ired. (N. Car.) 513; *State v. Poll*, 1 Hawks (N. Car.), 442; *Jackson v. State*, 56 Ga. 235; *State v. Daniel*, 31 La. Ann. 91; *People v. Simpson*, 48 Mich. 474; *Woodcock's Case*, 1 Leach, 500; *Tinkler's Case*, 1 East P. C. 354; *R. v. Mosley*, R. & M. C. C. R. 97; *R. v. Bonner*, 6 C. & P. 386; *Craven's Case*, 1 Lew. 77. Compare *R. v. Van Butchell*, 3 C. & P. 629; *State v. Belcher*, 13 S. Car. 459.

With respect to the interval of time which may have elapsed between the uttering of the dying declarations and the moment of death, it is clear that, if the impression exists in the mind of the declarant that dissolution is shortly impending, it will not make any difference that death does not in fact take place until some time afterwards. 1 Phill. Ev. (10th Ed.) 245; 3 Russ. on Cr. (5th Ed.) 556. Nor does there appear to be any case in which the evidence has been rejected on this ground. In most of the reported cases, however, the statements have been made within a few days of death actually taking place, and in most cases within a few hours. *Roscoe's Cr. Ev.* (10th Ed.) 37. In the case of *R. v. Bernadotti*, 11 Cox C. C. 316, the deceased did not die until three weeks after making the declaration.

When the deceased, a feeble old woman, was violently assaulted on Saturday night, and was unable to articulate for several days, and on the next Thursday expressed her conviction that she would die, and afterward made declarations as to the identity of the assailant, and lived sixteen days after she was assaulted, it appearing she thought all the time she would die *held*, the declarations were

6. *Res Gestæ*.—Dying declarations are restricted to the act of killing, and to the circumstances immediately attending it, and forming a part of the *res gestæ*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately illustrating or connected with the declarant's death, they are inadmissible.¹

competent evidence. *Baxter v. State*, 15 Lea (Tenn.), 657.

Dying declarations are admissible when made under a sense of impending dissolution, although death may not supervene immediately, or for seventeen days. *Lowry v. State*, 12 Lea (Tenn.), 142.

It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. 1 Greenl. on Ev. (14th Ed.) § 158.

1. *Reynolds v. State*, 68 Ala. 502; *Walker v. State*, 52 Ala. 192; *Ben v. State*, 37 Ala. 103; *Johnson v. State*, 17 Ala. 618; *Mose v. State*, 35 Ala. 421; *Faire v. State*, 58 Ala. 74; *Rattree v. State*, 53 Ga. 570; *West v. State*, 7 Tex. App. 150; *People v. Fong Ah Sing*, 64 Cal. 253; *Nelson v. State*, 7 Humph. (Tenn.) 542; *Moses v. State*, 11 Humph. (Tenn.) 232; *Hudson v. State*, 3 Coldw. (Tenn.) 355; *Lieber v. Com.*, 9 Bush (Ky.), 13; *Collins v. Com.*, 12 Bush (Ky.), 271; *Luby v. State*, 12 Bush (Ky.), 1; *State v. Shelton*, 5 Jones (N. Car.), 360; *State v. Wood*, 53 Vt. 560; *State v. Center*, 35 Vt. 386; *Wroe v. State*, 20 Ohio St. 460; *Hackett v. People*, 54 Barb. (N. Y.) 370; *Marshall v. Chicago*, etc., R. Co., 48 Ill. 475; *State v. Vasant*, 80 Mo. 67; *State v. Draper*, 65 Mo. 335; *State v. Chambers*, 87 Mo. 406; *Montgomery v. State*, 80 Ind. 338; s. c., 41 Am. Rep. 815; *Jones v. State*, 71 Ind. 66; *Weyrich v. People*, 89 Ill. 90; *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397; *R. v. Jenkins*, L. R. 1 C. C. 193; *R. v. Ashton*, 2 Lewis C. C. 147. *Compare State v. Terrell*, 12 Rich. (S. Car.) 321; *Carroll v. State*, 3 Humph. (Tenn.) 315.

What occurs before or after the act has been done does not constitute a part of the *res gestæ*, although the interval of separation may be very brief. *Montgomery v. State*, 80 Ind. 338 s. c., 41 Am. Rep. 815; *Jones v. State*, 71 Ind. 66; *Wheeler v. State*, 14 Ind. 573; *Binns v. State*, 57 Ind. 46; *Bland v. State*, 2 Ind. 608; *Field v. State*, 57 Miss. 474; s. c., 34 Am. Rep. 476, and note.

Dying declarations must be made at the time and place of shooting, in order to be admitted as part of the *res gestæ*; before such declarations, alleged to have been made some time after the shooting,

will be admitted in evidence, it must be shown that the declarant was aware of his approaching death. *Kane v. Com.*, 109 Pa. St. 541. See *Manes v. State*, 1 So. Rep. (Miss.) 733; *Kendrick v. State*, 55 Miss. 436; *Kraner v. State*, 61 Miss. 158; *Oliver v. State*, 17 Ala. 587; *Johnson v. State*, 17 Ala. 618; *People v. Ah Lee*, 60 Cal. 85; *Territory v. Davis*, 10 Pac. Rep. (Utah) 359; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36; *Chapin v. Marlborough*, 9 Gray (Mass.), 244; *Com. v. Densmore*, 12 Allen (Mass.), 535; *Wroe v. State*, 20 Ohio St. 460; *Hurd v. People*, 25 Mich. 405; *People v. Grunzig*, 1 Park. Cr. (N. Y.) 299. *Compare Insurance Co. v. Mosley*, 8 Wall. (U. S.) 419; *Com. v. McPike*, 3 Cush. (Mass.) 181; *People v. Vernon*, 35 Cal. 49; *Mitchum v. State*, 11 Ga. 616; *Kehoe v. Com.*, 85 Pa. St. 127; *Faire v. State*, 58 Ala. 74; *State v. McEvoy*, 9 S. Car. 208; *Brotherton v. People*, 75 N. Y. 159; *Burns v. State*, 61 Ga. 192.

It is improper for a court to admit evidence of a statement as being a part of the *res gestæ* on the ground that such statement will throw light upon the transaction under investigation, or that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, or that it was made under such circumstances as to compel the conviction of its truth. But the true rule for the admission of such evidence is that the statement testified to is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part. *Mayes v. State*, 64 Miss. 329.

The State was allowed, over objection, to prove the deceased's statement, twenty minutes after he was shot, respecting the cause and circumstances of the shooting. No predicate for the proof as dying declarations was laid. *Held*, in view of the concomitant evidence, that the proof was admissible. *Stagner v. State*, 9 Tex. App. 440.

The exclamations of deceased at the time he was shot, "O God! O my God!" are admissible as part of the *res gestæ*. *People v. Brown*, 59 Cal. 345. See *Stagner v. State*, 9 Tex. App. 440; *State v. Porter*, 34 Iowa, 131; *State v. Wagner*, 61 Me. 178; *Burns v. State*, 61

Ga. 19; Jackson v. State, 52 Ala. 305; Com. v. Hackett, 2 Allen (Mass.), 136. Compare Lewis v. State, 9 S. & M. (Miss.) 115.

So "O Alack, what have we done? I shall die." People v. Olmstead, 30 Mich. 431.

In State v. Center, 35 Vt. 378, the court said: "The rule that dying declarations should point distinctly to the cause of death and the circumstances producing and attending it, is one that should not be relaxed. Declarations, at the best, are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly related. As to dying declarations there can be no cross-examination. The condition of the declarant, in his extremity, is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence all vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible."

The dying declarations of a deceased person, showing the state of feeling existing between himself and a defendant charged with his homicide, are not competent evidence for the prosecution. Reynolds v. State, 68 Ala. 502; Jones v. State, 71 Ind. 66; Ben v. State, 37 Ala. 103.

The following question to the wounded man, and his answer, are not admissible: "Had either of them threatened to injure you before?" "Yes; my wife [one of the respondents] has threatened a thousand times to kill me before. She threatened to kill me before she went away the last time. She went away in July; I think, though, it was August 10th. She came back day before yesterday." State v. Wood, 53 Vt. 560.

It is error to admit as evidence, in a trial for homicide, the dying declarations of the victim to the effect that two weeks before the perpetration of the deed the defendant had made threats against his life. Merrill v. State, 58 Miss. 65; Nelson v. State, 7 Humph. (Tenn.) 542; State v. Draper, 65 Mo. 335.

Where the declaration was: "I believed he [defendant] was going after his pistol when he went into the house. . . . I had seen him at the house with a pistol before,"—held, that this ought to have been excluded. State v. Vansant, 30 Mo. 67.

Previous threats by the defendant against the deceased are not subject to proof by the deceased's dying declarations; but the admissibility in evidence of the residue of the written statement containing such dying declarations is not destroyed because it contained a clause stating such threats, which had been stricken out before it was permitted to be read in evidence. But the defendant would be entitled to have the whole statement read if he so desired. Statements made by the deceased, not contemporaneously with, but a few minutes after the transaction, as to who inflicted the injury, are not admissible as part of the *res gestæ*; and the length of time between the main fact and the statements cannot be important, if such time elapsed as to make the statements, having regard to their form and substance, merely narrative. Jones v. State, 71 Ind. 66; Mosé v. State, 35 Ala. 421. Compare Donnelly v. State, 2 Dutch. (N. J.) 463, 601.

Where the dying declarations included a statement that the prisoner had charged the deceased with insulting the prisoner's mother, held to be admissible, though not directly part of the *res gestæ*. West v. State, 7 Tex. App. 150.

Testimony had been admitted that the deceased shortly before his death stated, in effect, that he believed that he had been poisoned by strychnine, put in a bottle of wine by the defendant; and one R. testified that deceased "sent his boy for the bottle when we were there, and told him to tell T. to come, that he wanted to see him. The boy went and brought the bottle with him; he asked him if he had seen Mr. T.; he said yes." Held, the evidence was admissible as part of the *res gestæ*. The defendant was not injured by it, unless the counsel for the prosecution was permitted by the court, against the objection of defendant, to argue to the jury that he received a message and did not come to see deceased, as tending to show guilt on his part; but this does not appear to have been the case. People v. Taylor, 59 Cal. 640.

Five or six minutes after the shooting, the deceased said, "Patsy Callaghan shot me," and the court said: "The period of time at which it was made was so recent after the shooting as to justify its admission as a part of the *res gestæ*. No time had elapsed for the fabrication of a story." People v. Callaghan (Utah), 6 Pac. Rep. 49.

Two women were walking together, and one was fatally shot. In a prosecution for the murder the other testified that im-

mediately after the shot was fired her companion exclaimed, "My God, Simpson, you have shot me!" and then turned slowly and clasped the next to the top board in the fence close by. Another witness testified that he lived a block distant on the opposite side of the street, and was in the house when he heard the shot; that he ran to the place and found a woman leaning against the fence; that he went over as quick as he could and said to her, "Who shot you, madam?" and that she said it was John Simpson. *Held*, that these declarations of the injured person were admissible. *People v. Simpson*, 48 Mich. 474.

The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter. *Boyle v. State*, 105 Ind. 469; s. c., 55 Am. Rep. 218; *State v. Hamilton*, 27 La. Ann. 400; *Sylvester v. State*, 71 Ala. 17; *State v. Johnson*, 76 Mo. 121; *Lister v. State*, 1 Tex. App. 739.

The name which a man "always went by," which he declares is his name in his dying declaration, and by which his own mother knew him, may be deemed his right name although one witness has testified that it was not "his right name." *Binfield v. State*, 15 Neb. 484.

Where the deceased, two or three minutes after he was shot, and after he had been carried to a drug-store a few feet from where he was shot, stated, in the presence of some of the eye-witnesses of the shooting, that the defendant called to him to get down on his knees, and on his refusal to do so shot him, the statement was admitted as part of the *res gestæ*. *Territory v. Davis* (Arizona), 10 Pac. Rep. 359.

At a social gathering at night, during which intoxicating liquors had been freely used, a fight occurred between A. and K. S. interfered, and A. received a wound from which he died. S. was indicted and put upon trial on a charge of having murdered A. The witnesses for the State testified that while A. and K. were fighting, S. ran in between them, threw his arm around A., and cut him across the stomach with a knife, inflicting the wound from which death resulted. The witnesses for the accused testified that he did not inflict any wound on A., but only separated him and K., and that K. gave the fatal blow. H., a witness for the State, testified to a statement made by A. under these circumstances: When A. was cut he immediately ran a distance of from one hundred to one hundred and ten yards (pursued a part of the way by

S., who repeatedly snapped a pistol at him, but who turned back before A. ceased running) into some woods and lay down. H. walked in the direction in which A. had gone, and while thus going one L. called to him, saying: "Here is A. out in the woods with his guts cut out." Before getting to A., H. heard him and L. talking. H. reached A. in about five minutes after the wound had been given, and A. then said to him, "H., S. has cut my guts out; did you see him?" This statement of the deceased, as testified to by H., was objected to by the defendant, but was admitted in evidence by the court, as a part of the *res gestæ*. *Held*, that such statement was not a part of the *res gestæ*, and was erroneously admitted in evidence. *Mayer v. State*, 64 Miss. 329.

The deceased, after being cut by the defendant, ran about one hundred yards, and then lay down. A witness testified that he reached deceased about five minutes after he received the wound, and the deceased then said to him: "Henry, Sid [meaning the defendant] has cut my guts out; did you see him?" The court held this to be inadmissible. *Manes v. State* (Miss.), 1 So. Rep. 733.

The statement of a woman, whose death was caused by an attempted abortion, made the day before she died, to the effect that "the doctor had used instruments upon her," is not admissible. *State v. Clements* (Oregon), 14 Pac. Rep. 410.

Where the deceased said, on the evening before the morning of her death, "Mr. F. has killed me," and, about the same time, "I am dead: Mr. F. has killed me," it was held that the declarations were admissible as the dying declarations of the deceased. *State v. Freeman*, 1 Speers (S. Car.), 57.

A. was assaulted and left insensible. He was carried to an adjacent house, and the next morning, without any companion, started for his home. Upon the road he met a friend, to whom he said, "Bill, it is all up with me; I will never get over it," and then explained how he had been assaulted. He died from the effect of his injuries two days later. *Held*, that his statements were admissible as dying declarations. *Kehoe v. Com.*, 85 Pa. St. 127. See *Faire v. State*, 58 Ala. 74; *Brotherton v. People*, 75 N. Y. 159. *Compare Denton v. State*, 1 Swan (Tenn.), 279; *Binns v. State*, 57 Ind. 46.

Where Two Persons are Killed.—A. was found dead at a short distance from his house. B., his wife, was found in the house mortally wounded. *Held*, that her

The declarations of the deceased are admissible only to those things to which he would have been competent to testify, if sworn as a witness in the cause. They must relate to facts only, and not to mere matters of opinion or belief.¹

dying declarations were not admissible upon a trial for the murder of A. Brown *v. Com.*, 73 Pa. St. 321; *State v. Bohan*, 15 Kan. 407; *Krebs v. State*, 3 Tex. App. 348; *State v. Westfall*, 51 Iowa. 142; *State v. Fitzhugh*, 2 Oregon. 227; *R. v. Hind*, 29 L. J. M. C. 148. Compare *R. v. Baker*, 2 M. & R. 53; *State v. Wilson*, 23 La. Ann. 558; *State v. Terrell*, 12 Rich. (S. Car.) 321.

1. *People v. Taylor*, 59 Cal. 640; *People v. Sanchez*, 24 Cal. 26; *Warren v. State*, 9 Tex. App. 629; *Roberts v. State*, 5 Tex. App. 141; *Walker v. State*, 39 Ark. 221; *State v. Chambers*, 87 Mo. 406; *State v. Draper*, 65 Mo. 335; *McPherson v. State*, 22 Ga. 478; *Whitley v. State*, 38 Ga. 50; *Rattree v. State*, 53 Ga. 570; *Savage v. State*, 18 Fla. 909; *Reynolds v. State*, 68 Ala. 502; *Ben v. State*, 37 Ala. 103; *Johnson v. State*, 17 Ala. 618; *Mose v. State*, 35 Ala. 421; *McLean v. State*, 16 Ala. 674; *People v. Olmstead*, 30 Mich. 431; *Moeck v. People*, 100 Ill. 242; *Collins v. Com.*, 12 Bush (Ky.), 271; *Nelson v. State*, 7 Humph. (Tenn.) 542; *Binns v. State*, 46 Ind. 311; *Montgomery v. State*, 80 Ind. 338; s. c., 41 Am. Rep. 815; *Wroe v. State*, 20 Ohio St. 460; *State v. Williams*, 77 N. Car. 12; *People v. Shaw*, 63 N. Y. 38; *U. S. v. Veitch*, 1 Cranch (C. C.), 115. See *State v. Spencer*, 30 La. Ann. pt. 1, 362.

In *Shaw v. People*, 3 Hun (N. Y.), 272. the court said: "It is even more important to exclude an opinion, declared *in articulo mortis*, than in an ordinary case, where the witness may be subjected to a cross-examination."

The dying man said: "It was Edward Williams who shot me, though I did not see him." And in reply to a question asked him by the witness as to who shot him, he said, "I don't know what those poor creatures shot me for; it was Ed. Williams who shot me, but I did not see him." Held, that the declaration was inadmissible. *State v. Williams*, 67 N. Car. 12.

A dying statement, made by the victim of a homicide, that the defendant had no reason that he knew of for the perpetration of the crime, is the statement of a fact which the declarant would have been allowed to make had he been a witness on the stand, and is admissible in evidence. *Boyle v. State*, 105 Ind. 469; s. c., 55 Am. Rep. 218; *Wroe v. State*, 20

Ohio St. 460; *Payne v. State*, 61 Miss. 161; *Roberts v. State*, 5 Tex. App. 141; *People v. Abbott* (Cal.), 4 Pac. Rep. 769. Mere exclamations are not admissible. *Luby v. Com.*, 12 Bush (Ky.), 1.

The dying declarations of the deceased, as to the state of feeling existing between him and the defendant—as where he said, "he had nothing against the defendant, and did not know that defendant had anything against him"—are not competent evidence for the prosecution. *Reynolds v. State*, 68 Ala. 502.

The statement of the deceased that "the man cut him with a knife, and that he had no cause for it whatever," held to be the statement of a fact. *People v. Abbott* (Cal.), 4 Pac. Rep. 769.

The statement of the dying person was in answer to a question whether the shot was accidental or intentional, and the answer was that "it was intentional." The evidence was held competent. *State v. Nettlebush*, 20 Iowa, 257.

In *Brotherton v. People*, 75 N. Y. 159, it was held that the statement that "he, the deceased, did not at first recognize the defendant, but when the latter drew his pistol and commenced his pranks, he knew that it was the prisoner," was competent.

In *Collins v. Commonwealth*, 12 Bush (Ky.), 271, the dying declarations were "that Michael Collins killed me, and killed me for nothing." The court said: "In this case it was unnecessary to prove the declarations of the deceased to establish the fact that the killing was done by the accused. That fact was abundantly proved by several uncontradicted witnesses, and was virtually admitted by the line of defence adopted. The statement that Collins killed the deceased 'for nothing' was but the expression of an opinion, and was clearly inadmissible."

In *McPherson v. State*, 22 Ga. 478, the dying declaration was, that the declarant did not believe that the accused intended to hurt him. This was held not competent, even in favor of the prisoner, because not the statement of a fact.

In *People v. Wasson*, 65 Cal. 538, the dying declaration was, "I think that this man, Henry Wasson (the defendant), is the man that shot me." This was held to be the expression of an opinion, and hence not admissible.

In order to make dying declarations admissible in evidence, it is not necessary that the declarant state everything constituting the *res gestæ* of the subject of his statement, but only that his statement of any given fact be a full expression of all that he intended to say as conveying his meaning as to such fact.¹

7. Requisite Preliminary Proof.—In a prosecution for murder the offer of dying declarations should be preceded by evidence that they were actually made in expectation of impending death; and this may be shown by the nature of injury, by what the injured person said, or what physicians or attendants said in his hearing, by the evident state of his mind, etc. It is not essential that the injured person should have stated that they were made in that expectation, or that any person should have said in his presence that death must speedily follow.²

In *Binns v. State*, 46 Ind. 311, the dying declaration by the woman was that it was her husband, the defendant, who shot her. It was further developed by her statements, however, that she was shot through a window; that she did not see the person who shot her, but based her statement upon the fact that the husband had threatened to shoot her through the window. Held to be incompetent.

In *Warren v. State*, 9 Tex. App. 619; s. c., 35 Am. R. 745, the dying man said: "I know Geo. Warren shot me, for he threatened me." Held incompetent.

In *Shaw v. People*, 3 Hun (N. Y.), 272; s. c., *People v. Shaw*, 63 N. Y. 36, the woman, who was dying from the effects of poison, said: "Charles" (her husband) "and the Briggs woman was the cause of all this suffering, the cause of all this." In a subsequent statement to another person she said that she "expected it was Charles and Mrs. Briggs."

The prisoner approached the deceased, who was his son-in-law and intimately acquainted with him, disguised as a tramp. The dying declarations were in substance that he (deceased) at first did not recognize the prisoner, but when the latter drew his pistol and "commenced his pranks," he knew it was the prisoner. Held, that the declarations were not mere expressions of opinion, but were statements of facts, and so were competent. *Brotherton v. People*, 75 N. Y. 159.

The evidence for the State further tended to show that deceased, after he had been shot by Jule Jordan, asked one Berry Johnson if he thought deceased would recover, and Johnson replied that he might. After this and after a visit from a physician, deceased repeatedly said he thought he would die, and remarked to said Berry Johnson: "I am not drunk, I am sober, I am in my right

senses; Jule shot me and Handy cut me, and all for nothing." Held admissible. *Jordan v. State*, 81 Ala. 20.

The dying declaration of the deceased was taken in the form of questions and answers; and he was asked, "What reason, if any, had the man for shooting you?" to which he answered, "Not any that I know of. He said he would shoot my damned heart out." Held to be admissible, and not the expression of an incompetent opinion. *Boyle v. State*, 105 Ind. 469; s. c., 55 Am. Rep. 218.

In *Walker v. State*, the deceased said: "Mother, I cannot get well; I am going to die; Nick Walker shot me. I was singing over a ham-bone, and did not know I was shot until I came to myself; for, when the gun fired, a thousand bells were ringing in my head." Held admissible, although the shot was fired through an auger-hole in a door.

1. *State v. Patterson*, 45 Vt. 308; *State v. Ferguson*, 2 Hill (S. Car.), 619.

2. *People v. Simpson*, 48 Mich. 474; *Ward v. State*, 78 Ala. 441.

Before a written statement is admissible in evidence as dying declarations, it must be shown that the deceased at the time of making it was in possession of his memory and mental faculties to such an extent as to understand the nature of the business in which he was engaged, and to be able to give a true and correct account of the facts to which the statement relates. *Tracy v. People*, 97 Ill. 101.

The declarant need not state everything that constituted the *res gestæ*, but only that his statement of a given fact should be a full expression of all he intended to say as conveying his meaning as to such fact. *State v. Patterson*, 45 Vt. 308.

The declarations are admissible, though

8. Admissibility—Discretion of the Court.—The ascertainment of the primary facts is for the court. The judicial mind must be satisfied and when satisfied that the requisite predicate is established, the duty to receive the evidence is imperative. To establish the prerequisite facts, it is not necessary that the declarant shall express a conviction or belief that he must or will die. They may be reasonably inferred from attendant facts and circumstances, as any other fact of judicial ascertainment. Resort may be made to the nature and extent of his wounds, his physical state, his evident danger, his conduct, his contemporaneous expressions, the occurrence of death soon thereafter, and all other circumstances at the time; and if from these the reasonable inference is that the declarations were made under a conviction of impending death, it is sufficient.¹

deceased apparently desired to say more. *State v. Giroux*, 26 La Ann. 582.

Statements made by deceased to a third person, after he had been informed by another that his wound was necessarily fatal, are not admissible as dying declarations, where it was not shown as preliminary to their introduction that they were made under a sense of impending death and with the impression on the mind of the declarant of almost immediate dissolution. *State v. Partlow*, 90 Mo. 608.

It is not necessary that each witness testifying to a dying declaration should definitely fix the belief of the person making the declaration that death was imminent. The sense of impending death may be shown by one witness, and the declaration proved by another. *People v. Garcia*, 63 Cal. 19.

Where the declarant refused to answer further questions, saying he was "a dying man," his statement is admissible. *People v. Sow*, 51 Cal. 597.

If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible, as such, for want of compliance with some of the legal formalities, it seems it may still be treated as a dying declaration, if made *in extremis*. Greenleaf's Ed. (14th Ed.) § 161.

Other Evidence of Same Facts.—Dying declarations are admissible in evidence, although the facts which they tend to establish may be proved by other testimony. *Payne v. State*, 61 Miss. 161; *Curtis v. State*, 14 Lea (Tenn.), 502; *Battle v. State*, 74 Ga. 101.

1. *Ward v. State*, 78 Ala. 441; *McLean v. State*, 16 Ala. 672; *Wills v. State*, 74 Ala. 21; *Kilpatrick v. Com.*, 31 Pa. St. 198; *Kehoe v. Com.*, 85 Pa. St. 127; *People v. Smith*, 104 N. Y. 491; *Donelly*

v. State, 2 Dutch. (N. J.) 601; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *State v. Frazier*, 1 Houst. Cr. (Del.) 176; *Swisher v. Com.*, 26 Gratt. (Va.) 903; *State v. Williams*, 68 N. Car. 62; *Owens v. State*, 59 Miss. 547; *Lambeth v. State*, 23 Miss. 322; *Dixon v. State*, 13 Fla. 636; *Smith v. State*, 9 Humph. (Tenn.) 9; *Bolin v. State*, 9 Lea (Tenn.), 516; *State v. Cantieny*, 34 Minn. 1; *State v. Elliott*, 45 Iowa, 486; *State v. Johnson*, 76 Mo. 121; *Doles v. State*, 97 Ind. 555; *Jones v. State*, 71 Ind. 66; *Starkey v. People*, 17 Ill. 17; *People v. Glenn*, 10 Cal. 32; *State v. Lee*, 7 Oregon, 237; 1 Greenl. on Ev. (14th Ed.) § 160; *Whart. Cr. Ev.* (9th Ed.) § 297. Compare *Jackson v. State*, 56 Ga. 235; *Dumas v. State*, 62 Ga. 58.

In *R. v. Spilsbury*, 7 C. & P. 187, Lord Coleridge said: "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that if received it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover, as he was very ill. Now, people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that:

they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there was not sufficient proof that he was without any hope of recovery, and that I therefore ought to reject the evidence." See *Tip v. State*, 14 Lea (Tenn.), 502.

Competency of dying declarations is a question for the court; and it is erroneous to admit them in evidence in such a case until full investigation of the circumstances under which they were made shows that they conform to the requirements of law." *Owens v. State*, 59 Miss. 547.

The preliminary evidence to introduce a dying declaration may be given in the presence of the jury. *Sullivan v. Com.*, 93 Pa. St. 284. Compare *Starkey v. People*, 17 Ill. 17.

Where the defendant is charged with murder, and the State, on the trial, proposes to put in evidence the dying declarations of the deceased, and to that end offers the necessary preliminary proof to show the court that the declarations were made by the deceased while *in extremis* and under a solemn sense of his impending dissolution, it is in the discretion of the trial court whether it will allow the State to introduce such preliminary proof in the presence and hearing of the jury, or will send the jury out during the introduction of such proof. *Doles v. State*, 97 Ind. 555.

Where, upon the trial of an indictment for murder, the admissibility of statements made by the deceased, which are offered in evidence as dying declarations, is brought in question, it is the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death. Such preliminary examination may, in the discretion of the court, be conducted in the presence of the jury; but during it they stand simply in the attitude of spectators; with the testimony given they have no concern, it being merely for the information of the court, and until by its ruling some portion of it is presented to the jury as competent evidence in the case, there is nothing to which the defendant may except as constituting legal error. An exception, therefore, may not be based upon the reception in evidence upon such preliminary examination of statements of the deceased, not relating to the immediate circumstances of the death, which is not so presented to the

jury. It is within the discretion of the court to determine how far the examination shall extend. The exercise of that discretion is reviewable by the General Term, but not by this court, unless it appears that such discretion was abused, and the action of the court arbitrary and unreasonable. *People v. Smith*, 104 N. Y. 491.

The State proved, without objection, that the deceased, being *in extremis* and in apprehension of death, stated that the prisoner had mortally wounded her with an axe; the defence afterwards introduced evidence tending to prove the insanity of the declarant; the trial judge charged the jury, that the sanity of the declarant was a question of fact for them to determine; it was insisted upon appeal that the judge should himself have determined the question of the sanity of the declarant. *Held*, that the defendant should have objected to the admission of the declaration, if he desired to raise the sanity of the declarant as a preliminary question; that the judge could not be put in error for admitting evidence, unobjected to at the time and competent in the shape presented, by other evidence subsequently introduced; and though it would have been his duty to withdraw the declarations from the jury if he had been convinced of the declarant's insanity, yet his action in not withdrawing the declarations implies that he thought the declarant sane, and, if erroneous, defendant could not complain, since the judge gave the jury the power to find this question, which he had thus impliedly determined against the prisoner, in the prisoner's favor. *Bolin v. State*, 9 Lea (Tenn.), 516.

A *prima facie* case is all that is necessary to carry dying declarations to the jury. It is an issue of fact whether or not they were made in immediate prospect of death. This is to be passed upon by the jury; and where the evidence is contradictory as to whether or not such declarations were made with the consciousness that the declarant was *in articulo mortis*, the court will not interfere with the verdict of the jury. *Varmedoe v. State*, 75 Ga. 181.

Declarations in Writing.—If the statement of the deceased was committed to writing and signed by him at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy, nor parol evidence of the declarations, could be admitted to supply the omission. *Greenleaf's Ev.* (14th Ed.) § 161. See *State v. Sullivan*, 51 Iowa, 142; *State v. Tweedy*, 11 Iowa, 350; *People v. Glenn*, 10 Cal. 32;

But the court can determine only as to the admissibility of dying declarations. Their weight or credit must be left to the jury.¹

Collier v. State, 20 Ark. 36. Compare *State v. Patterson*, 45 Vt. 308; *Krebs v. State*, 8 Tex. App. 1; *Com. v. Haney*, 127 Mass. 455.

Where the declarations were in part dictated to a justice of the peace by a third person, but the material part was taken from the dying person himself by the justice, and the whole as written was read over to the declarant and assented to by him, and the part thus taken directly from his lips was alone read to the jury, *held*, that the declaration was competent evidence. *State v. Martin*, 30 Wis. 216.

It is not a sufficient error for reversal that parol testimony was admitted, on a trial for murder, of the dying declaration of the deceased that the defendant had killed him, made at the same time a dying statement was taken in writing and signed by the deceased, without the production of the writing, the written statement not having been called for by the defendant when the person who took it, and stated the fact, was examined as a witness, similar parol declarations having been given by witnesses without objection, and the proof leaving no doubt that the deceased was actually killed by the defendant. *Epperson v. State*, 5 Lea (Tenn.), 291.

But where the declarations had been repeated at different times, at one of which they were made under oath, and informally reduced to writing by a witness, and at the others they were not, it was held that the latter might be proved by parol, if the other could not be produced. *Greenleaf's Ev.* (14th Ed.) § 161. See *State v. Patterson*, 45 Vt. 308.

The fact that dying declarations have been committed to writing by a bystander, which writing has not been signed by deceased or read over to him, does not exclude parol evidence of such dying declarations. *Allison v. Com.*, 99 Pa. St. 17. See *State v. Fraunburg*, 40 Iowa, 555.

The admissibility of dying declarations is not affected by the fact that the witness testifying to them made a written memorandum of them, which was not signed by the deceased, nor read over to him; nor is it necessary to produce the memorandum, though the witness may refer to it to refresh his memory. *Anderson v. State*, 79 Ala. 5.

Where the statement was reduced to writing by the justice before whom the

defendants were examined, and sworn to but not signed by the deceased, *held*, that the writing was not admissible as original evidence, but only as secondary evidence in the event the justice could not recollect the statement. *Beets v. State*, Meigs (Tenn.), 106. See *State v. Fraunburg*, 40 Iowa, 555.

The declarations were reduced to writing, and sworn to by the deceased. The paper offered in evidence was not the original, but was proven to be a true copy. The copy was made under the belief that the original was of no value because written with a pencil. After the copy was made, the original was not taken care of and was lost. Under the circumstances, there was no legal objection to the copy as a substitute for the original. *Merrill v. State*, 58 Miss. 65. Compare *Binns v. State*, 46 Ind. 311.

It is not necessary that the written statement should show upon its face that it was made under the apprehension of impending death. That is a fact *dehors* the writing, and may be proved by parol testimony. *Com. v. Haney*, 127 Mass. 455.

Declarations not Reduced to Writing.—A witness may give the substance of a dying declaration if he is unable to give the precise words. *Roberts v. State*, 5 Tex. App. 141; *Montgomery v. State*, 11 Ohio, 424; *Ward v. State*, 8 Blackf. (Ind.) 101.

The fact that where one of several declarations had been reduced to writing does not render parol evidence of another declaration inadmissible. *Krebs v. State*, 8 Tex. App. 1.

Previous conversation between the deceased and the witness may be admitted. *Nelms v. State*, 13 S. & M. (Miss.) 500.

1. *Campbell v. State*, 38 Ark. 509; *State v. McCanon*, 51 Mo. 160; *Walker v. State*, 37 Tex. 366; *People v. Abbott* (Cal.), 4 Pac. Rep. 769; *Donelly v. State*, 2 Dutch. (N. J.) 463, 601; *Doles v. State*, 97 Ind. 555; *Com. v. Casey*, 11 Cush. (Mass.) 417.

The character and situation of the declarant as affecting his credibility are to be judged of by the jury as if he had been a witness. *State v. Nash*, 7 Iowa, 347. See *Hurd v. People*, 25 Mich. 405; *People v. Knapp*, 26 Mich. 112; *People v. Lawrence*, 25 Mich. 368; *McPherson v. State*, 9 Yerg. (Tenn.) 279; *People v. Knapp* 1 Edm. Sel. Cas. (N. Y.), 177;

9. Evidence for the Prisoner.—Dying declarations may be given in evidence, as well to acquit as to convict the prisoner.¹

Com. v. Lenox, 3 Brewst. (Pa.) 249.
Compare People v. Maine, 16 N. Y. Sup. Ct. 113.

1. Moore v. State, 11 Ala. 764.

Where the dying declarations are impeached, corroborative evidence may be introduced. State v. Blackburn, 80 N. Car. 474. Compare Wroe v. State, 20 Ohio St. 460.

Prisoner in his Defence may Show the State of Mind or Character of the Deceased.—As the declarations of a dying man are admitted on a supposition that in his awful situation on the confines of a future world he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence may enter into particulars of his state of mind and of his behavior in his last moments, or may be allowed to show that the deceased was not of such a character as was likely to be impressed by a religious sense of his approaching dissolution. 3 Russ. on Cr. (5th Ed.) 361.

With respect to the effect of dying declarations, it is to be observed that, though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight if clearly and distinctly proved, yet it is always to be recollected that the accused has not had the opportunity of a cross-examination—a power quite as essential to the eliciting of the whole truth as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of the persons and to

the omission of facts essentially important to the completeness and truth of the narrative. When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, yet they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different; and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination. It may be added also, that the deceased in many cases is laboring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator. 3 Russ. on Cr. (9th Am. Ed.) *272.

When dying declarations are offered in evidence, it is competent for the accused to show by cross examination of the people's witnesses, or by other witnesses, that the deceased in making the statements was in a reckless, irreverent state of mind, and entertained feelings of malice and hostility towards the accused, and proof of the indulgence in profane language at or about the time of making the statement is clearly competent for that purpose. A brother of the deceased was introduced by the people for the purpose of identifying the written statement of the deceased, which was subsequently admitted in evidence as a dying declaration, and also to show the circumstances under which it was made. On cross-examination he was asked, if during a conversation of which he had spoken as having occurred immediately before the written statement was made, or if during any conversation had with the deceased after that conversation, the deceased used profane language, which the court refused to allow the witness to answer. *Held*, that so far as this language related to the conversation of which the witness spoke in his examination in

chief. there could be no doubt of its propriety, and that the question was also proper as tending to negative the assumption that the deceased, at the time of making the statement, was rational, and had no hopes of life, and was not actuated by malice or revenge. *Tracy v. People*, 97 Ill. 101.

Upon an indictment for manslaughter, a surgeon stated that deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better, and afterwards said: "I don't think he would have struck me if I had not provoked him;" *Coleridge, J.*, at first expressed some doubt whether he ought to receive the statement; but afterwards received the evidence, observing that it might have an influence on the amount of punishment. *R. v. Scaife*, 1 M. & Rob. 551.

Evidence that a wife's general disposition was bitter and vindictive is inadmissible in the prosecution of her husband for her murder for the purpose of affecting her dying declaration against him. *People v. Simpson*, 48 Mich. 474.

If the defence attacks the mental condition of the deceased, it is competent for the State to meet the objection *in limine*, and to show by his acts and words that he was laboring under no hallucination, and that his mental faculties were unimpaired. *Donnelly v. State*, 2 Dutch. (N. J.) 496.

The declarations of the deceased are not evidence to establish the insanity of the accused. *State v. Spencer*, 1 N. J. 196.

Declaration Exonerating Prisoner.—The dying declarations of the deceased are not only admissible against a prisoner, but also in his favor. *R. v. Scaife*, 1 M. & Rob. 551; *People v. Knapp*, 26 Mich. 112; *Moore v. State*, 12 Ala. 764. *Compare Moeck v. People*, 100 Ill. 242; s. c., 39 Am. Rep. 38; *Adams v. People*, 47 Ill. 376.

The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if against the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favor of the prisoner. Indeed, almost every case of manslaughter, in which such declarations have been admitted, is an authority to that effect, as the *prima facie* presumption is that the prisoner had murdered the deceased. And, moreover, a declaration in favor of a prisoner must ever be taken to be more likely to be true; as it

is not probable that a person should make a statement favorable to the person who has inflicted a mortal injury upon him, but rather the contrary. 3 Russ. on Cr. (5th Ed.) 361 n.

At the trial of an indictment for manslaughter, evidence that the person injured, soon after the alleged injuries were inflicted, said that the defendant was not to blame, and that the injuries were the result of an accident, are not admissible in defence, in the absence of evidence that the statement was made as a dying declaration. *Com. v. Dunan*, 128 Mass. 422.

The declarations of one who had received a mortal wound by the hand of another, made shortly before his death, exonerating the person who inflicted the wound from any blame in the affair, when so remote from the transaction as not to be considered as a part of the *res gesta*, are not admissible in evidence in favor of the person inflicting the injury, upon his trial for the homicide. *Moeck v. People*, 100 Ill. 242; s. c., 39 Am. Rep. 38.

A was on trial for the murder of B, who had made a dying declaration accusing A. The defence offered in evidence the dying declaration of C, that he had committed the crime. *Held*, that the declaration of C was inadmissible. *West v. State*, 76 Ala. 98.

Religious Belief of Deceased.—Where, in the trial of a case of homicide, proof of a statement made by the deceased is admitted in evidence as his dying declaration in relation to the killing, it is error for the court to exclude testimony offered by the defendant, with the view of detracting from the value of such declaration, to the effect that the deceased had in his lifetime often said "that there was no hell or hereafter, and all the punishment a man got was in this world." *Hill v. State*, 64 Miss. 431. See *State v. Elliott*, 45 Iowa, 486; *People v. Chia Mook Sow*, 51 Cal. 597; *People v. Sanford*, 43 Cal. 29; *State v. Ah Lee*, 8 Oregon, 274; *Goodal v. State*, 1 Oregon, 333; *Nesbit v. State*, 43 Ga. 238; *Walker v. State*, 39 Ark. 220. *Compare Donnelly v. State*, 26 N. J. 463, 601.

Infamous Witness.—When the declarant, if living, would have been incompetent to testify, by reason of infamy, and the like, his dying declarations are inadmissible. 1 Greenl. on Ev. (14th Ed.) § 157; *Nesbit v. State*, 43 Ga. 238; *Walker v. State*, 39 Ark. 220.

The dying declarations of one convicted of burglary and larceny are not admissible as evidence; but when the infamy

10. Children.—Where a child is of intelligent mind, and fully comprehends the nature of an oath and the consequences in a future state of telling a falsehood, his declarations, made under a sense of impending dissolution, are admissible.¹

of the declarant is discovered after verdict, a new trial cannot be demanded as a right. The motion in such case is addressed to the sound discretion of the court. *Walker v. State*, 39 Ark. 221.

The declaration of a convict at the moment of execution cannot be given in evidence as a dying declaration; for as an attainted convict he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. *Drummond's Case*, 1 Leach, 337. In this case, which was a trial for robbery, it was alleged that a man resembling the prisoner had been recently executed for robbery, and immediately previous to his execution had made a statement as to the robbery then being inquired into; and it was submitted that it was admissible as a dying declaration: but it was held to be inadmissible on the ground stated in the text. But as a convicted prisoner is now a competent witness, the ground of this decision is gone, and therefore the admissibility of such a declaration will now depend on whether a dying declaration of any person except a murdered person be admissible. 3 Russ. on Cr. (9th Am. Ed.) 268, n.

Bad Character of Deceased.—Where the defence attacks the character of the deceased, corroborative evidence may be introduced to sustain his dying declaration. *State v. Thomas*, 1 Jones (N. Car.), 274. See *Nesbit v. State*, 43 Ga. 238; *Donnelly v. State*, 2 Dutch. (N. J.) 463; *People v. Knapp*, 1 Edm. Sel. Cas. (N. Y.) 177.

Intemperate Habits.—On a trial for murder, the dying declarations of the deceased are admissible as to the cause and extent of the injury received, and are open to remark before the jury, in connection with general evidence of his intemperate habits and low state of health. *State v. Thawley*, 4 Harr. (Del.) 562.

Insanity of Declarant.—A dying declaration of an insane person is not admissible. *Bolin v. State*, 9 Lea (Tenn.), 516; *Donnelly v. State*, 2 Dutch. (N. J.) 463; *State v. Ah Lee*, 8 Oregon, 314.

Mistaken Identity.—If dying declara-

tions have been admitted to prove the identity of the defendant as the person who committed a crime, evidence is admissible in reply to show that the deceased had met and talked with persons with whom he was well acquainted, mistaking them, at the time, for other persons whom they did not resemble, and that he was in the habit of thus mistaking persons. *Com. v. Cooper*, 5 Allen (Mass.), 495.

1. Whart. Cr. Ev. (9th Ed.) § 290.

The declaration must have been made by a person who, if alive, would have been a competent witness. Thus, on an indictment for the murder of a girl four years of age, Park, J., refused to hear evidence of her declarations, observing that, however precocious her mind might be, it was impossible that she could have had that idea of a future state which is necessary to make such a declaration admissible. In this decision, Parke, B., concurred. *R. v. Pike*, 3 C. & P. 598. But when the child is of an intelligent mind, impressed with the nature of an oath, and expecting to die, the declaration is receivable. In *R. v. Perkins*, 2 Moo. C. C. 135; 9 C. & P. 395, where the child was eleven years old, it appeared that the deceased, who was a little more than ten years old, received a severe wound from a gun on one day, of which he died the following morning; and in order to show his state, when certain declarations were made on the evening after he was wounded, a surgeon was examined, who said: "I was of opinion the boy could not survive many days. I said to him, 'My good boy, you must know you are laboring now under a very severe injury, which in all probability you will not recover from, and the effects of it will most likely kill you.' My father asked him if he was perfectly conscious where he should go if he told a lie, and where he should expect to go if he told the truth on the subject. In answer to the first he said he should expect to go to hell, and to the latter that he should go to heaven. My father said nearly similar words to what I said myself. When he was told that he was not likely to recover, I could see a change in the expression of his countenance. The appearances of tears came into his eyes, and an appearance such as it is difficult to describe—an appearance

10. Several Declarations.—The prosecutor in a murder case cannot be confined to proving dying declarations made at one time if there were others made at other times, and all were competent; nor can he be confined to proving what was said at one time where the statement was reduced to writing and signed at another.¹

11. Condition of Declarant.—The party signing or making dying declarations must have been in such a state of mind at the time as to have had a clear understanding of the contents of the document he is said to have signed, or of the declaration he is said to have made.²

Dying declarations by one deprived of full consciousness, so as to be unable to give an intelligent account of the facts connected with his being shot, and made to one not impartial, should not be received.³

of distress; but he said nothing, that I can remember, expressing either assent or dissent. My father said to him, 'You may recover, though in all probability you will not.' The father, also a surgeon, said, 'I said to the deceased, after feeling his pulse and examining the wound, 'My little man, you appear to me to be much more sensible than, from the nature of the accident you have received, I should have expected. It is impossible for me to say whether you may survive the injury or not. I think it more probable that you will not, and that you may be dead before morning.' I then asked him if he was aware of the nature of an oath. He made no reply. I then said, 'If you don't tell the truth, and how this accident occurred, where do you expect to go?' He then said, 'To hell.' 'If you do speak the truth, I suppose you expect to go to heaven?' He made no reply. I then told him, 'I put these questions to you that, in case of your death, the truth of the accident may be ascertained,' or words to that effect. I don't think he made any reply. He expressed no opinion as to his state." On cross-examination he said, "I said you may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The child appeared at the time in a very debilitated state from the injury, but he appeared to be a very quick, intelligent child. Upon a case reserved, it was contended that there was not sufficiently strong proof to show that there was a perfect belief in the mind of the deceased of approaching death, and that the apprehensions of death in a child were not enough to render his declarations admissible, unless he was shown to be aware of the nature of an oath; but the judges were unanimously of opinion that the

statements were receivable if made under the apprehension and expectation of immediate death, and they all (except Bosanquet, J., Patterson, J., and Coleridge, J.) thought they were so made and receivable.

Upon the trial of a father for the murder of his child, evidence of the answer of the child, that "papa did it," made to a question addressed to him two days before his death, as to the cause of his swollen face, was held inadmissible, as being neither a dying declaration nor part of the *res gestæ*. *State v. Dominique*, 30 Miss. 585.

Husband and Wife.—The dying declaration of a husband is competent evidence against the wife, on her trial for murder, to show her guilt. *Moore v. State*, 12 Ala. 764; *People v. Green*, 1 Denio (N. Y.), 164; *Penns v. Stoops*, Add (Pa.) 381.

1. *People v. Simpson*, 48 Mich. 474.

It is sometimes said that such declarations are tolerated on the principle of necessity; but there is no rule of law which excludes them, because there is other and even undisputed testimony as to the cause of the death, and the circumstances attending it; and such a rule would be impracticable, as well as antagonistic to the reasons which sanction the admission of such evidence. *Reynolds v. State*, 68 Ala. 502.

Where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration nor a part of the *res gestæ*, is not admissible to impeach such declarations. *Wroe v. State*, 20 Ohio St. 460.

2. *Binfield v. State*, 15 Neb. 484.

3. *Mitchell v. State*, 71 Ga. 128; *McHugh v. State*, 31 Ala. 317.

Suspicious circumstances and practices connected with the taking of dying declarations will not exclude them, but go to their credibility.¹

12. General Character of Rule.—The rule governing the admission of dying declarations is the same in all cases, whether the defence is insanity, self-defence, or an *alibi*.²

13. Practice.—A general objection to the admission of dying declarations, when offered as a whole, may be overruled, although a portion of the evidence is illegal.³

Dying declarations are in their nature secondary evidence, and are so regarded in the law. It is therefore error to instruct a jury to give them the same weight they would if the declarant had testified before them.⁴

1. *People v. Knapp*, 26 Mich. 112.

2. *Boyle v. State*, 105 Ind. 469; s. c., 55 Am. Rep. 218.

3. *Reynolds v. State*, 68 Ala. 502.

4. *State v. Vansant*, 80 Mo. 67; *Lambeth v. State*, 23 Miss. 322; *People v. Knapp*, 1 Edm. Sel. Cas. (N. Y.) 177.

Degree of Credit to be Given to.—With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. *Roscoe's Cr. Ev.* (10th Ed.) 38; *Whart. Cr. Ev.* (9th Ed.) § 276. See *R. v. Crockett*, 4 C. & P. 544, where the declaration was, "that damned man has poisoned me," which may be presumed to be vindictive; and *R. v. Bonner*, 6 C. & P. 386, where the dying declaration was distinctly proved to be incorrect. Such considerations show the necessity of caution in

receiving impressions from accounts given by persons in a dying state; especially when it is considered that they cannot be subjected to the power of cross-examination; a power quite as necessary for securing the truth as the religious obligation of an oath can be. The security, also, which courts of justice have in ordinary cases for enforcing truth, by the terror of punishment and the penalties of perjury, cannot exist in this case. The remark before made on verbal statements which have been heard and reported by witnesses applies equally to dying declarations; namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding, or from infirmity of memory. *Roscoe's Cr. Ev.* (10th Ed.) 38. In one of the latest cases upon the subject, the species of proof is spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. *Per Coleridge, J., R. v. Spilsbury*, 7 C. & P. 196; 1 *Phill. Ev.* (10th Ed.) 251. "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." *Per Alderson, B., R. v. Ashton*, 2 *Lewin C. C.* 147. See also the remarks of *Pollock, C. B.*, to the same effect in delivering the judgment of the court of criminal appeal in *R. v. Reaney, Dears. & B. C. C.* 151;

EACH.—See note 1.

State v. Vansant, 80 Mo. 67; *Mitchell v. State*, 71 Ga. 128, 141.

Mr. Greenleaf says: "Yet it is always to be recollected that the accused has not the power of cross-examination—a power quite as essential to the eliciting of all the truth as the obligation of an oath can be; and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn." 1 Greenl. Ev. (14th Ed.) § 162. See *People v. Sanchez*, 24 Cal. 17.

The weight to be attached to dying declarations depends upon these conditions: (1) The trustworthiness of the reporters; (2) the capacity of the declarant at the time to remember accurately the past; (3) his disposition to tell truly what he remembers. Whart. Cr. Ev. (9th Ed.) § 276.

Contradictory Statements.—Where dying declarations were proved, it was admissible to show that, after the deceased was wounded, he made statements concerning the transaction conflicting with such dying declarations. *Battle v. State*, 74 Ga. 101; *People v. Lawrence*, 21 Cal. 368; *Hurd v. People*, 25 Mich. 405; *Felder v. State*, 23 Tex. App. 477; s. c., 59 Am. Rep. 777. Compare *Wroe v. State*, 20 Ohio St. 460.

The court charged a jury, "that if they found that the deceased, in her dying declarations, made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness." *Held*, that this was erroneous. *M'Pherson v. State*, 9 Yerg. (Tenn.) 279.

Where dying declarations, made under the belief of impending death, are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, or whether either, is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions for the jury, it is error. *Moore v. State*, 12 Ala. 764.

Accomplices.—The dying declaration of an accomplice is admissible; but this can only happen where the prisoner is charged in assisting in the self-destruction of the accomplice; for dying declarations are never admissible except

where the death of the person who made them is the subject of the indictment. 3 Russ. on Cr. (5th Ed.) 359; *R. v. Tinkler*, 1 East P. C. 354. See **ABORTION**, 1 Am. & Eng. Encyc. of L. p. 31, n. 4.

1. **In a Bond.**—An obligation by two, binding themselves and "each of their heirs, executors and administrators," is joint and several. *Geddis v. Hawk*, 10 S. & R. (Pa.) 33; s. c., 2 Wheel. Am. C. L. 380. "Here it must be conceded that if the word 'each' were to be transposed so as to be grammatically applicable to the persons of the obligors, instead of being exclusively applicable to the persons of their representatives, these obligations would be several as well as joint. Now this word 'each' must be taken as having been intended to have some operation and legal effect; and if it can have none where it stands, we are bound to suppose that this particular collocation of the words used was purely accidental, and contrary to the real intent and meaning of the parties. But the word can have no operation where it stands; for it is impossible that a bond shall be joint as to the immediate parties and several as to their representatives. . . . We must then intend that the word 'each' was designed to be applicable to the persons of both obligors wherever they are named; and if that be so, the consequence is unavoidable that these obligations are several as well as joint."

"**Each of Them,**" in the covenants in a bond, renders the covenants several, or joint and several, as the case may be. *Duke of Northumberland v. Errington*, 5 T. R. 522; 1 Saund. 154a, n. (b); *Wood v. Hummel*, 4 Watts (Pa.), 50; *Robinson v. Walker*, 1 Salk. 393.

A surety bond by three for the payment of £1000 worded "for which payment to be well and faithfully made, we bind ourselves and each of us for himself, for the whole and entire sum of £1000 each," is a several and not a joint and several bond. *Collins v. Prosser*, 3 Dowl. & Ry. 112. "The word 'each' has the effect of binding the parties separately, but not jointly." And see *Inhab. of Middletown v. McCormick*, Penn. (N. J.) 500. But a bond executed by five persons in the words "we are holden and bound, . . . for the payment of which we bind ourselves and each of us," was held a joint and several bond. *Carter v. Carter*, 2 Day (Conn.), 442.

"**Each Case.**"—In a policy of insurance it was stipulated that the underwriters should not be liable "for any partial loss

EAR.—(See also MAYHEM.)—The external ear performs the important function of collecting, arresting, and conveying the waves of sound to the auditory canal, and without it they would not be thus carried, unless in the direct line of the auditory canal which commences at the orifice of the ear. It is therefore a "member of the body" within the meaning of the statute of mayhem.¹ As to biting off "an ear," see note 2.

EARLY.—See note 3.

EARNEST.—(See also SALE; STATUTE OF FRAUDS.)—A sum paid as part of the price for property sold, or of money due upon an agreement for the purpose of binding the bargain; also some-

on other goods, or on the vessel and freight, unless it amount to five per cent, exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss." *Held*, that the words "in each case" did not mean "at each time of loss," but referred to the subjects insured—goods, freight, and vessel, and required a damage of five per cent to justify a claim in each case. *Donnell v. Col. Ins. Co.*, 2 Sumn. (U. S.) 366.

"Each Entry," in an act requiring notice to be given to the collector of customs "on each entry," means "that in all cases, whether of entry in bond or for consumption, the owner shall give notice in writing on each entry to the collector, etc., not meaning on the paper or record called the entry, but in respect of each entry." *Ullman v. Murphy*, 11 Blatch. (U. S.) 360.

"Each and Every Part of a Charge" in an exception is insufficient, being "but a single exception, and not a statement that a separate exception was taken to each proposition stated by the court in its charge, and to its refusal." *Shull v. Raymond*, 23 Minn. 66. See also *Ayrault v. Pac. Bk.*, 47 N. Y. 576, and cases cited in *Woods v. Berry* (Mont.), 14 Pac. Rep. 761.

A contract by two persons with a boat-builder to pay for a boat to be built for them for a certain sum, "each his one half," is several, not joint. *Costigan v. Lunt*, 104 Mass. 217.

Where a penalty was imposed for "each offence" under a statute describing more than one offence, it was held that "the act imposed a penalty for every violation of either of the prohibitions contained in the statute," and did not, as contended, relate to the description of the offence, and not to repetitions of either of the offences. *Suydam v. Smith*, 52 N. Y. 389, where *Washburn v. Mc-*

Inroy, 7 J. R. 135, is distinguished. See also PARTY, PARCEL.

1. *Godfrey v. People*, 5 Hun (N. Y.), 379, where the court, after investigating the structure of the ear, say: "The very instant we arrive at the conclusion, therefore, that the sense of hearing is affected by the cutting off of the external ear or pavilion, or the greater part of it, we must admit the great importance of that appendage or appurtenance as a member of the body, the violent disablement of which should be severely punished;" and decide that the court may take judicial notice of the fact that the ear is a "member of the body." Compare, as to this latter point, *Slattery v. State*, 41 Tex. 619, where it is held that this is a matter of fact to be found by the jury.

2. To constitute a maim by "biting off an ear," it is not necessary that the whole ear should be bitten off; it is sufficient if a part only is taken off, provided enough is taken off "to attract observation, and, to ordinary observation, to render the person less comely." *State v. Gerkin*, 1 Ired. L. (N. Car.) 121.

But the biting off a small portion of the ear, which does not disfigure the person, and can only be discovered by close examination or inspection when attention is directed to it, does not bring the case within the statute. *State v. Abram*, 10 Ala. 928.

In an indictment for maiming by biting off "an ear," it is not necessary to state whether it was the right or the left ear. *State v. Green*, 7 Ired. L. (N. Car.) 39.

3. "Early Spring."—On the construction of a contract for the shipment of goods in "early spring," it was held not error to receive evidence of the meaning of those words, and to leave this for the jury to determine,—the latter finding that shipments on April 24 were in time. *Phoenix Iron Co. v. Samuel*, 13 W. N. C. (Pa.) 50.

times a portion of the goods when delivered and accepted for like purpose.¹

EARNINGS.—(See also NET; SURPLUS.)—The word “earnings” in a statute declaring an unrecorded assignment of “future earnings” invalid against a trustee process was used for the purpose of embracing a larger class of credits than would be included in the more common term “wages.” It involves the idea of compensation for services rendered, but is not limited to gains from merely personal labor.² In a statute regulating the application of a judgment debtor’s property towards satisfaction of the judgment, except his “earnings for his personal services” within a given time, the word “earnings” means the gains of the debtor derived from his services or labor without the aid of capital.³ “Services and earnings,” in an act regulating the property of married women, is a wider term than “claims for labor,” and may be as well for works of skill and science as for mere physical toil.⁴

EARTH is soil of all kinds, including gravel, clay, loam, and the like, in distinction from the firm rock.⁵

1. Abb. L. Dict.

2. *Jenks v. Dyer*, 102 Mass. 236, where it was held that money due for board and lodging furnished to the debtor’s workmen was “earnings.” So money due for board furnished to sailors by a debtor, under an agreement with a third person, was held “earnings” in *Jason v. Antone*, 131 Mass. 534.

Money to become due for labor and materials furnished under an entire contract for building a house was held to be “future earnings.” *Somers v. Keliher*, 115 Mass. 165, where the court said: “The statute applies to the compensation for services—a term which involves more than the mere labor of the person by whom they are rendered, and may include expenditures as well as labor.”

But rents payable under an ordinary contract of lease, which requires no personal services on the part of the lessor, are not “earnings” within the meaning of the statute. *Kendall v. Kingsley*, 120 Mass. 94.

3. *Brown v. Hebard*, 20 Wis. 330. “If the debtor has no capital and no credit contributing to increase his profits, except the credit arising from the labor or service in which he is presently engaged, and out of the proceeds of which his obligations on account of such labor or service are to be discharged, then I think his net receipts or gains from such labor or service may fairly be accounted ‘earnings.’ If, for example, the man whose business it is to dig a well, sink a mine, erect a house, run a raft of lumber or a ferry-boat, or to perform any of the

numerous kinds of work in which the assistance of others is necessary, employs others, as he must do, to assist him, and who are to be paid, as he himself is paid, out of the proceeds of the work, it seems to me that what remains after the others are paid must be regarded as his ‘earnings.’ We all know that there are many men who have a peculiar skill and adaptation to these different kinds of labor—who, from long application and experience, are qualified to assume the management and control of them and of others engaged in them, and when they do so under the circumstances stated, why may not their gains, increased perhaps beyond the gains of others who have no skill and experience, be said to be the result of their personal services? I must say that I think they are the ‘earnings’—the fruits of the proper skill, experience, and industry—of the persons to whom they belong.” It was accordingly held that the net proceeds of the debtor’s business were “earnings,” within the meaning of the statute.

4. *Hoyt v. White*, 46 N. H. 48. The stock-in-trade of a married woman comes within the term “wages and earnings,” and is protected by the Married Woman’s Property Act. *Ashworth v. Outram*, 5 Ch. D. 937; *Lovell v. Newton*, 4 C. P. D. 7.

5. *Dickinson v. Poughkeepsie*, 75 N. Y. 76 (quoting *Webs. Dict.*), where the contract provided for “earth” excavation; and it was held that this included “hard-pan;” and that to limit or vary the ordinary general meaning of the word by

EASEMENTS.—(See also LATERAL AND SUBJACENT SUPPORT; PARTY-WALLS; RIGHT OF WAY; WATERS AND WATER-COURSES; DRAINS AND SEWERS.)

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I. Definition.—"An easement may be defined to be a privilege without profit, which the owner of one neighboring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not to do something on his own land, for the advantage of the dominant owner."¹

proof of usage, if it could be done (as to which, *quare*), it devolved upon plaintiff to show a usage uniform, general, and presumably known to the parties—not a usage local, partial, or personal.

Where there was a contract to pay at a certain amount per cubic yard for all excavation of "earth," and unexpectedly to both contracting parties, the contractors met with a large amount of indurated earth and gravel which they excavated, it was held that the price to be paid the contractors for the excavation of such materials was not provided in the contract, and that consequently they might recover what the same was reasonably worth;—it appearing that among engineers and contractors indurated earth and cemented gravel were known and recognized as entirely distinct from common earth, and that it was customary for contractors to receive extra compensation for excavating such materials. *Shepherd v. Plank Road Co.*, 28 Mo. 373. "The obvious and most natural sense of the words 'excavation of earth' is the ordinary earth; . . . nor are they technical words whose sense may not be controlled by extrinsic evidence when they are used in connection with any particular trade or business."

Under a statute authorizing cities to lay out land as gravel and clay pits, and to take therefrom "earth and gravel" necessary for the construction, etc., of streets, it was held that any earth, gravel, or stones, suitable for the purpose and capable of being dug out of the ground and removed by ordinary excavation, might be taken. *Hatch v. Hawkes*, 126 Mass. 177. "The words 'earth and gravel' are not to be taken with such extreme strictness as to require that the gravel should be screened, or that the

question should be raised and decided judicially how large a pebble or movable stone must be in order to cease to be included in the general description of 'earth or gravel.'"

1. *Gale on Easements*, p. 5; *Oliver v. Hook*, 47 Md. 301. See also *Fetters v. Humphreys*, 3 C. E. Green (N. J.), 260; *Tabor v. Bradley*, 18 N. Y. 109; *Pierce v. Keator*, 70 N. Y. 419; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Scriven v. Smith*, 100 N. Y. 471; *Big Mt. Imp'v't Co.'s App.* 54 Pa. St. 361; *Kieffer v. Imhof*, 26 Pa. St. 438; *Pomeroy v. Mills*, 3 Vt. 279; *Hazelton v. Putnam*, 3 Pinn. (Wis.) 107; s. c., 3 Chand. (Wis.) 117; s. c., 54 Am. Dec. 158.

"An easement or servitude is a right which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor. . . . The merger of the easement, arising from unity of title and possession, which will extinguish and put an end to such easement, arises from that unlimited power of disposal which will enable the owner to grant any part of the soil with the former incidents, or to grant it without the former incidents, or create and annex to it, or subject it to new incidents in favor of another estate, at his own will and pleasure. Such a power of disposal can only exist when the same proprietor has a permanent estate in both tenements, not liable to be defeated by the performance of a condition or happening of any event beyond his control, and when the estates cannot again be disjoined by operation of law." There was, therefore, no merger of the easement by the vesting of both estates in the same person as mortgagee under separate mortgages, until the foreclosure of both mortgages. *Riiger v. Parker*, 8 Cush. (Mass.) 145.

1. *Appurtenant*.—An easement appurtenant is one which runs with the land, regardless of any change of ownership.¹ (See APPURTENANCE, APPURTENANT.)

2. *In Gross*.—An easement in gross is one which is attached to the person using it, or to whom it is granted, alone. It cannot be assigned to another, nor transmitted by descent. It dies with the person, and is so exclusively personal that the owner of the right cannot take another person in company with him.²

"The right of making use of the land of others, whether it be that of the public or of individuals, for a precise and definite purpose not inconsistent with a general right of property in the owner, especially where it is for a public use, is in legal contemplation an easement or franchise, and not a grant of the soil or general property. . . . As the acts of the legislature purport to confer upon the plaintiffs a right of flowage only, and the rights necessarily incident thereto, as the enjoyment of such right of flowage does not necessarily draw after it a right of property or an exclusive right of possession, and as these are not necessary to its enjoyment, no rule of construction requires that a larger grant should be considered as conferred by it than that of an easement, which fully satisfies it." *Boston Water Power Co. v. Boston & Worcester R. Co.*, 16 Pick. (Mass.) 522.

An easement proper is a privilege which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person. (Goddard on Eas. 2; *Tabor v. Bradley*, 18 N. Y. 109.) Such an easement one cannot have in land of which he owns the fee. At the time he gave the mortgage, Jones owned the fee of all the land to the west line of the way, and hence owned the strip of land covered by the way. Hence, the way was not a proper easement appurtenant to his land, and it never had been; but he had the right to use it as owner of the fee. It was a way over his own land used by him for his own convenience. It had never existed apart from the land as an easement appurtenant thereto. When there is such an easement, however, it passes in a conveyance of the dominant tenement by the word "appurtenances." (Goddard on Eas. 71.) But there are rights which are mentioned in the books as *quasi* easements: (1) Where there has been an easement proper with a dominant and servient tenement, and the ownership of such tenements has been verified. In such case when the ownership is again severed by a conveyance of the dominant tenement, the way will not pass by the

general word "appurtenances" merely, but there must be particular or general words indicating an intention to grant the way. (*Goddard on Eas.* 72; *Barlow v. Rhodes*, 1 O. & M. 448; *Thomson v. Waterlow*, L. R. 6 Eq. Cas. 36; *Fetters v. Humphreys*, 19 N. J. Eq. 471.) (2) There are other *quasi* easements, as when the owner of land has constructed a way or a drain over one portion of it for the benefit of another portion, and there has never been a separate ownership of a dominant and servient tenement. This class is again subdivided into those which are called continuous, as a drain or sewer which is used continuously without the intervention of man, and those which are called non-continuous, as a right of way which can only be used by the intervention of man, repeated at intervals when use is desired. (*Goddard on Eas.* 84; *Poedon v. Boston*, L. R. 12 B. 156; *Fetters v. Humphreys*, *supra*; *Lampman v. Milks*, 21 N. Y. 505.) Such continuous *quasi* easements pass up on the conveyance of what will become the dominant tenement by the word "appurtenances," and probably without that word; but the non-continuous easements will pass only by words sufficient to create a new tenement and annex it to the newly-made dominant tenement, and the word *appurtenances* is not sufficient. (*Goddard on Eas.* 70; *Washburn on Eas.* 39; *Dodd v. Burchall*, 1 H. & C. 113; *Thomson v. Waterlow*, *supra*; *Langley v. Hammond*, L. R. 3 Exch. 161; *Worthington v. Gimson*, 105 E. C. L. 616; *Russell v. Harford*, L. R. 2 Eq. Cas. 507; *Pearson v. Spencer*, 1 Best & S. 571.) *Parsons v. Johnson*, 68 N. Y. 62; s. c., 23 Am. Rep. 149.

1. Easements are of two kinds,—appurtenant or appendant, and in gross. The former run with the land, and pass by a deed of conveyance; but the latter are personal, and will not pass by a deed of conveyance. *Knecken v. Voltz*, 110 Ill. 264; *Manderbach v. Bethany Orphans' Home*, 1 Cent. Rep. (Pa.) 402; *Hills v. Miller*, 3 Paige (N. Y.), 254.

2. An easement or servitude created by deed is never presumed to be personal or in gross when it can be fairly construed to

3. *Quasi-easements.* — There are two classes of what are known as quasi-easements. First, where there has been an easement proper, with a dominant and servient tenement, and the ownership of such tenements has been unified. In such a case, when the ownership is again severed by a conveyance of the dominant tenement, the easement will not pass by the general word "appurtenances;" but there must be particular or general words indicating an intention to grant the easement.¹

Second, where the owner of a tenement has imposed a servitude upon one portion of it for the benefit of another portion, and there has never been a separate ownership of a dominant and servient tenement.

This class is again divided into continuous and discontinuous easements.

a. *Continuous* easements are those of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man, — as a drain, or sewer.

b. *Discontinuous* easements are those the enjoyment of which can be had only by the interference of man, — as rights of way, or a right to draw water.²

4. *Easement distinguished from a License.* — An easement is an incorporeal hereditament, always implies an interest in the land upon which it is imposed, and therefore lies only in grant.

A license carries no such interest, may be created by parol, and is generally, though not always, revocable at the will of the licensor. A license is strictly confined to the original parties, and can neither operate for nor against third persons.³

be appurtenant to some other estate; and when the reservation naturally operates to enhance the value of the other adjacent lands of the grantor, it is a strong circumstance to indicate that it was intended to be appurtenant to the estate, and not merely personal to the grantor.

The owner of certain lands fronting on the river, on which he had a warehouse and landing, conveyed a part of them by deed to a steam-mill company as a site for their mill, expressly reserving to himself, his heirs and assigns, the right to erect and have a warehouse and landing on any part of the premises, and prohibiting such erection or use by the grantees, their heirs or assigns; *held*, that the easement was not personal to the grantor only, but was appurtenant to the lands, passed to a subsequent purchaser, and might be enforced by him against a sub-purchaser of the granted premises with notice.

A stipulation in such deed providing for a forfeiture and reversion of the granted premises, on breach of the condition, is not assignable, but is only available to the grantor or his heirs; and it does not take away the jurisdiction of equity to protect

and enforce the easement at the suit of an assignee or purchaser of the dominant estate. *McMahon v. Williams*, 79 Ala. 288; *Knecken v. Voltz*, 110 Ill. 264; *Spensley v. Valentine*, 34 Wis. 154.

1. *Parsons v. Johnson*, 68 N. Y. 62; *Longendyke v. Anderson*, 101 N. Y. 625; *Barlow v. Rhodes*, 1 C. & M. 448; *Thomson v. Waterlow*, L. R. 6 Eq. Cas. 36.

2. *Parsons v. Johnson*, 68 N. Y. 62; s. c., 23 Am. R. 149; *Lampman v. Milks*, 21 N. Y. 505; *Outerbridge v. Phelps*, 13 Abb. N. C. (N. Y.) 117; *Schrymser v. Phelps*, 62 How. Pr. (N. Y.) 1; *Grant v. Chase*, 17 Mass. 443.

The distinction between easements which are apparent and continuous, and those which are not apparent and continuous, is completely established by adjudicated cases. The former pass on the severance of the two tenements as appurtenant, without the use of the word appurtenances; but the latter do not pass unless the grantor uses language in the conveyance sufficient to create the easement *de novo*. *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Stuyvesant v. Woodruff*, 1 Zab. (N. J.) 133.

3. A license is an authority to do a par-

5. *Easement distinguished from a Profit a Prendre.* — A right by which one person is entitled to remove and appropriate for his own use any thing growing in, or attached to, or subsisting upon, the land of another, for the purpose of the profit to be gained from the property thereby acquired in the thing removed, has always been considered in law a different species of right from an easement. Such right is a privilege, and is an easement; but the latter is a privilege without profit, and is merely accessorial to the rights of property in land; while the former is the reverse. If granted to one in gross, it is so far of the character of an estate or interest in the land itself that it is treated as such.¹

II. Characteristics and Incidents. — Easements have these essential qualities: there must be two tenements, the dominant and servient, owned by several proprietors. They are incorporeal, and, strictly considered, exist only in favor of, and are imposed only on, corporeal property. They confer no rights to any profits arising from the servient tenement. They must have a character of permanence and continuity. An easement appurtenant cannot be assigned separately from the dominant estate; and an easement in gross is not assignable at all, nor is it inheritable.²

ticular act or series of acts upon another's land, without possessing any estate therein. A claim for an easement must be founded on prescription or a grant by deed, for it is a permanent interest in another's land. *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72. See also *Foot v. N. H. & N. R. Co.*, 23 Conn. 214; *Prince v. Case*, 10 Conn. 375; *Cook v. Stearns*, 11 Mass. 533; *Stevens v. Stevens*, 11 Met. (Mass.) 251; *Seidensparger v. Spear*, 17 Me. 123; *Desloge v. Peace*, 38 Mo. 588; *Fuhr v. Dean*, 26 Mo. 116; *Harris v. Gillingham*, 6 N. H. 9; *Veghte v. The Raritan Water Power Co.*, 4 C. E. Green (N. J.), 142; *Ex parte Coburn*, 1 Cow. (N. Y.) 568; *Wiseman v. Luckinger*, 84 N. Y. 31; *Mumford v. Whitney*, 15 Wend. (N. Y.) 384; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Banks v. The American Tract Soc.*, 4 Sandf. Ch. (N. Y.) 438; *Forbes v. Balenseifer*, 74 Ill. 183; *Oliver v. Hook*, 47 Md. 301.

A parol license, when executed, may become an easement. *Dark v. Johnston*, 55 Pa. St. 164; *Foster v. Browning*, 4 R. I. 47; *Hazelton v. Putnam*, 3 Pinn. (Wis.) 107; s. c., 3 Chand. (Wis.) 117; s. c., 54 Am. Dec. 158; *De Haro v. U. S.*, 5 Wall. (U. S.) 599; 2 Am. Lead. Cas. (5th ed.) 549, note.

1. *Huntington v. Asher*, 96 N. Y. 604. See also *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Hill v. Lord*, 48 Me. 83; *Huff v. McCauley*, 53 Pa. St. 206.

2. The essential qualities of easements are these: 1st, they are incorporeal; 2d,

one imposed on corporeal property; 3d, they confer no right to a participation in the profits arising from such property; 4th, they are imposed for the benefit of corporeal property; and 5th, there must be two distinct tenements, — the dominant, to which the right belongs; and the servient, upon which the obligation rests. *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72. See also *Wheeler v. Gilsey*, 35 How. Pr. (N. Y.) 139; *Parsons v. Johnson*, 68 N. Y. 62; *Stuyvesant v. Woodruff*, 1 Zab. (N. J.) 133; *McTavish v. Carroll*, 7 Md. 352; *Oliver v. Hook*, 47 Md. 301; *Durel v. Boisblanc*, 1 La. Ann. 407; *Meek v. Breckenridge*, 29 Ohio St. 642; *Murphy v. Welch*, 128 Mass. 489; *Dark v. Johnston*, 55 Pa. St. 361; *Mabie v. Matteson*, 17 Wis. 1.

Rights of this description, denominated prædial servitudes in the civil law, and by our law termed easements, are attached to the estate, and not the person of the owner of the dominant tenement; and they follow that estate into the hands of the assignee thereof. So, on the other hand, they are a charge upon the estate or property of the servient tenement, and follow it into the hands of any person to whom such tenement or any part thereof is subsequently conveyed. As the right is annexed to the estate, for the benefit of which the easement or servitude is created, the right is not destroyed by a division of the estate to which it is appurtenant. And the owner or assignee of any portion of that estate may claim the right, so far as it is applicable to his part of the property, provided

III. How Acquired or Created. — All easements lie in grant, express or implied. This includes those acquired by prescription, since the law presumes the existence of a grant at some former time.¹

the right can be enjoyed as to the separate parcels, without any additional charge or burden to the proprietor of the servient tenement. *Hills v. Miller*, 3 Paige (N. Y.), 254.

1. An easement in real estate cannot be created, except by deed or prescription and a parol license, which, if given by deed, would create an easement, is revocable, although executed by the licensee. *Morse v. Copeland*, 2 Gray (Mass.), 302.

An easement is an interest in land; and a parol contract creating it is void under the statute of frauds, unless such a part performance is shown as to take it out of the statute. *Robinson v. Thraillkill*, 110 Ind. 117. See also *Fuhr v. Dean*, 26 Mo. 116; *Brooks v. Curtis*, 4 Lans. (N. Y.), 283; *Miller v. A. & S. R. Co.*, 6 Hill (N. Y.), 61; *Thompson v. Gregory*, 4 Johns. (N. Y.), 81; *Day v. N. Y. C. R. Co.*, 31 Barb. (N. Y.) 548; *Child v. Chappell*, 9 N. Y. 246; *Brondage v. Warner*, 2 Hill (N. Y.), 145; *Pitkin v. L. I. R. R. Co.*, 2 Barb. (N. Y.) Ch. 221; *Collam v. Hocker*, 1 Rawle (Pa.), 108; *Huff v. McCauley*, 53 Pa. St. 206; *Van Rensselaer v. Albany, etc., R. Co.*, 1 Hun (N. Y.), 507; *Farrington v. Bundy*, 5 Hun (N. Y.), 617; *Declonet v. Borel*, 15 La. Ann. 606; *Fitch v. Seymour*, 9 Met. (Mass.) 462; *Cobb v. Hampshire, etc., Canal*, 18 Pick. (Mass.) 340; *Veghte v. The R. W. P. Co.*, 4 C. E. Green (N. J.), 142; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77.

The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly: it cannot be established by intentment or presumption. *Polson v. Ingram*, 22 S. Car. 541.

A parol agreement to build a party-wall, when fully performed, may create an easement running with the land. *Rawson v. Bell*, 46 Ga. 19. See also *Harrison v. Boring*, 44 Tex. 255.

A tenant in common of property, who owns other premises in severalty, cannot so use the last as to acquire or exercise for the benefit of his premises so owned in severalty, an easement in the property held in common. . . . Where, therefore, a tenant in common, in a grant of premises held by him in severalty, has attempted to create an easement in the premises held in common, subsequent grantee of all the tenants in common is not estopped by the fact of his succeeding to the interest of the one who granted the easement from asserting, as

a grantee of the co-tenants, the invalidity of the grant of the easement, and as against him it is void. *Crippen v. Morss*, 49 N. Y. 63. See also *Great Falls Co. v. Worster*, 15 N. H. 412.

The grantor may reserve an easement by deed. *Rose v. Bun*, 21 N. Y. 275; *Burr v. Mills*, 21 Wend. (N. Y.) 290; *Hoyt v. Carter*, 16 Barb. (N. Y.) 212; *Gibert v. Peteler*, 38 Barb. (N. Y.) 488; *White v. Crawford*, 10 Mass. 183; *Ashcroft v. E. R. Co.*, 126 Mass. 196; *Hankey v. Clark*, 110 Mass. 262; *Corbin v. Dale*, 57 Mo. 297; *Richardson v. Clements*, 89 Pa. St. 503.

Where a right of way is granted without any designation of the place in the deed, it becomes located by usage for a length of time. And being so located, it cannot afterwards be changed by the grantor. But if changed, and the grantee has for a length of time used the new road, his acquiescence in the alteration will be presumed. *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222.

Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of the burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale; and neither has a right, by altering arrangements then openly existing, to change materially the value of the respective parts. *Lampman v. Milks*, 21 N. Y. 505; *Huttemeier v. Albro*, 18 N. Y. 48; *Lansing v. Wiswall*, 5 Denio (N. Y.), 213. Some of the late cases criticise this doc-

trine as laid down in *Lampman v. Milks*, holding that this liberal construction can only be in favor of the grantee, while only easements of absolute necessity are to be implied as reserved to the grantor. *Butterworth v. Crawford*, 46 N. Y. 349; *Curtiss v. Ayrault*, 47 N. Y. 73; *Smyley v. Hastings*, 22 N. Y. 217; *Ogden v. Jennings*, 62 N. Y. 526; *Griffiths v. Morrison*, 106 N. Y. 165; *Outerbridge v. Phelps*, 13 Abb. N. C. (N. Y.) 117; *Shoemaker v. Shoemaker*, 11 Abb. N. C. (N. Y.) 80; *Reines v. Young*, 38 Hun, 335; *Voorhies v. Burchard*, 6 Lans. (N. Y.) 196; *Havens v. Klein*, 51 How. Pr. (N. Y.) 82; *Alexander v. Tolleston Club*, 110 Ill. 65; *Cihak v. Klekr*, 117 Ill. 643; *Morrison v. King*, 62 Ill. 30; *Life Ins. Co. v. Patterson*, 103 Ind. 582; s. c., 53 Am. Reps. 550; *Robinson v. Thraillkill*, 110 Ind. 117; *Cave v. Crafts*, 53 Cal. 135; *Sanderlin v. Baxter*, 76 Va. 299; s. c., 44 Am. Rep. 165; *Scott v. Bentel*, 23 Gratt. (Va.) 1; *Hardy v. McCullough*, 23 Gratt. (Va.) 251; *Burwell v. Hobson*, 12 Gratt. (Va.) 322; *Dillman v. Hoffman*, 38 Wis. 559; *Jars-tadt v. Smith*, 51 Wis. 96; *Galloway v. Bonesteel*, 65 Wis. 79; *Petland v. Keep*, 41 Wis. 490; *Turner v. Thompson*, 58 Ga. 268; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492; *Hazard v. Robinson*, 3 Mason (U. S.), 272.

Some courts hold, that, in order to create an easement by implication, it must be one of absolute necessity. The following decision of the Maryland court presents this view:—

No easement or *quasi*-easement can be taken as reserved by implication, unless it be *de facto* annexed and in use at the time of the grant; and it be shown, moreover, to be actually necessary to the enjoyment of the estate or parcel retained by the grantor. And such necessity cannot be deemed to exist if a similar way or easement may be secured by reasonable trouble and expense, and especially not if the necessary way or easement can be provided through the grantor's own property.

In order to give rise to the presumption of a reservation of an existing easement or *quasi*-easement, where the deed is silent upon the subject, the necessity must be of such strict nature as to leave no room for doubt of the intention of the parties, that the adjoining properties should continue to be used and enjoyed, in respect to existing easements or *quasi*-easements, as before the severance of ownership; for otherwise parties would never know the real purport of their deeds. If the grantor intends to reserve any right or easement over the property granted, it should be done by express terms, and not afterwards require a plain grant, it may be for full consideration, to be limited and cut down by any mere implied reservation of privileges

over the property granted. It is only in cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of *implied reservation* can be invoked. *Burns v. Gallagher*, 62 Md. 462. See also *Mitchell v. Seipel*, 53 Md. 251; *Oliver v. Hook*, 47 Md. 301; *Johnson v. Jordan*, 2 Met. (Mass.) 234; *Carbrey v. Willis*, 7 Allen (Mass.), 364; *Randall v. McLaughlin*, 10 Allen (Mass.), 366; *Thayer v. Payne*, 2 Cush. (Mass.) 327; *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Grant v. Chase*, 17 Mass. 443; *Richardson v. Bigelow*, 15 Gray (Mass.), 154; *Barnes v. Lloyd*, 112 Mass. 224; *Hollenbeck v. McDonald*, 112 Mass. 247; *Buss v. Dyer*, 125 Mass. 287; *Wentworth v. Philpot*, 60 N. H. 193; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Dunklee v. R. Co.*, 4 Fost. (N. H.) 489; *Francies's Appeal*, 96 Pa. St. 200; *Strickler v. Todd*, 10 S. & R. (Pa.) 63; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Phillips v. Phillips*, 48 Pa. St. 178; *Hathorn v. Stimson*, 10 Me. 224; *Warren v. Blake*, 54 Me. 276; *Brakely v. Sharp*, 2 Stock. (N. J.) 206; *Stuyvesant v. Woodruff*, 1 Zab. (N. J.) 133; s. c., 47 Am. Dec. 156; *Fetters v. Humphreys*, 3 C. E. Green (N. J.), 260; *Denton v. Leddell*, 23 N. J. Eq. 64; *Ferguson v. Witsell*, 5 Rich. (S. Car.) 280; *Thompson v. Miner*, 30 Iowa, 386; *Baldwin v. Thompson*, 15 Iowa, 505; *Sniter v. Turner*, 10 Iowa, 517; *Dickey v. Lyon*, 19 Iowa, 544; *Yunker v. Nichols*, 1 Colo. T. 551; *Kenyon v. Nichols*, 1 R. I. 412; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Prov. Tool Co. v. Corliss S. E. Co.*, 9 R. I. 564; *Evans v. Dana*, 7 R. I. 306; *Lanier v. Booth*, 50 Miss. 410; *McPherson v. Acker*, 4 MacArthur (D. C.), 150; s. c., 48 Am. Rep. 749.

Where the owner of two adjoining messuages and lots of land, one of which he occupies, and the other of which he leases, constructs a drain from the messuage which he leases through the land which he occupies into a common sewer, and permits his tenants to use it for ten years and more, and then sells both messuages and lots on the same day to different purchasers, and in his deed to the purchaser of the messuage and lot which he formerly leased does not mention the drain, such purchaser acquires no right, by the deed, to the use of the drain through the other lot of land, if he, by reasonable labor and expense, can make a drain without going through that land. *Johnson v. Jordan*, 2 Met. (Mass.) 234; *Whitney v. Eames*, 11 Met. (Mass.) 517.

The defendant, a religious camp-meeting association, having laid out and mapped its seaside property into lots, reserving a tier of blocks, extending from the ocean

westward, as a "camp-ground" for religious services and tenting purposes, and having sold to the complainant lots by this map fronting on the blocks so reserved, whereon he erected a summer residence, *held*, that the association had thereby entered into an implied covenant with the complainant that these blocks should be devoted to the uses indicated, and that it had no right to divide these blocks into lots for the purpose of leasing them for a term of years with the privilege of erecting thereon permanent cottages. *Lennig v. Ocean City Assn.*, 41 N. J. Eq. 606; s. c., 56 Am. Rep. See also *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Foster v. City of Buffalo*, 64 How. Pr. (N. Y.) 127; *In the Matter of Opening Eleventh Ave.*, 81 N. Y. 436; *Baxter v. Arnold*, 114 Mass. 577; s. c., 11 Am. R. 335.

The rule that those who purchase by reference to a plat are entitled to the use of the streets, on which the purchased premises appear to abut, and of all connecting streets, was *held* not to apply in a case where the plat was never acknowledged, nor the dedication thereby accepted, nor the streets laid out on it used, or capable of use; and where the streets were neither ways of necessity nor of convenience, and no equities were shown against closing them for the benefit of individual interests. *Bell v. Todd*, 51 Mich. 21. This rule is applied in the following cases: *Smyles v. Hastings*, 22 N. Y. 217, approving 24 Barb. (N. Y.) 44; *Pratt v. B. C. R. Co.*, 19 Hun (N. Y.), 30; *Foster v. Buffalo*, 64 How. Pr. (N. Y.) 127.

A. conveyed land to B. by a deed containing these words: "There is a passage-way on the south-easterly side of the said premises, which is to be used in common with the abutters thereon." C. owned land abutting on the south-easterly side of the land conveyed to B. At the time of the conveyance from A. to B. there was a passage-way four feet wide over which a right of way had been granted by A. as appurtenant to adjoining land which he had before that time conveyed. *Held*, that a right of way over B.'s land was not reserved as appurtenant to C.'s land by the deed to B. *Held, also*, that the declarations of A. to C., at the time of his deed to B., were not competent to affect the deed. *Murphy v. Lee*, 144 Mass. 371.

If land, which is subject to an easement, is devised "subject to all incumbrances thereon," the fact that the testator had been in the habit of using the land in connection with his adjoining land does not make such mode of use an incumbrance; nor is such a construction aided by the fact that the testator devised his remaining land to two persons in severalty, and imposed an easement on each part for the benefit

of the other. *Sullivan v. Ryan*, 130 Mass. 116.

A release, by a mortgagee, of one of two parcels of land included in the mortgage, does not convey to the releasee an easement in favor of the parcel released, created by him by imposing a servitude upon the other parcel, while occupying the whole premises, before the release. *Harlow v. Whitcher*, 136 Mass. 553.

It is well settled in the case of *Clark v. Rugge*, 2 Roll. Abr. 60, that if a man having a close surrounded by his own land, grants such close to another, the grantee and those claiming under him have a right of way of necessity, through the lands of the grantor as incident to the grant; which way of necessity the grantor may assign to the grantee such part of his land as he shall think proper. The same principle also appears to apply to the case where the close granted is partly surrounded by lands of a third person. . . . The right of way of necessity over the lands of the grantor, in a conveyance, in favor of the grantee, and those subsequently claiming the dominant tenement under him, is not a perpetual right of way; but it continues only so long as the necessity exists. . . . A way of necessity only arises upon the implication of a grant, and cannot be extended beyond what the existing necessity of the case requires. *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353; *Smyles v. Hastings*, 22 N. Y. 217; *Wheeler v. Gilsey*, 35 How. Pr. (N. Y.) 139; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Collins v. Prentice*, 15 Conn. 39; s. c., 38 Am. Dec. 61; *Brown v. Burkenmeyer*, 9 Dana (Ky.), 159; *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; *Pingree v. McDuffee*, 56 N. H. 306; *McTavish v. Carroll*, 7 Md. 352; *Oliver v. Hook*, 47 Md. 301; *Burns v. Gallagher*, 62 Md. 462; *Viall v. Carpenter*, 14 Gray (Mass.), 126; *Day v. Walden*, 46 Mich. 575.

When the use of a way has, for the requisite time, been open, notorious, uninterrupted, undisputed, under claim of right, and adverse, the law presumes a grant of such way from the owner of the servient tenement, and such presumption is conclusive. *Ward v. Warren*, 82 N. Y. 265.

"There are various methods of meeting, qualifying, and explaining the evidence adduced to establish the user during the twenty years; and where a case the least questionable is made, it has commonly been the course to leave it to a jury to say whether they will presume a grant. But the fact of adverse enjoyment for twenty years being beyond dispute, the law itself raises the presumption, which is very strong; and in one case it was even held to be a presumption *juris et de jure*." *Tyler v. Wilkinson*, 4 Mason (U. S.), 397; *Corning v. Gould*, 16 Wend. (N. Y.) 531.

IV. How Lost or Extinguished.—An easement may be lost or extinguished by a release from the owner of the dominant tenement; ¹ by a merger of the two estates under the same title and

See also *Coolidge v. Learned*, 8 Pick. (Mass.) 504; *Hazard v. Robinson*, 3 Mass. 272; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Barnes v. Haynes*, 13 Gray (Mass.), 188; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Stearns v. Jones*, 12 Allen (Mass.), 582; *Hill v. Crosby*, 2 Pick. (Mass.) 466; *Com. v. Low*, 3 Pick. (Mass.) 408; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Gloucester v. Beach*, 2 Pick. (Mass.) 60; *Medford v. Pratt*, 4 Pick. (Mass.) 222; *Gayetty v. Bethune*, 14 Mass. 49; *Bodfish v. Bodfish*, 105 Mass. 317; *Gordon v. Taunton*, 126 Mass. 349; *Wallace v. Fletcher*, 10 Post. (N. H.) 446; *Watkins v. Peck*, 13 N. H. 360; *Winnepiseogee Lake Co. v. Young*, 40 N. H. 420; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Hart v. Vose*, 19 Wend. (N. Y.) 365; *Curtis v. Keesler*, 14 Barb. (N. Y.) 511; *Nicholls v. Wentworth*, 100 N. Y. 455; *Flora v. Carbean*, 38 N. Y. 111; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564; *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *Lansing v. Wiswall*, 5 Denio (N. Y.), 213; *Brooks v. Curtis*, 50 N. Y. 639, affirming 4 Lans. (N. Y.) 283; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Luce v. Carley*, 24 Wend. (N. Y.) 451; *Rexford v. Marquis*, 7 Lans. (N. Y.) 249; *Townsend v. McDonald*, 12 N. Y. 381; *Tracy v. Atherton*, 36 Vt. 503; *Townsend v. Downer*, 32 Vt. 183; *Dodge v. Stacy*, 39 Vt. 558; *Parish v. Kaspere*, 109 Ind. 586; *Palmer v. Wright*, 58 Ind. 486; *City of Hartford v. County of Hartford*, 49 Conn. 554; *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Conklin v. Boyd*, 46 Mich. 56; *Dowling v. Hennings*, 20 Md. 180; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Stokes v. Appomattox Co.*, 3 Leigh (Va.), 318; *Mannier v. Myers*, 4 B. Mon. (Ky.) 514; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Polson v. Ingram*, 22 S. Car. 541; *Benlow v. Robbins*, 71 N. Car. 338; *Smith v. Bennett*, 1 Jones (N. Car.), L. 372; *Mebane v. Patrick*, 1 Jones (N. Car.), L. 23; *Warren v. Jacksonville*, 15 Ill. 236; *Pierre v. Fernald*, 26 Me. 436; *Hill v. Lord*, 48 Me. 83; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *Schuylkill Co. v. Stoever*, 2 Grant (Pa.), Cas. 462; *Esling v. Williams*, 10 Pa. St. 126; *Campbell v. West*, 44 Cal. 646; *Arimond v. Green Bay, etc.*, Canal Co., 35 Wis. 41; *Petland v. Keep*, 41 Wis. 490; *Louisville, etc., R. Co. v. Hays*, 11 Tenn. 382; s. c., 14 Am. & Eng. R. R. Cas. 284.

An easement will not arise by prescription where the facts show that the owner of the servient estate has habitually broken and interrupted the use whenever he thought proper to do so. *Kirschner v. The*

W. & A. R. Co., 67 Ga. 760. See also *Powell v. Bagg*, 8 Gray (Mass.), 441; *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Eckerson v. Crippen*, 39 Hun (N. Y.), 419.

A right of way over a person's land in all directions, where most convenient to the dominant owner, and least prejudicial to the servient owner, cannot be prescribed for, nor can a non-existing grant of such a way be presumed. *Jones v. Percival*, 5 Pick. (Mass.) 485.

Title by prescription is restricted to such rights as might have been created by grant. If by law no grant of a right could ever be rightfully made, no presumption of grant arises from user, and the right cannot rest in prescription. The presumption must be in such case that the party claiming by user held only by such right as might have been lawfully obtained. *Burbank v. Fay*, 5 Lans. (N. Y.) 397; *Watkins v. Peck*, 13 N. H. 360.

The public cannot acquire an easement by prescription: the doctrine is inapplicable to the public. A prescription supposes a grant, and in the case of the public there can be no grantee. *Curtis v. Keesler*, 14 Barb. (N. Y.) 511; *Pearsall v. Post*, 20 Wend. (N. Y.) 121; s. c., 22 Wend. (N. Y.) 440; *Warren v. Jacksonville*, 15 Ill. 236. Compare *Gordon v. Taunton*, 126 Mass. 349.

A town may acquire a right of way by grant, and exclusive uninterrupted use by the inhabitants for twenty years unexplained is evidence of a grant; but such way will be a private way, and a nuisance on it will not be indictable. *Com. v. Low*, 3 Pick. (Mass.) 408.

An easement may be created by a dedication to the use of the public. Trustees of *Watertown v. Cowen*, 4 Paige (N. Y.), 510. See also *Scott v. Cheatham*, 12 Heisk. (Tenn.) 713; *Stevenson v. Chattanooga*, 20 Fed. Rep. 586.

1. An easement in real estate, whether acquired by grant or prescription, may be extinguished, renounced, or modified by a parol license granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. *Morse v. Copeland*, 2 Gray (Mass.) 302. Compare *Dyer v. Sandford*, 9 Met. (Mass.) 395.

A party entitled to a right of way, or other mere easement in the land of another, may abandon and extinguish such right by acts *in pais*, and without deed or other writing. The act or acts relied on, however, to effect such result, must be of a decisive character; and, while a mere decla-

in the same person;¹ by abandonment.² Abandonment will be presumed from various acts of the dominant owner; as, for example, where the holder of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right. Abandonment may also be presumed from non-user for a length of time sufficient to create the right by prescription, where such right was originally acquired by prescription.

ration of an intention to abandon will not alone be sufficient, the question whether the act of the party entitled to the easement amounts to an abandonment or not, depends upon the intention with which it was done, and that is a subject for the consideration of the jury. A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement without any reference whatever to time. *Vogler v. Geiss*, 51 Md. 407. See also *Pope v. O'Hara*, 48 N. Y. 446; *Folson v. Ingram*, 22 S. Car. 541; *Hamilton v. Farrar*, 128 Mass. 492; *King v. Murphy*, 140 Mass. 254.

If two tenants in common of an estate, part of which is a mill privilege, make partition thereof, and execute mutual deeds of release, which stipulate that neither the grantor, nor his heirs, nor any other person claiming under him or them, shall "claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof forever," this is an extinguishment of the privilege, which cannot be revived by a grantee of one of the co-tenants as against the other. *Hamilton v. Foster*, 128 Mass. 492.

1. *Warren v. Blake*, 54 Me. 276; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Grant v. Chase*, 17 Mass. 443; *Brakely v. Sharp*, 9 N. J. Eq. 9; *Denton v. Leddell*, 23 N. J. Eq. 64; *McTavish v. Carroll*, 7 Md. 352; *Miller v. Lapham*, 44 Vt. 416; *McAllister v. Devane*, 76 N. Car. 57.

A right of way appurtenant to land, over and upon adjoining land, is not extinguished by the vesting of both estates in the same person as mortgagee, until both mortgages are foreclosed. *Ritger v. Parker*, 8 Cush. (Mass.) 145.

Where the title to two lots of ground, with an alley between them, running from one street to another, which had been dedicated to the use of the lots bounding thereon by a former owner, became vested in two persons as tenants in common, who continued the use of the alley for many years, the right to use it passes to a purchaser of an inner lot, at a joint sale of the interests of the two tenants in common, by the administrator of one after his decease, and the survivor; and the purchaser of the two lots has no right to close it, though

the measurements in his deed extend to the centre of the alley, and embrace the whole of it.

The easement, being both apparent and continuous, was not extinguished by merger, in consequence of the unity of possession in the two joint owners who had purchased subject to it, and had maintained its use: it could not therefore be closed without the consent of all the owners of lots bounding on it. *McCarty v. Kitchenman*, 47 Pa. St. 239.

Where a tenant holds land by a defective title, and an easement in it by a valid title, the easement is not extinguished by unity of possession. *Tyler v. Hammond*, 11 Pick. (Mass.) 193.

That unity of title in the dominant and servient estates should operate to extinguish an easement, the ownership of the two estates should be co-extensive. When a person holds one estate in severalty, and only a fractional part of the other, there is no extinguishment of an easement. *Atlanta Mills v. Mason*, 120 Mass. 244.

If easements or servitudes, which are apparent and continuous, and which are technically extinguished or put to sleep by unity of title, which are allowed to remain undisturbed, they revive upon severance. *Hurlburt v. Firth*, 10 Phila. (Pa.) 135.

2. By the extinguishment of a right is meant its total annihilation, and not its suspension. The right to overflow the lands of another by grant or prescription is an incorporeal hereditament, and, if extinguished for a moment, is gone forever. . . . A servitude may be extinguished by the act of God, the operation of law, or by the act of the party. . . . A servitude may be extinguished by a renunciation of the party, either expressed or implied, as by permitting the party from whom the servitude is due to build on the property such works as presuppose an abandonment of the right. When the act which prevents the servitude is by the party to whom the servitude is due, it is wholly extinguished; but when it is by the act of another, it is only suspended. An act incompatible with the nature or exercise of the servitude is sufficient to extinguish it; so the creation of a new inconsistent right by the party himself will extinguish the former right. *Taylor v. Hampton*, 4 Mc-

Cord (S. Car.) 61. See also Cartwright v. Maplesden, 53 N. Y. 622; Ballard v. Butler, 30 Me. 94; Vogler v. Geiss, 51 Md. 407; Steere v. Tiffany, 13 R. I. 568; Warren v. Syme, 7 W. Va. 476; Central Wharf, etc., Corp. v. Proprietors of India Wharf, 123 Mass. 567.

It is true, as a general rule, that an interest in real estate cannot be conveyed except by a deed; but it is well settled that an owner of a right of way or other easement may, without deed, abandon his right so as to relieve the servient estate of the incumbrance. King v. Murphy, 140 Mass. 254. See also Dyer v. Sanford, 9 Met. (Mass.) 395; Pope v. Devereux, 5 Gray (Mass.), 409; Warshauer v. Randall, 109 Mass. 586; Jamaica Pond Aqueduct v. Chandler, 121 Mass. 3; Canny v. Andrews, 123 Mass. 155; Crain v. Fox, 16 Barb. (N. Y.) 184.

An alley lying between two houses had been used for over forty years by the adjoining owners for access to the rear of their houses, and to the lots behind, and belonging thereto. Both houses were destroyed by fire. *Held*, that the easement in the alley was not thereby lost, and that whether complainant had forfeited her right thereto by placing the foundation of her house in the alley, in rebuilding (the evidence thereof being conflicting), should be determined by an issue at law before she could enjoin the defendant from appropriating the part of the alley next to his lot in rebuilding. Chew v. Cook, 39 N. J. Eq. 396.

When the owner of an easement created by a covenant has made or permitted permanent erections which substantially intercept the air, light, and vision to and from his lot, the easement is thereby extinguished; and so, if the erection interferes with the easement to a certain extent, to that extent it is destroyed: the fact that the owner chooses to relinquish part of his easement, does not deprive him of the whole. It devolves upon the defendant in an action upon the covenant to show that the erection, either in whole or in part, destroyed the easement. Lattimer v. Livermore, 72 N. Y. 174.

The owner of a lot of land having a right of way, acquired by grant, over two passages leading therefrom, built a close board fence five feet high on the boundary of his land, extending across one of these ways, and a subsequent owner placed palings three or four feet high on top of this fence. *Held*, that the maintenance of this fence for seven years was not of itself an abandonment of the right of way over the passage across which it was built. Hayford v. Spokesfield, 100 Mass. 491.

Plaintiff, being the owner of a lot which was subject to a mortgage, conveyed the

same to M., reserving an easement therein for light and air to the windows of its church adjoining, M. assuming the mortgage. M. conveyed the lot, through a third person, to his wife, subject to the mortgage, but without any liability on her part to pay the same. Upon foreclosure of the mortgage, Mrs. M. became the purchaser, and took the deed. In an action to restrain her from obstructing the light and air, *held*, that, under the foreclosure deed, Mrs. M. took the absolute title, unencumbered by the easement; that she owed no duty to the plaintiff or mortgagee, requiring her to pay off the mortgage, and so there was no equity preventing her from asserting her title, and the action was not maintainable. *It seems* that plaintiff, to save its easement, should have appeared in the foreclosure suit, and by offering to bid the full amount of the mortgage debt and costs upon sale, subject to the easement, sought to have the judgment modified so as to direct such a sale. Rector, etc., Christ P. E. Church v. Mack, 93 N. Y. 488, reversing 25 Hun (N. Y.), 418. See also Scrymser v. Phelps, 33 Hun (N. Y.), 474.

An easement, to become extinguished by disuse, must have been acquired by use; and the doctrine of extinction by non-user does not apply to servitudes or easements created by deed. In the one case, mere disuse is sufficient; but in the latter, there must not only be disuse by the land dominant, but there must be an actual adverse user by the owner of the land servient. Jewett v. Jewett, 16 Barb. (N. Y.) 150. See also Pope v. O'Hara, 48 N. Y. 446; Smyles v. Hastings, 22 N. Y. 217; Smiles v. Hastings, 24 N. Y. 44; Snell v. Levitt, 39 Hun (N. Y.), 227; White v. Crawford, 10 Mass. 183; Bannon v. Angier, 2 Allen (Mass.), 128; Eddy v. Chace, 140 Mass. 471; Bronson v. Coffin, 108 Mass. 175; Barnes v. Lloyd, 112 Mass. 224; Hollenbeck v. McDonald, 112 Mass. 247; Knecken v. Voltz, 110 Ill. 264; Day v. Walden, 46 Mich. 575.

Abandonment is a simple non-user of an easement; but to establish such an answer to the claim of a right of way, the enjoyment of the right must have totally ceased for the same length of time that was necessary to create the original presumption. The non-user for twenty years affords a presumption, either that the former presumptive right was extinguished in favor of some other adverse right, or, if no such adverse right appears, that it has been surrendered, or never had existence. A mere non-user, it seems, is sufficient to produce this effect, without showing the erection of, or permission to erect, a permanent obstruction. A permanent obstruction, however, alone, by one party, insisted on by the other, operates to extinguish all

V. Rights and Liabilities of the Parties.—“The owner of the dominant tenement has a right, as well as a duty, as a part of the servitude, to perform, at his own expense, all such works as are necessary for preserving and making use of the servitude, and so he is entitled to have access to make the necessary repairs. The owner of the servient estate can do nothing to diminish the use or convenience of the servitude to the owner of the dominant. Nor can the owner of the dominant enlarge his use so as to increase the burden on the servient, unless in so far as such change of use may be necessary in order to make the servitude effectual.” It is the right of both parties to insist that the easement remain substantially as it was at the time of its acquisition.¹

right to the use of a common way, although such obstruction has existed for a period less than twenty years. *Corning v. Gould*, 16 Wend. (N. Y.) 531. See also *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *White's Bank v. Nichols*, 64 N. Y. 65; *Steere v. Tiffany*, 13 R. I. 568; *Louisville, etc., R. Co. v. Covington*, 2 Bush (Ky.), 526; *Wilder v. St. Paul*, 12 Minn. 192.

An easement will not be extinguished by mere non-user for twenty years: it will if the non-user is accompanied by acts which show an intention of abandonment. Otherwise it requires adverse possession, as well as non-user, to effect the extinguishment. *Veghte v. R. W. P. Co.*, 4 C. E. Green (N. J.), 142. See also *Horner v. Stillwell*, 35 N. J. L. 307; *Pratt v. Sweetser*, 68 Me. 344; *Eddy v. Chace*, 140 Mass. 471.

The presumption of an abandonment of an easement may arise from a period of time much less than it will take to acquire it. *Rhodes v. Whitehead*, 27 Tex. 304.

The dedication or use of land as a highway is not necessarily so inconsistent with the existence of an easement for the maintenance of an aperture in the sidewalk by the owners and occupants of an adjoining building, to be used by them occasionally and reasonably for the introduction of articles into their building, as to extinguish it. The owner of such land, whether the State or its representatives, or a private individual, may grant such an easement to be enjoyed by a private person to be used by him, so as not to interfere with the general use of such land as a highway. *Irvin v. Fowler*, 5 Rob. (N. Y.) 482.

Where a right has been acquired by adverse enjoyment, it will not be defeated by asking for and obtaining a license for a continued use from the owner of the servient tenement; but this would be evidence tending to prove that the previous possession was not adverse, or under a claim of right. *Perrin v. Garfield*, 37 Vt. 304.

A right of way acquired by a railroad corporation prior to the Act of 1856, and

transferred to a corporation created subsequently to said act, is property; and a legislative enactment giving it to another corporation is not due process of law. Such right of way may be lost by abandonment; and non-user of more than ten years is held to be sufficient evidence of abandonment. Abandonment is to be more readily presumed where the easement is granted for the public benefit than where it is held for private use. When such right has been so abandoned, it is constitutional for the State to grant it to another corporation. *Henderson v. Central Passenger R. Co.*, 21 Fed. Rep. 358.

A right of way, assigned to a dowager, over land of her husband with her dower, was held to cease with the estate in dower. *Hoffman v. Savage*, 15 Mass. 130.

The question as to whether a party has abandoned his right to an easement, is one of fact, and should be submitted to the jury. *Cooper v. Smith*, 9 S. & R. (Pa.) 26; *Parkin v. Dunham*, 3 Strobb. (S. Car.) 224.

1. 3 Burge, Col. & T. Law, 443.

Where a man had an easement in another's land to discharge water into a stream by means of a ditch, it was held, that, “if the ditch got out of repair by reason of floods or washing away its banks, or otherwise, it was the legal right of the plaintiff to repair it, so as to restore it to its original condition, and make it subserve the purposes which it originally effected, of carrying off the water of the stream. He was entitled to have the ditch kept up as it was when he purchased, and to keep it in that condition, and, if necessary, to enter upon the defendant's land to make repairs, doing no unnecessary injury. But he had no right to substantially change the condition of the ditch to the injury of the defendant's land. The artificial channel was intended to, and did, carry off the water in its ordinary stages, but was not sufficient for freshets or unusual floods. The plaintiff had no right to change its character in this respect, and consequently no right, by the construc-

Any one in possession of the premises may have an action for the unlawful obstruction or disturbance of the easement; and if

tion of barriers or embankments, to cause more water to flow upon the defendant's land in times of freshet or flood than when the channel was made. If such unusual barriers were erected upon the defendant's land, it was his legal privilege to reduce them to the proper standard, but would not justify an unnecessary destruction of the entire structures. The legal rights of the parties accord with sentiments of abstract justice. *Roberts v. Roberts*, 55 N. Y. 275. See also *Holmes v. Serby*, 19 Wend. (N. Y.) 507; *Brown v. Bowen*, 30 N. Y. 519; *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Huson v. Young*, 4 Lans. (N. Y.) 63; *Evangelical, etc., Home v. Buffalo Hydraulic Assn.*, 64 N. Y. 563; *Onthank v. Lake Shore, etc., R. Co.*, 15 N. Y. Sup. Ct. 131; *Spencer v. Weaver*, 20 Hun (N. Y.), 450; *Fritcher v. Anthony*, 20 Hun (N. Y.), 495; *Veghte v. R. W. P. Co.*, 4 C. E. Green (N. J.), 142; *Jaqui v. Johnson*, 27 N. J. Eq. 526; *Johnson v. Jaqui*, 27 N. J. Eq. 552; *Darlington v. Painter*, 7 Barr (Pa.), 473; *Stevenson v. Stewart*, 7 Phila. 293; *Hall v. McCaughey*, 51 Pa. St. 43; *Frailey v. Waters*, 7 Pa. St. 221; *Smith v. Wiggins*, 52 N. H. 112; *Kaler v. Beaman*, 49 Me. 207; *Gillis v. Nelson*, 16 La. Ann. 275; *Shaffer v. State Bank*, 37 La. Ann. 242; *Prescott v. White*, 21 Pick. (Mass.) 341; *Prescott v. Williams*, 5 Met. (Mass.) 429; *Cary v. Daniels*, 8 Met. (Mass.) 466; *Doane v. Badger*, 12 Mass. 65; *Thompson v. Uglow*, 4 Oreg. 369; *Blaisdell v. Stephens*, 14 Nev. 17.

Defendant had not, by acquiescence in the substitution of small wooden trunk for an open raceway, lost his right to have such open raceway maintained over complainant's lands as reserved in his several grants; and that the court could not, without his consent, compel him to accept any covered conduit whatever in lieu of the original open one. *Johnston v. Hyde*, 32 N. J. 446. See also *Hulme v. Shreve*, 3 Green's Ch. (N. J.) 116; *Merritt v. Parker, Cox* (N. J.), 460; *Tillotson v. Smith*, 32 N. H. 90; *Dewey v. Bellows*, 9 N. H. 282; *Jewett v. Whitney*, 43 Me. 242.

Although a grantee arched over a passage-way leading from the street, and narrowed it to the width of an old gateway, yet since it was substantially as convenient as before, the grantor had no ground for claiming damages. *Atkins v. Boardman*, 20 Pick. (Mass.) 291; s. c., 2 Met. (Mass.) 457; *Gerrish v. Shattuck*, 132 Mass. 235.

Where, by the report of the commissioner appointed by the court to make partition of land between heirs, the right of way is reserved across certain parts of the

partitioned premises for the purpose of enabling certain heirs to have access to woodland set to them, the party whose premises is burdened with this right of way is bound to make its use as convenient as the mode of access which the farmer usually provides for himself to get to and from his woodland.

In the absence of any specific agreement between the parties, one whose premises is burdened by such an easement is bound to afford reasonable facilities for its enjoyment by the other party. *Bakeman v. Talbot*, 31 N. Y. 366.

An easement created by reservation in a deed, and consisting in a right to take water from a well, imposes upon the owners of the servient estate the obligation to keep the well in repair or in a condition to be used. Such a reservation does not assure the right in the well as a permanency, but only so long as it existed in a suitable state for use. Such an easement is destroyed by erecting buildings of a permanent character over and upon the well. For the wilful destruction of the easement by the erection of such buildings by the owner of the servient estate, damages may be recovered.

One who purchases the dominant estate, after the extinguishment of the easement, can have no remedy against one who also purchased the servient estate, after such extinguishment. *Ballard v. Butler*, 30 Me. 94. See also *Partridge v. Gilbert*, 15 N. Y. 601; *Hieatt v. Morris*, 10 Ohio St. 523.

There is no implied obligation between owners of distinct parts of a building which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby the plaintiff's part is injured. *Pierce v. Dyer*, 109 Mass. 374. See also *Cheesebrough v. Green*, 10 Conn. 318; *Bartlett v. Peaslee*, 20 N. H. 547.

Where the grantor, in a deed, reserved a right of way across the premises conveyed without fixing its locality, and at the time of the conveyance two ways were in use, one of which was afterwards closed by the grantee with the assent of the grantor, held, that the grantor retained an easement over the other and remaining way; and if it is conceded that a grantor may designate the locality for a way, thus reserved, he has not a right to build a fence across the only path where passage was practicable. *Bangs v. Parker*, 71 Me. 458.

Where the owner of lands, across which others have a prescriptive right of way, for his own convenience closes such way, and opens another across other parts of his

there be a permanent injury to the inheritance, a reversioner may also have an action.¹ Redress may be sought, both at law and in equity. At law, the remedy is damages for the injury already done. In equity, the remedy is injunction to restrain the offender.²

lands for the use of those having the right, and they assent to the change, and use the new way for a period less than twenty years, the owner cannot close such new way, and prevent its use, without first restoring the old one to its former condition.

If the owner of the lands, without restoring the old way, remove a bridge over a stream crossing the new one, those having the prescriptive right to the old way may rebuild the bridge, or fill the stream where such bridge stood, doing as little damage as possible to the owner of the land, and continue the use of the new way until the old one is restored. *Hamilton v. White*, 5 N. Y. 9. See also *Krauts*, App. 71 Pa. St. 64.

The proprietor of an easement cannot surely be prejudiced by any one who has subsequently been at an expense for the improvement of the land to which it is attached. *McLean v. Tompkins*, 18 Abb. Pr. (N. Y.) 24.

1. Any one in possession of premises to which an easement belongs, may have an action for the disturbance of the enjoyment of the same. *Noyes v. Hemphill*, 58 N. H. 536. See also *Carleton v. Cate*, 56 N. H. 130; *Foley v. Wyeth*, 2 Allen (Mass.), 135; *Gurney v. Ford*, 2 Allen (Mass.), 576; *Hastings v. Livermore*, 7 Gray (Mass.), 194; *Ferguson v. Witsell*, 5 Rich. (S. Car.) 280; *Carlin v. Paul*, 11 Mo. 32; *Hall v. McCaughey*, 51 Pa. St. 43; *Tinsman v. Ry. Co.*, 1 Dutch. (N. J.) 255; *Brown v. Bowen*, 30 N. Y. 519; *Lansing v. Wiswall*, 5 Denio (N. Y.), 213; *Wheeler v. Gilsey*, 35 How. Pr. (N. Y.) 139; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266.

An action lies against the owner of land for erecting a building over a passage-way in such a manner as to obstruct the plaintiff's right of depositing merchandise thereon, or hoisting merchandise into the windows of his adjoining building, and the incidental right of swinging his shutters over the passage-way. *Richardson v. Pond*, 15 Gray (Mass.), 387.

Abutters upon a public street claiming title to their premises by grant from the municipal authorities, who, at the same time, covenant that a street to be laid out in front of such property shall continue forever thereafter for the free and common passage of, and as public streets and ways for, the inhabitants and all others passing and returning through or by them, in like manner as the other streets of the same city now are, or lawfully ought to be, ac-

quire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of their property situated thereon.

The ownership of such easement is an interest in real estate constituting property within the meaning of that term, as used in the constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use.

The erection of an elevated railroad, the use of which is intended to be permanent in a public street, and upon which cars are propelled by steam-engines generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages thereby occasioned to their property. *Lahr v. Met. El. R. Co.*, 104 N. Y. 268; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122.

In an action to obtain equitable relief for damages sustained by reason of the construction and operation of an elevated railroad in front of plaintiff's premises, recovery may be had for loss of rental value, although, during the whole period in question, the owner was occupant of the premises, wherever it appears that the premises were rendered disagreeable and uncomfortable; and also damages for the value of so much of the easement as was taken by defendants, but the recovery must be confined to the six years preceding the commencement of the action, together with the added damage to the time of the trial. The road may be restrained from further operation after a future day to be named, unless defendant buys the easement taken for the purposes of the road. *Kearney v. Met. El. R. Co.*, N. Y. Daily Reg. March 14, 1888. Compare *M. & E. R. Co. v. Newark*, 2 Stockt. (N. J.) 352.

One claiming a privilege in a well and pump situate in the land of another, each being bound to contribute his proportional part of the repairs, can have no action against him whose land the well is in, until after a request and refusal to repair. *Doane v. Badger*, 12 Mass. 65.

2. *Applegate v. More*, 7 Lans. (N. Y.)

VI. Extent and Mode of Use.—The use of an easement is confined strictly to the purpose for which it was created; but on the other hand, the dominant owner must be allowed to enjoy his easement in such a manner as will secure to him all the advantages contemplated by the grant.¹ A dominant estate may be divided, and the privileges belonging to the whole will attach to each of the parts; but a dominant owner may not extend any privileges which he has in favor of one estate to other lands.²

VII. Particular Kinds of Easements.—See LATERAL and SUBJACENT SUPPORT; PARTY-WALLS; RIGHT of WAY; WATERS and WATER-COURSES.

1. *Light and Air.*—The easement of light and air is the right which one person has to have light and air come to his windows unobstructed across the land of another. It is held in most of the States that this easement cannot be created by prescription, on the ground that it is inconsistent with the condition of a country which is growing and changing so rapidly as the United States.³

59; *Carleton v. Cate*, 56 N. H. 130; *Blaisdell v. Stephens*, 14 Nev. 17; *Shaffer v. State Bank*, 37 La. Ann. 242.

1. *Noyes v. Hemphill*, 58 N. H. 536; *French v. Marsten*, 24 N. H. 440; *Shivers v. Shivers*, 32 N. J. Eq. 578; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Brooks v. Curtis*, 4 Lans. (N. Y.) 283; *Boyce v. Brown*, 7 Barb. (N. Y.) 80; *Williams v. Safford*, 7 Barb. (N. Y.) 309; *Rexford v. Marquis*, 7 Lans. (N. Y.) 249; *Beals v. Stewart*, 6 Lans. (N. Y.) 408; *Farrington v. Bundy*, 5 Hun (N. Y.), 617; *Elliott v. Rhett*, 5 Rich. (S. Car.) 405; *Rutter v. Fidler*, 11 Pa. St. 181.

Where one has an easement in another's land, he must be allowed to enjoy it in such a manner as will secure to him all the advantages contemplated by the grant. But he must so use his own privileges as not to do any unnecessary injury to the plaintiff. *Dixon v. Clow*, 24 Wend. (N. Y.) 188. See also *Elliott v. Fitchburg R. Co.*, 10 Cush. (Mass.) 190; *Bissell v. Grant*, 35 Conn. 288; *Hill v. Shorey*, 42 Vt. 614.

The extent of the right of flowage which is acquired by prescription is not measured by the claim which the owner of the dominant tenement makes during the period of prescription, nor by the height of the structure of the dam he maintains on his own lands. It is limited to the lines of the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription. *Homer v. Stilwell*, 35 N. J. L. 307; *Carlisle v. Cooper*, 4 C. E. Green (N. J.), 256; s. c. on appeal, 6 C. E. Green (N. J.), 577.

If the public were entitled to an easement in certain lands, either as a common, a highway, or a landing-place, the town had no authority to bind the public in regard to the extent of such easement, by submission to arbitration. *State v. Peckham*, 9 R. I. 1.

2. The general rule undoubtedly is, that where an easement is secured to a dominant estate, and is designed to benefit the same, in whosoever hands it may be, it will enure to the benefit of the owners of the several parts into which it may be divided, provided the burden upon the servient estate is not thereby enhanced. *Outerbridge v. Phelps*, 13 Abb. N. C. (N. Y.) 117. See also *Hills v. Miller*, 3 Paige, Ch. (N. Y.) 254; *McMakin v. Magee*, 13 Phila. 105; *Kirkham v. Sharp*, 1 Whart. (Pa.) 323; *Lewis v. Carstairs*, 6 Whart. (Pa.) 193; *Evans v. Dana*, 7 R. I. 306.

3. The States which hold that the easement of ancient lights cannot be prescribed for, are *Alabama, Connecticut, Georgia, Iowa, Indiana, Maine, Maryland, Massachusetts, New York, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, and Vermont.*

These holding that this easement may be prescribed for, are *Illinois, Louisiana, and New Jersey.*

Bronson, J., says, "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and I see that it has recently been sanctioned with some qualifications by an act of parliament; but it cannot be applied in the growing cities and villages of this country,

EAST.¹

EASTERLY, when used alone, in a deed, will be construed to mean "due east;" but that is a rule of necessity, growing out of the indefiniteness of the term, and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case, instead of meaning "due east," it means precisely what the qualifying word makes it mean.²

EATING-HOUSE.³

EAVESDROPPING.—1. *Definition.*—Eavesdropping is listening under walls and windows, or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.⁴ The offence consists in lurking about dwelling-houses and other places where persons meet for private intercourse, and listening to what is said, and then tattling it abroad, not in peeping or looking into such places, which is not an indictable offence.⁵

without working the most mischievous consequences. It has never, I think, been deemed a part of our law; and, besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. There were two *nisi prius* decisions at an earlier day; but the doctrine was not sanctioned in *Westminster Hall* until 1786, when the case of *Darwin v. Upton* was decided by the K. B. This was clearly a departure from the old law." *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Radcliff v. Mayer*, 4 N. Y. 195; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Shipman v. Beers*, 2 Abb. N. Cas. (N. Y.) 435; *Ward v. Neal*, 37 Ala. 501; *Ray v. Lynes*, 10 Ala. 63; *Ingraham v. Hutchinson*, 2 Conn. 584; *Morrison v. Marquardt*, 24 Iowa, 35; *Pierre v. Fernald*, 26 Me. 436; *Cherry v. Stein*, 11 Md. 1.

In Massachusetts there seems at one time to have been a tendency to recognize the doctrine of the English law, but it is now well settled that this easement cannot be acquired by prescription. *Keats v. Hugo*, 115 Mass. 204; *Randall v. Sander-son*, 111 Mass. 114; *Carrig v. Dee*, 14 Gray (Mass.), 583; *Richardson v. Pond*, 15 Gray (Mass.), 387; *Mullen v. Stricker*, 19 Ohio St. 135; *Haverstick v. Sipe*, 33 Pa. St. 368; *Maynard v. Esher*, 11 Pa. St. 222; *Klein v. Gehrung*, 25 Tex. (Sup.) 232; *Powell v. Sims*, 5 W. Va. 1; *Napier v. Bulwinkle*, 5 Rich. (S. Car.) 311; *Hubbard v. Town*, 33 Vt. 295; *Keiper v. Klein*, 51 Ind. 316; *Stein v. Hauck*, 56 Ind. 65; *Turner v. Thompson*, 58 Ga. 268.

The following uphold the English rule: *Gerber v. Grabel*, 16 Ill. 217; *Taylor v. Boulware*, 35 La. Ann. 469.

1. "Countries east of the Cape of Good Hope" in a revenue statute means coun-

tries with which, at the time of the statute, the United States ordinarily carries on commercial intercourse by passing around that cape. *Powers v. Comly*, 101 U. S. 790.

2. *Pratt v. Woodward*, 32 Cal. 227-8.

3. The lessee of a stall in a market-house who furnishes meals to the public does not keep an "eating-house" within the meaning of a revenue act regulating licenses. *State v. Hall*, 73 N. C. 252.

4. *Com. v. Lovett*, 4 Clark (Pa.), 5; s. c., 8 Haz. Reg. (Pa.) 305; *Com. v. Mengelt*, 4 Clark (Pa.), 6; *State v. Williams*, 2 Tenn. (2 Overten) 108; *State v. Pennington*, 3 Head (Tenn.), 299; s. c., 75 Am. Dec. 771; 4 Bl. Com. 168; 1 Hawk. P. C. (Curw. ed.) 695; 1 Gab. Cr. L. 319; 1 Russell on Crimes (5th ed.), 438; 1 Bishop, Cr. L. (7th ed.) sec. 112; Whart. Cr. L. sec. 1445; 1 Bouv. L. Dict. (15th ed.) 578.

Definition of Text-writers.—Bishop defines eavesdropping to consist in "the common nuisance of hanging about the dwelling-houses of another, hearing tattle, and repeating it to the disturbance of the neighborhood." 1 Bish. Cr. L. (7th ed.) sec. 1122.

Desty says (Am. Crim. L. sec. 105 e.) that eavesdropping "consists in approaching near to the room of a grand jury while in session for the purpose of hearing what is said and done. Habitually lurking about a dwelling-house, and places where persons meet for private intercourse, secretly listening and reporting what is said." The first, however, is an illustration rather than a definition.

5. *Com. v. Lovett*, 4 Clark (Pa.), 5.

Listening about Grand-jury Room.—It has been held in Tennessee that one is guilty of eavesdropping who secretly and stealthily approaches the room of a grand jury while they are engaged in the perform-

ECCLESIASTICAL—ECLECTIC—ECUMENICAL.

Eavesdropping is a nuisance indictable at common law;¹ but where the act was authorized by the master of the house, such authorization is a defence.²

2. *Procedure.*—Respecting prosecutions for eavesdropping, Bishop says that “It may be desirable, and perhaps it is legally necessary,³ to prove at least three instances of offending, from which, and from the more general evidence, the jury will infer the habit of eavesdropping, wherein probably is the gist of the offence.”⁴

ECCLESIASTICAL.⁵

ECLECTIC.⁶

ECUMENICAL.—Universal. Ecumenical council means a universal council, a council of all, not of a part, and is only applied to the councils of the Catholic Church.⁷

ance of their duties, for the purpose of overhearing what is said and done. *State v. Pennington*, 3 Head (Tenn.), 299; s. c., 75 Am. Dec. 771. The court say, “It is difficult to conceive of a more mischievous species of this offence than that now presented. The members of the grand jury are required, by their oath, to keep their counsels secret, and are not permitted to disclose their own acts. This is a rule adopted upon the soundest policy. It produces free and unrestrained disclosures and consultations in relation to their duties, and saves them from persecution or injury from the violent and unprincipled, upon whom it may be their duty to act or vote. But, in addition to these considerations, it is necessary for the ends of justice to keep their proceedings secret, so that information may not reach offenders of forthcoming charges against them, and thereby enable them to escape. All these evils, and more, would result from eavesdropping. If it be an indictable offence to clandestinely overhear the discourse of a private family, by which only a private injury would be done, much more must it be to obtain, by the same unlawful means, the secrets of the jury-room. The same salutary principle must cover both cases, and for a much stronger reason the latter. If the same be a nuisance, much more in the other. The proceedings of the juries, both grand and petit, are so important to the life and liberty and property of the citizen, that they cannot be too carefully guarded. Invasions of the sanctity of the jury-room cannot be too severely punished. No intrusions upon their deliberations can be tolerated.”

1. *Com. v. Lovett*, 4 Clark (Pa.), 5; *State v. Williams*, 2 Overt. (Tenn.) 108; *State v. Pennington*, 3 Head (Tenn.), 299; *State v. Williams*, 2 Overt. (Tenn.) 208; *Dane*, Abr. Index; 4 Bl. Com. 168; *Russell on Crimes* (5th ed.), 438.

2. *Com. v. Lovett*, 4 Clark (Pa.), 5.

In New York it is provided that any person who secretly loiters about a building with intent to overhear discourse therein, and repeat and publish the same to vex, annoy, or injure others, is guilty of a misdemeanor. N. Y. Penal Code, § 436.

3. 1 Bish. Cr. L. sec. 1122; 2 id. sec. 65.

4. 2 Bish. Cr. Proc. (3d ed.) sec. 313.

Bishop cites the case of the *State v. Pennington*, 3 Head (Tenn.), 299; s. c., 75 Am. Dec. 771, to support the text; but there is nothing in the case as reported justifying this assertion.

5. The publication of banns and the solemnization of marriages are among the “ecclesiastical purposes” for which a parish is constituted. *Fuller v. Alford*, 52 L. J. R. Q. B. 265.

6. “Without professing to understand much of medical phraseology, we suppose that the terms allopathic practice and legitimate business, in the connection in which they were used, mean the ordinary method commonly adopted by the great body of learned and eminent physicians, which is taught in their institutions, established by their highest authorities, and accepted by the larger and more respectable portion of the community. By eclectic practice, without imputing to it, as the counsel for the plaintiff seem inclined to, an odor of illegality, we presume is intended another and different system, unusual and eccentric, not countenanced by the class before referred to, but characterized by them as spurious, and denounced as dangerous. It is sufficient to say that the two modes of treating human maladies are essentially distinct, and based upon different views of the nature and causes of diseases, their appropriate remedies, and the modes of applying them.” *Bradbury v. Bardin*, 34 Conn. 453.

7. *Groesbeck v. Dunscomb*, 41 How.

EDITION.—A literary work; a publication; a work prepared and edited for publication; the publication of any literary work.¹

EDITOR.—One who edits; one who superintends or revises any book for publication; one who conducts or manages a periodical, newspaper, or magazine for publication.²

Pr. (N. Y.) 344. "Whereas the synod of Dort, which the plaintiff improperly calls the 'ecumenical council of Dort,' was simply a meeting of a few of the presbyteries of the Presbyterian and Reformed Dutch Churches. The word synod signifies simply a meeting of the few adjoining presbyteries."

1. Chancellor Kent, having made arrangements to bring out the sixth *edition* of his "Commentaries on American Law," the five previous editions of which were entirely exhausted, died before the publication thereof, leaving a will, by which, in the sixth clause, he made a specific bequest of the "Commentaries," "with the right of renewal of all previous and future *editions*, according to law, and all other rights and privileges appertaining to the copyright." By the residuary clause of the same will, he bequeathed all the residue of his estate, beyond what was before specially bequeathed, specifying as part of such residue, "unsold Commentaries on hand," in a manner different from the dispositions of the sixth clause. At the time that this will was executed, the fifth *edition* of the "Commentaries" was not entirely exhausted, but it became so before the testator's death.

On the question whether the sixth *edition*, which was unfinished at the time of the testator's death, was included in the terms "future editions" in the specific bequest, or in the terms "unsold Commentaries on hand," in the residuary clause, the court *held* that it passed under the specific bequest in the sixth clause of the will; *Fewell, J.*, saying, "The only question for our decision is, whether the sixth *edition* of the 'Commentaries,' produced under the circumstances stated, passed to the residuary legatees under the eighth clause of the testator's will, or whether it must be deemed an *edition future* to the death of the testator, published by his legatee of the copyright in pursuance of the right of publishing future editions of that celebrated work, as bequeathed to him under the sixth clause of said will. In my opinion, there is no just reason to conclude that this *edition*, in the condition in which it was found at the time of the death of the testator, is included within the words or meaning of the eighth clause of the will. By that clause nothing is proposed to be disposed of, except such property of the testator as remained beyond what was

therein before specially bequeathed, not even 'unsold Commentaries on hand.' It was not designed by that clause to disturb or displace any bequest or provision previously made by the will. The property in this *edition* clearly did not pass to the residuary legatees as 'unsold Commentaries on hand,' for it had no existence as such at the death of the testator; nor did it form any part of the residue of the testator's estate at his death. The contracts made by the testator in his lifetime for publishing the *edition* of his 'Commentaries' in question, although in part executed, did not constitute it an *edition*; nothing short of a publication could have that effect. An *edition* of a book is the publication of it. That did not take place until several weeks after the decease of the testator; and then, under and by virtue of the copyright bequeathed to him by the sixth clause of the will, William Kent published this *edition*, for which he took out a copyright in his own name as the proprietor of the work. I think that he was fully authorized so to do, under the bequest to him, and that it became a 'future *edition*' within the meaning of the sixth clause of the will, and the avails subject to be disposed of as therein provided." *Hone v. Kent*, 2 Selden (N. Y.), 390.

2. The Oregon code provides, where an action is brought against a non-resident or absent defendant who has property within the State, for a service of summons by publication, and directs that the order of court shall designate the newspaper in which publication is to be made, and that the proof of such publication shall be "the affidavit of the printer, or his foreman, or his principal clerk." Where such service had been made, and papers setting forth the fact thereof were offered in evidence, it was objected that it appeared from said papers that no proof of service by publication was ever made, the affidavit thereof being made by the "editor" of "The Pacific Christian Advocate," not by "the printer, or his foreman, or principal clerk." But the court *held* that the provisions of the statute were complied with by the affidavit; *Field, J.*, saying, "The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made, by the 'affidavit of the printer, or his foreman, or his principal clerk,' is satisfied when the affidavit is made by the *editor*

EDUCATE, Etc. — To bring up ; train ; to instruct.¹

of the paper. The term 'printer,' in their judgment, is there used not to indicate the person who sets up the type,—he does not usually have a foreman or clerks,—it is rather used as synonymous with publisher." The Supreme Court of New York so held in one case, observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." See *Bunce v. Reed*, 16 Barb. (N. Y.) 350. And following this ruling, the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient. See *Sharp v. Daugney*, 33 Cal. 512. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper, and put it into circulation. Webster, in an early edition of his dictionary, gives as one of the definitions of an "editor," a person "who superintends the publication of a newspaper." It is principally since that time that the business of an "editor" has been separated from that of a publisher and printer, and has become an independent profession. *Pennoyer v. Neff*, 5 Otto (U. S.), 714.

1. In action of libel brought against the next friend of certain minors, because, in a petition for the removal of the guardian of the minors, he alleged that the guardian "had in his family a girl, who is now probably over sixteen years of age, who came to live with him at about the age of thirteen years, and has remained in his family ever since ; her reputation is ruined, and she is now an example of shame and prostitution,"—the defence set up was, that the statement was privileged, inasmuch as it was made in proceedings for the removal of a guardian ; and it was, therefore, a matter included in, and part of, a judicial proceeding. The court held the statement privileged, for the county court, under the Code, sec.-2521, sub-sec. 4, had the power to remove a guardian "when he neglects to educate or maintain his ward, according to his degree and circumstances," and therefore, when the guardian's habits, principles, or domestic associations, are such as tend to the corruption and contamination of his ward, he may be removed ; *Nelson, J.*, saying, "In its broadest sense, 'education' comprehends, not merely the instruction received at school, but the whole course of training,—moral, intellectual, and physical ; and with a view to the highest and best interests of minors, we hold that it is so used in the statute. . . . It follows, therefore, that the plaintiff in

error had a perfect right to present the petition in the names of the infants by him, as their next friend, to be qualified to the truth of its contents ; and that, when the petition was so presented and filed, it became a regular judicial proceeding. . . . Having the undoubted right to present the petition, the question recurs, was the reason assigned by the plaintiff in error to the county court for the removal of the guardian, such a reason as he might lawfully assign, and his petition a privileged communication within the meaning of the law ? If a guardian may be removed because 'his domestic associations are such as tend to the corruption or contamination of the ward,' upon what principle is it that the person seeking the removal may not even name his associates, and cause their character to be inquired into ? How is the county court to guard the infant against the corruption or contamination, unless its nature is stated, and the malign influences, real or imaginary, carefully scrutinized and investigated ?" *Ruchs v. Backer*, 6 Heisk. (Tenn.) 395.

Where a testator charged the bequest of his estate to his two legitimate daughters, with the "support and education" of a minor illegitimate child, without naming any amount therefor, it was held, that, in determining what should be the style and manner of education and support, the conclusion must be arrived at on a fair and just interpretation of the provisions of the will, considering all the circumstances which surrounded the testator, and the motives which probably actuated him. *Williams v. MacDougall*, 39 Cal. 80.

A bequest was "to my wife, . . . subject to the following conditions ; viz., that my said wife shall relinquish all her right to dower in my estate, and provided that she educate and bring up my granddaughter M. L. R." The wife died in seven days after the testator, without expressly waiving the provision made for her in the will, or claiming her dower. It was held in an action by the wife's administrator, against the testator's executor, to recover the property so bequeathed to the wife, that her acceptance of such provision might be presumed, it being more beneficial than her right to dower ; and that the condition to "educate" the granddaughter was a condition subsequent, and so the legacy vested in the wife ; and the non-performance of this condition, being occasioned by an act of Providence, did not divest the legacy ; the court, *Shaw, C. J.*, saying, "The other condition was, that the legatee should educate and bring up the testator's granddaughter. This is clearly a condition sub-

sequent. It was to be performed for a time which might, and probably would, continue long after the legacy was to vest. The defendant objects that it was not complied with. To this there are two answers, depending upon the force of the terms, *educate and bring up*. If they imply personal, parental care, then the duty terminates with her own life, and the condition was performed. She did *educate* and *bring up* the granddaughter, so long as she lived; though it was, indeed, for a very short period. Besides, in the case of a condition subsequent, the act of God excuses non-performance. But if "to educate and bring up" means to furnish subsistence to the granddaughter, then the condition was a mere charge on the legacy; and it might be performed by the personal representative, and would not prevent the legacy from vesting. We think that a personal case was intended, and, consequently, that, by the death of the legatee, the legacy became discharged of the condition." *Merrill v. Emery*, 10 Pick. (Mass.) 507.

If land be devised by A. to his wife for life, on condition that she shall "educate" B. their eldest son, remainder after her decease to the second son in tail; B., when of age, may enter for breach of the condition, and hold for her life: for it seems the entry is lawful, although no re-entry or entry are expressly reserved to him, because it is tacitly implied in law when the condition is to be performed by the devisee; and this sort of condition carries with it a penalty, the defeasance of the estate to which the condition is annexed. And in common reason, he who was prejudiced by the devise, the heir who was disinherited by it, shall take advantage of the breach of condition. *Warren v. Lee*, 2 Dyer, 126, b.

But where A., by his will, directed that his three grandsons should be educated until twenty-one years of age, out of the profits of his real estate, under the direction of his executors, and charged his real estate with the expense of their education, and a bill was filed by the grandsons (this direction not having been complied with), sixteen years afterwards, against the devisees in the will, to recover, as compensation for the injury they had sustained, as much money as ought, under the provisions of the will, to have been applied to their education, it was dismissed. *Johns v. Stoops*, 5 H. & J. (Md.) 430.

A testator made certain devises, "provided that the devises hereinbefore contained, to the children of my said son, are made upon this express condition that they be educated in England, and in the Protestant religion, according to the rites of the Church of England; and in case any one or more of such children shall be educated abroad, or not in the Protestant

religion, according to the rites of the Church of England, then I do hereby revoke," etc., and there was a gift over. The children went with their father to France, when very young, and remained with him there from 1802 to 1810, during which time he was detained as a prisoner of war by Napoleon; but they might have returned to England, had their father so pleased. They were, while in France, educated at Roman-Catholic schools, but were not proved to have been taught Roman-Catholic doctrines, but were able to receive religious instruction from a Protestant minister who attended each of their schools. On their return to England, at the peace of 1814, they were sent to English Protestant schools. It was held that the children took vested estates subject to be divested upon certain contingencies; that the proviso constituted a condition subsequent, to defeat vested estates, and was therefore to be construed strictly; and that, under these circumstances, the children had not incurred the forfeiture within the words of the proviso. *Clavering v. Ellison*, 7 H. of L. Cas. 707.

An association was formed, as proprietors of a building to be erected and "used exclusively for an academy, and similar purposes." Subsequently a building was erected by the trustees appointed by the association, on land conveyed to them to hold in trust for the proprietors, "while they maintain a building thereon for the purposes of education." At first the building was used as an academy; but, not being sustained, it was leased by the trustees to a district school. The heirs of the grantor, in the mean while, conveyed the premises to A., who sowed turnips thereon, which the trustees pulled up. In action of tort for breaking and entering A.'s close, it was held that the grantee's estate was not terminated by the leasing of the building to the district school; the court, *Chapman, C. J.*, saying, "The evident intention of the proprietors, at the time, was, that the building should be occupied for such a school as is usually called an academy. Yet they did not restrict themselves to the maintenance of such a school, in these articles of agreement cited above. And when Sanford came to make his deed, he restricted them only to the maintenance of the building for the purposes of education. This would embrace such a school as is called a district school. And it did not require the trustees to retain the control or superintendence of the school, or restrict them from renting it to others, who should maintain a school, as lessees." *Peck v. Claflin*, 105 Mass. 420.

Missionary, Educational, and Benevolent Enterprises. — See title, "Benevolent." *De Camp v. Dobbins*, 29 N. J. Eq. 36.

EDUCATION.—See LIBRARIES; PARENT AND CHILD; SCHOOLS AND SCHOOL LAWS; UNIVERSITIES AND COLLEGES; WILLS.

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I. Education defined.—Education is the bringing up, physically or mentally, of a child, or the preparation of a person, by some due course of training, for a professional or business life, or other calling.¹

II. Education Acts in England.—In England, there was substantially no system providing for public elementary education, until the Elementary Education Act of 1870, which made provision for such a system in England and Wales. Prior to that time, however, there were other acts which related to higher education, and also to education in other branches.²

III. Scotland.—There was substantially no system of public elementary education in Scotland outside of the old parochial system and grants of Parliament, until the Education Act of 1872.³

IV. Ireland.—In Ireland, grants in behalf of public elementary education are made to the lord-lieutenant, the manner of expenditure being subject to and within the control of commissioners of education appointed by the crown.⁴

1. Webster's Unabridged Dictionary. Education is defined as "bringing up" by the Attorney-General in *Clavering v. Ellison*, 7 House of Lords Cases, 713.

The definition given in the text is in strict accord with all the decisions where the construction of wills, deeds, or statutes have depended upon the meaning of the term. See cases in this article.

2. The following are the Endowed Schools Acts in England: 1840, 3 & 4 Vict. c. 77; 1844, 7 & 8 Vict. c. 37; 1854-5, 18 & 19 Vict. c. 34 & 131; 1854-5, 19 & 20 Vict. c. 116; 1860, 23 & 24 Vict. c. 11; 1867-8, 31 & 32 Vict. c. 32; 1868-9, 32 & 33 Vict. c. 56; 1870, 33 & 34 Vict. c. 75; 1873, 36 & 37 Vict. c. 86 & 87; 1874, 37 & 38 Vict. c. 87; 1875, 38 & 39 Vict. c. 29; 1879, 42 & 43 Vict. c. 66.

Elementary Education Acts in England are: 1868-9, 32 & 33 Vict. c. 56; 1870, 33 & 34 Vict. c. 75; 1872, 34 & 35 Vict. c. 94; 1872, 35 & 36 Vict. c. 21, 27, 59, 71; 1873, 36 & 37 Vict. c. 49, 86, 87; 1874, 37 & 38 Vict. c. 9, 39, 90; 1876, 39 & 40 Vict. c. 79; 1879, 42 & 43 Vict. c. 6; 1879, 42 & 43 Vict. c. 48; 1880, 43 & 44 Vict. c. 23, 25; 1884, 47 & 48 Vict. c. 43; 1884, 47 & 48 Vict. c. 70; 1884-5, 48 & 49 Vict. c. 38.

The Public Schools Acts in England, with their amendments, are: 31 & 32 Vict. c. 118; 33 & 34 Vict. c. 84; 34 & 35 Vict. c. 60; 35 & 36 Vict. c. 54; 36 & 37 Vict. c. 41; 36 & 37 Vict. c. 62.

When an endowment for charitable uses is an educational endowment under the Endowed Schools Act of 1869, see *Ross v. Charity Comm'rs of St. Dunstan's Charities*, *In re* 7 L. R. App. Cas. 463.

An act for the education of idiots and imbeciles is, 1886, 49 & 50 Vict. (In Law Rep. Stat. 1886, p. 38 *et seq.*). Restrictions on education in the Roman-Catholic religion were removed by 10 Geo. IV. c. 7.

See SCHOOLS AND SCHOLARS, UNIVERSITIES AND COLLEGES.

3. Education (Scotland) Acts, 1849, 10 & 11 Vict. c. 91; 1872, 35 & 36 Vict. c. 62; 1873, 36 & 37 Vict. c. 53; 1876, 39 & 40 Vict. c. 79; 1877, 40 & 41 Vict. c. 38; 1878, 41 & 42 Vict. c. 48 & 78; 1882, 45 & 46 Vict. c. 18 & 59; 1883, 46 & 47 Vict. c. 56.

Educational Endowments, Scotland, 45 & 46 Vict. c. 59.

4. Intermediate Education, Ireland, 41 & 42 Vict. c. 66.

Education, Ireland, 53 Geo. III. c. 107; 3 Geo. IV. c. 79; 17 & 18 Vict. c. 91.

V. In the United States.—The right to an education is guaranteed the people, either directly by the Constitution, or by some provision therein, making it the duty of the legislature to encourage or protect the same, or guaranteeing or insuring a fund therefor, in *Alabama*,¹ *Arkansas*,² *California*,³ *Colorado*,⁴ *Connecticut*,⁵ *Florida*,⁶ *Georgia*,⁷ *Illinois*,⁸ *Indiana*,⁹ *Iowa*,¹⁰ *Kansas*,¹¹ *Kentucky*,¹² *Louisiana*,¹³ *Maine*,¹⁴ *Maryland*,¹⁵ *Massachusetts*,¹⁶ *Michigan*,¹⁷ *Minnesota*,¹⁸ *Mississippi*,¹⁹ *Missouri*,²⁰ *Nebraska*,²¹ *Nevada*,²² *New Hampshire*,²³ *New Jersey*,²⁴ *New York*,²⁵ *North Carolina*,²⁶ *Ohio*,²⁷ *Oregon*,²⁸ *Pennsylvania*,²⁹ *Rhode Island*,³⁰ *South Carolina*,³¹ *Tennessee*,³² *Texas*,³³ *Vermont*,³⁴ *Virginia*,³⁵ *West Virginia*,³⁶ *Wisconsin*.³⁷

Educational Endowments, Ireland, 47 & 48 Vict. c. 22; 48 & 49 Vict. c. 78.

Endowed Schools, Ireland, 1812–13, 53 Geo. III. c. 107; 1822, 3 Geo. IV. c. 79; 1840, 3 & 4 Vict. c. 108.

See, generally, for an historical statement of the condition from a legal stand-point of education in England, Scotland, and Ireland, the "Encyclopædia Britannica," vol. 4, p. 680 *et seq.*, title "Education."

1. Constitution of 1865 (in Rev. Code, 1867), art. 4, sec. 33. See also Constitution of 1875 (in Code, 1876), art. 13.

2. Constitution of 1868 (in Gault's Digest, 1874), art. 1, sec. 23; art. 9, secs. 1, 4, 7, 8, 9; Constitution 1874 (in Mansfield's Digest), art. 14.

3. Constitution 1879 (in Deering's Codes and Statutes, 1885, vol. I.), art. 9, secs. 1, 4, 5, 6, 9.

4. Constitution 1876 (in Gen. Stat. 1883), art. 9, secs. 2, 3, 5, 11.

5. Constitution 1818 (in Gen. Stat. Rev. 1887), art. 8, sec. 2.

6. Constitution 1868 (in McClellan's Digest, 1881), art. 8, secs. 1, 2, 4.

7. Constitution 1877 (in Code, 1882), art. 8, secs. 1, 3, 5.

8. Constitution 1870 (in Starr & Curtis's Annotated Stat. 1885), art. 8, secs. 1, 2.

9. Constitution 1851 (in Rev. Stat. 1881), art. 8, secs. 1, 2.

10. Constitution 1857 (in McClain's Annotated Stat. 1880), art. 9, division 1, sec. 12; division 2, secs. 1, 2, 3, 4.

11. Constitution 1859 (Dassler's Compiled Laws, 1885), art. 6, secs. 2, 3.

12. Constitution 1850 (in Gen. Stat. 1873), art. 11, sec. 1.

13. Constitution 1879 (in Acts, 1880), secs. 224, 229.

14. Constitution 1820 (in Rev. Stat. 1883), art. 8.

15. Declaration of Rights, 1851, art. 41. See Constitution 1867 (in Code, 1878), art. 8.

16. Constitution 1780 (in Pub. Stat. 1882), part 2, chap. 5, sec. 2.

17. Constitution 1850 (in Howell's Stat. 1882), art. 13, secs. 2, 3, 4, 10, and 11.

18. Constitution 1857 (in Gen. Stat. 1878), art. 8, secs. 2 and 3.

19. Constitution 1869 (in Code, 1880), art. 8, secs. 1, 5, 6, 7, 8, and am't 2.

20. Constitution 1865 (in Wagner's Stats. 1872), art. 9, secs. 1, 2, 4, 5, 8, and 9. See also Constitution 1875 (in Rev. Stat. 1879), art. 11.

21. Constitution 1875 (in Compiled Stat. 1881), art. 8, secs. 3, 4, 5, 6, 9.

22. Constitution 1864 (in Stats. 1875), art. 11, secs. 1 to 6.

23. Constitution 1792 (in Gen. Laws, 1878), part 2, art. 83.

24. Constitution 1844 (in Rev. Stat. 1877), art. 4, sec. 7, par. 6.

25. Constitution 1846 (in vol. 1, Banks Bros.' Rev. Stat.), art. 9, sec. 1.

26. Constitution 1868, amended, 1876 (in Code, 1883), art. 1, sec. 27; art. 9, secs. 1, 2, 4, 5, 15.

27. Constitution 1851 (in vol. 2, Rev. Stat. 1886), art. 1, sec. 7; art. 6, secs. 1, 2.

28. Constitution 1857 (in Gen. Stat. 1872), art. 8, secs. 2 and 3.

29. Constitution 1874 (in Brightley's Purdon's Digest, 1885), art. 10, sec. 1.

30. Constitution 1842 (in Pub. Stat. 1882), art. 12, secs. 1, 2, and 4.

31. Constitution 1868 (in Rev. Stat. 1873), art. 10, secs. 3, 11. See also Gen. Stat. 1882.

32. Constitution 1870 (in Milliken & Verree's Code, 1884), art. 11, sec. 12.

33. Constitution 1876 (in Rev. Stat. 1879), art. 7, secs. 1, 2, 3, 10.

34. Constitution 1793 (in Rev. Laws, 1880), chap. 2, art. 41.

35. Constitution 1870 (in Code, 1873), art. 8, secs. 3, 7, and 8.

36. Constitution 1872 (in Kelley's Rev. Stat. 1879), art. 12, secs. 1, 4, 5, and 12.

37. Constitution 1848 (in Rev. Stat. 1878), art. 10, secs. 2, 3, and 6.

"No student of the history of this country, from the earliest settlement to the

VI. Educational Corporations, subject to the control of the State, are among the exceptions under the general provisions in the constitutions of certain States which forbid the creation of corporations by special act.¹

VII. Suffrage.—Educational qualifications to the right of suffrage exist by the constitutions in Colorado,² Connecticut,³ Florida,⁴ Massachusetts;⁵ but such qualifications are expressly forbidden in Alabama⁶ and in Mississippi.⁷

VIII. Bureau and Commissioner of Education in the United States.—The United States Statutes make provision for the establishment of a bureau or office of education for the purpose of collecting statistics and facts showing the progress, state, and condition of education in the several States and Territories, to diffuse information relating thereto, and to otherwise aid and promote the cause of education in the United States; and the management of the same is committed to an officer called the "commissioner of education," who holds his office by virtue of an appointment by the President and confirmation by the Senate. The Bureau of Education is in the Department of the Interior.⁸

IX. Education of Children by Parents.—The education of a child suitable to its station in life is incumbent upon parents.⁹ It has been decided in England,¹⁰ that the education and bringing-up of children until they become twenty-one is subject to the control

present day, can fail to see, that, to furnish facilities for the education of the people, it has not only been the constant practice of both the State and corporate organizations to engage in projects for the advancement of education, but that this has been a favorite and preferred object; and it seems to us that more permanent good has come to the country from this application of both State and municipal funds than from any other use of such funds, nor is this merely an American idea. Some of the very earliest and most flourishing foundations for the advancement of education in England were made by the corporation of London. Even amid the troubles of the protectorate during the minority of Edward VI., the mayor and aldermen repaired and refitted the House of Gray Friars for the education of poor children under the name of Christ's Hospital."—The court in *Danielly et al. v. Cabaniss et al.*, 52 Ga. 211.

1. Colorado Constitution of 1876 (in Gen. Stat. 1883), art. 15, sec. 2. Illinois Constitution, 1870 (in Starr & Curtis's Annotated Stat. 1885), art. 11, sec. 1. Nebraska Constitution, 1875 (in Compiled Stat. 1881), art. 11, Miscellaneous Corporations, sec. 1.

2. Constitution 1876 (Gen. Stat. 1883), art. 7, sec. 3, where it is provided that the legislature may enact such provision after 1889.

3. Constitution, art. XI. p. lvii. (Gen. Stat. Rev. 1887), title vii. chap. xxviii. See also sec. 200, Gen. Stat. Rev. 1887.

4. Constitution 1868 (McClellan's Digest 1881), art. 14, sec. 7, where it is provided that the legislature shall enact such provision after 1880.

5. Constitution 1780 (Pub. Stat. 1882), am't. 20.

6. Constitution 1875 (Code 1876), art. 1, sec. 38.

7. Constitution 1869 (Code 1880), art. 1, sec. 18.

8. Rev. Stat. of the U. S. (2d ed.) 1878, secs. 516-519; Commissioner of Education, Rev. Stat. U. S. (2d ed.) 1878, secs. 517, 518. See also the several State provisions, the title "Schools and Scholars." See also Circular of Information of the Bureau of Education, "No. 4, 1883," being recent school-law decisions in cases tried and determined in the several States, and relating more particularly to "Schools and Scholars," a neat compilation covering about eight hundred citations. Education of the blind; a permanent fund is provided through the printing-house for, chap. 186, United States Stat. 1879, p. 465-467.

9. 1 Black, Comm. 450. See Georgia Code, 1882, sec. 1792.

10. *In re Agar-Ellis*; *Agar-Ellis v. Lascelles*, 24 L. R. Chanc. Div. 317.

and direction of the father; and, although they may be wards of court, he may exercise his authority without interference of court. This right, however, is declared subject to certain exceptions, — as in case of gross moral turpitude; or where he expressly, or by his conduct, abdicates his rights, or endeavors to remove such wards beyond the court's jurisdiction.

X. Orders of Court as to Education. — The court, upon request of two guardians of two infants, — the mother, who was also the testamentary guardian, and in whose immediate charge the wards were, being a resident elsewhere, — made an order relating to the education of the infants in a certain faith, they having real estate in England.¹ So it has been held that an allowance will be made by a court of equity out of a legacy left to children, to provide for their education, in case the father is unable to properly educate them; and this, although the will provide that the property be allowed to accumulate until the children successively reach a certain age.²

XI. "Education" in a Statute. — In construing a statute providing for the removal of a guardian, if "he neglects to educate and maintain his ward according to his degree and circumstances," it was held that the word "education" comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical, and with a view to the highest and best interests of minors; and that the word was so used in the statute.³

XII. "Education" in a Deed. — Where land was conveyed to certain trustees in trust for certain proprietors, so long as "they maintain a building for the purposes of education," and to hold in trust for the benefit of said proprietors "while they occupy the same for the purpose of education, and no longer," and, under said deed, the building was used for an academy, and thereafter was leased by the trustees for a district school, the lease being conditioned that the premises *should be used for the purposes of education*, it was held that the estate created by said deed and conveyance was not determined by said lease for a district school.⁴

1. *In re Montagu*; *In re Wroughton*; *Montagu v. Festing*, 28 L. R. Chan. Div. 82. See also 2 Story's Eq. Jur. (11th ed.) p. 654, sec. 1339.

"In general, parents are intrusted with the education of their children. This is done upon the natural presumption that the children will be well brought up, with a due education in literature and morals and religion. But whenever this presumption is removed, whenever (for example) it is found that a father . . . is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles;

or that his domestic relations are such as tend to the corruption and contamination of his children; or that he acts in a manner injurious to the morals of his children, — the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them and superintend their education." *Cowls v. Cowls*, 3 Gilm. (Ill.) 435, 437.

2. *Newport v. Cooke*, 2 Ashm. (Penn.) 332.

3. *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395, 400.

4. *Peck v. Claffin*, 105 Mass. 421.

XIII. "Education" in a Will. — One W. died possessed of a large estate, leaving a will wherein he made provision that his whole estate should go to two legitimate daughters, after the payment of certain legacies, and subject to the "*education* and support" of the two legitimate, and also of six illegitimate, daughters, until the illegitimate ones should become married or should attain the age of twenty-one. No sum was specified as the amount to be expended therefor, nor was any direction given as to the manner of education. A small portion of the estate was devised to M., one of the illegitimate daughters. Upon legal proceedings brought for a distribution and settlement of the estate, an order for an allowance of a sum of two hundred dollars per year was made by the district court for the "maintenance and suitable education of the infant defendant" M. Thereafter this allowance was increased, by agreement between the interested parties, to three hundred and fifty dollars per annum. Prior to said agreement, however, the district court had, upon application of the natural guardian of M., increased the allowance to five hundred dollars; said agreement fixing the amount at three hundred and fifty dollars being the result of a compromise, under which this sum was paid for a period of about four and a half years next following. A suit was then brought to recover the difference between the three hundred and fifty dollars and the five hundred dollars for the whole time during which the first-named sum was paid, and also to increase the allowance to five hundred dollars per year. A decree was obtained granting the relief asked, and the matter came up to this court on appeal from the decree. It was *held*, that, in determining what sum should be charged upon the estate for the education and maintenance of M., reference should be had to the whole will and the intent of the testator as therein expressed. The relative situation of the legitimate and illegitimate daughters, the fact that ample provision had been made for the former, and a small pittance given to M., and that the fact that she was not placed by the testator in his will on an equal footing with his two legitimate children, would furnish an indication that he did not intend that M. should be supported in luxury or "very highly and expensively educated," but that she was only to be "reasonably well educated, so as to fit her to occupy creditably her proper and natural position in life;" and the court declared, that if the testator "had intended her to be very highly accomplished, and to enjoy all the advantages of the highest and most expensive academies, it is most strange that he made no such provision in his will, and particularly that he did not set apart a specific fund for this purpose. We think the conclusion is irresistible that the testator intended M. to be comfortably maintained, and reasonably well but not expensively educated." It was also determined that the sum of five hundred dollars per year should be allowed for such purposes of education and maintenance, but that that portion of the decree re-

quiring the payment of the difference between the three hundred and fifty and the five hundred dollars for the four and a half years should be omitted.¹

Again, where a devise was made to the children of the testator's son, contingent upon the express condition "that they be educated in England, and in the Protestant religion, according to the rites of the Church of England; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of England," then the gift was to be revoked, and a certain other disposition made of the property. The son went to France in 1802, taking four of his children with him. He was there when the order of Napoleon was issued, making all Englishmen between certain ages prisoners of war, and was detained under said order until 1814, when he returned to England. It did not appear, however, but that he might have sent the children back to England during said time. One of the children returned there in 1808, at about the age of fifteen, having received a part of his education abroad. He remained in England until he became twenty-one, and while there was sent to Harrow, and then to a military academy at Woolwich, the time spent in both schools being about two years. He died in 1824. Two of the daughters remained in France till 1810, when they returned to England, remained there about eight years, again went abroad, and were married. They attended school in England for a short period. After marriage, one of them professed the Roman-Catholic faith, the other the Protestant religion. It appeared, though, that thirteen years of the minority of each of them was spent in England, and the court found that the education of both was going on in England during that period. It was *held* with regard to this part of the condition, that none of the children were educated abroad. As to the condition relative to their being educated in the Protestant faith of the Church of England, it appeared that, while in France, they attended Roman-Catholic schools, but that a Protestant minister visited the schools, and imparted religious instructions, and that attendance on the services of the Romish Church was not compulsory on them. It was held that the terms of the will were not forfeited within the meaning of the proviso.²

1. Williams v. McDougall, 39 Cal. 80.

2. Clavering v. Ellison, 7 H. of L. Cas. 707.

The Lord Chancellor (Lord Campbell), p. 721, said, "First, as to the condition of not being educated abroad, I am of the opinion that the forfeiture can only be incurred if the children can truly be said to have had the substantial part of their education abroad; and, still more, that this has happened without the father, who was to superintend the education of the children, being forced, against his inclination,

by the *vis major*, to keep the children abroad for education. Now, I think it very doubtful if any of these children can truly be said to have been educated abroad, within the meaning of the condition." And again, "We have now only to consider whether there has been a forfeiture by a breach of the second condition,—that the children should be educated in the Protestant religion, according to the rites of the Church of England,—as to which I have never entertained the smallest doubt. It has been argued as if the condition re-

In another case, where an estate was bequeathed in trust to A. and B., to invest the same, and use the interest accruing therefrom, for the maintenance and education of the granddaughter of the testator, and the whole amount to be given her on the day of her marriage, or when she should attain the age of twenty-one, to be hers absolutely, free from all trusts of any kind, provided "she is educated in some Roman-Catholic female seminary or school, and is reared as a Roman Catholic;" and in case she were not so educated, then said estate was to be otherwise disposed of, it was held that such proviso was not impossible, nor void for uncertainty, or as being in contravention of public policy, and that it was not unconstitutional.¹

quired the children to be taken regularly to a place of public worship, where the divine service should be celebrated by a priest in orders, according to the Book of Common Prayer; and where they might hear the Athanasian Creed said or sung on all the Sundays and saints' days appointed by the Rubric for that purpose. I find no language in the will upon which such a construction can be put; and I conceive the true meaning of the condition to be only that the children should be brought up as Protestants in communion with the Church of England. This they might have been, had they remained in England; although on account of sickness, or distance from any place of public worship, they might very rarely have had the advantage of the ministrations of a regularly ordained clergyman, and although the services from the Liturgy might have been read by a female."

1. *Magee v. O'Neill*, 19 S. Car. 170.

The court said, "We do not take the view that the bequest was given for the purpose of educating the grandchild. It seems to us that the condition, as to the manner in which she should be educated, was independent of the source from which the means were to be denied. . . . The whole tenor of the will shows that the testator did not intend the trustees to take charge of his granddaughter, and send her to school, providing the means to do so out of the legacy. He attached the condition, and left it to the mother to do as she pleased—to act in regard to the education of her daughter in such way as to secure or renounce the legacy;" and again, "It is not claimed that this condition is in contravention of any established law. We know of none which prohibits a citizen from using his own means in educating a grandchild, and in doing so to make his own choice of a school, and have the education given under particular influences, religious or otherwise. We have no hierarchy, no particular form of religious worship made lawful, and thereby all others

made unlawful. The State knows no religious denominations further than to protect them in their rights. The members of all, as well as those who are members of none, are equally her citizens; and she has enacted no law forbidding education under the forms and influence of any of them. . . . But was this will, as to the manner in which the legatees should be reared and educated, in contravention of the spirit of our law? As we understand the argument, the precise point is, that we have no form of religious worship established by law; but the Constitution declares that 'no person shall be deprived of the right to worship God according to the dictates of his own conscience.' Any requirement attached to a bequest that the legatee shall be educated, and reared at a school and under the influence of a particular denomination of Christians, is in violation of the perfect liberty of conscience vouchsafed to all; and there being no express law upon the subject, the court should declare it void as against public policy. Presented in this form, it is certainly a new question in this State if not in the United States, and one in some aspects not without difficulty. . . . Can it be properly said to be against the spirit of the Constitution for a member of one of these religious denominations so protected, to endeavor by peaceable and legal means to extend his faith, and to influence his children and grandchildren to adhere to the church of their fathers? . . . Because such things may have some effect in determining religious opinions, can it be truly said that therefore they violate liberty of conscience, and are productive of evil consequences to the public—against public policy? . . . It seems to us that the distinction is rather shadowy between a donation for a school to be conducted according to certain religious forms, and one to a person to be educated in that school. . . . We cannot say that the terms of this will so far exceed the license, which is allowed the citizen in the disposition of his own property, as to

In *Spooner v. Lovejoy*, 108 Mass. 529, the residuary bequest in a will was, "I give, bequeath, and devise all the rest, residue, and remainder of my property and estate, whether real, personal, or mixed, to my beloved wife," S., "principal and income to her own use, and to be disposed of at her decease according to the terms of any will or testamentary document that she may leave. *She is, of course, to charge herself with the education and support of our daughters . . . so long as they shall remain unmarried.*" The question arose, as to whether the whole of the residue was vested absolutely in the testator's wife, or whether the subsequent clause charging her with the education, etc., of "our daughters," raised a trust or charge upon the property; and the court said, "But, without undertaking to express any opinion as to the limits within which the rule as to precatory words ought to be confined, we are of the opinion that the words of the testator are not in this instance to be considered as imperative. They furnish a clear intimation of his wishes, as to which she was to be considered under a moral, instead of a legal, obligation. We find no case in which it has been held that the words, 'the legatee is, of course, to charge herself with certain expenses of education and support,' are of themselves sufficient to create an implied trust;" and it was held that the words raised no trust or charge upon the estate.¹

Where a will provided that all the rents and profits should go to the wife of the testator, during her life, "for her support, and the *support and education*" of his children, under the direction of his executors, it was held that the executors had no control of the support or education of the parties to be benefited, and that the will should be construed to have been principally intended for the benefit of the widow; that there was simply an expression of confidence that the money would be applied as requested, and that no present interest was vested in the children.²

Where the testator made a bequest of certain property to his wife "subject to the following conditions, viz., that my said wife shall . . . *educate and bring up* my granddaughter R. until she arrive at the age of eighteen years, or is married," it was decided that this was a condition subsequent, which, as the court declared, "was to be performed for a time, which might, and probably would, continue long after the legacy was to vest. The defendant objects that it was not complied with. To this there are two

render it void as against public policy. We do not understand that there was any thing in this bequest which can properly be called 'coercion,' or that the granddaughter was deprived 'of liberty of conscience.'"

1. In another case, where there was a devise of lands to a son; profits to the wife till he became of age "for his education and bringing up," upon the marriage of the wife it was held that the profits did not go to the second husband, that "nothing is

devised but a confidence." *Anon.* 2 Leon, 221, cited in *Everts v. Chittenden*, 2 Day (Conn.), 352, also citing *Dedicott's Case*, 3 Leon, 9.

2. *Paisley's Appeal*, 70 Pa. St. 153.

To the widow, to be applied by her "to the maintenance, support, and education of my children" under age. *Held*, that, no trust was created, and that it was merely an expression of confidence in the widow. *Biddle's Appeal*, 80 Pa. St. 258.

answers depending upon the force of the terms *educate and bring up*. If they imply a personal, parental care, then the duty terminates with her own life, and the condition was performed. She did educate and bring up her granddaughter so long as she lived, although it was indeed for a very short period. . . . But if '*to educate and bring up*,' means to furnish subsistence to the granddaughter, then the condition was a mere charge in the legacy, and it might be performed by the personal representative, and would not prevent the legacy from vesting. We think that a personal care was intended, and consequently, that, by the death of the legatee, the legacy became discharged of the condition."¹

Where the words of a will were, "My property, after my debts are paid, I leave and bequeath to my beloved wife, A., and wish her *to educate my two daughters, J. and G., with care*," etc., it was held, in the absence of any other bequest, gift, or devise, except the gift of a ring to one M., "that there was nothing to limit the devise to any species of property, or to any proportion of it, and that all the testator's property must pass, or none of it;" and that he gave the children nothing, "but for the purpose of educating and rearing them, he invests every thing in his wife."²

Again, in a case where, under a will, directions were given, and provision made, *for the education of three grandsons* of the testator until such time as they should become of age, and the real estate of the testator was charged with the expense necessary therefor, and the provision was not carried out, upon a bill brought by the grandsons sixteen years thereafter, against the devisees under the will, to be reimbursed by way of compensation for the injury claimed to have been sustained by reason of the non-fulfilment of the terms of the will, in respect to their education, demanding a sum equal to that which ought to have been applied to that purpose, it was held that the bill should be dismissed.³

So, under a provision in a will that the income of certain funds — placed in the hands of trustees — should be paid to the father of a child, *to be by him applied to the education* of the child, it was decided to be a beneficial gift to the father, and that he was to judge in what manner the child should be educated.⁴

1. Merrill v. Emery, 10 Pick. (Mass.) 510; Richards v. Merrill, 13 Pick. (Mass.) 405.

2. Jackson v. Housel, 17 Johns. (N. Y.) 281, 283.

3. Johns v. Stoops, 5 Harr. & J. (Md.) 430.

4. Byne v. Blackburn, 26 Beav. 41.

In the case of Foley v. Parry, 5 Sim. 138, 145, affirmed 2 Myl. & Cr. 138, a testator made a certain bequest to his wife for life, and, after her decease, to the plaintiff, using the words, "It is my particular wish and request that my dear wife will superintend and take care of his (the plaintiff's) education, so as to fit him for any respectable

profession or employment." The court decided that these words amounted to a "gift to the plaintiff of the expenses of his education, and that this education included maintenance," and that he was entitled to be educated and maintained up to the age of twenty-one, so as to fit him for any respectable profession or employment.

Where property was left in trust, *the profits to be applied to the education of two minors* during the life of the testator's wife, and on her decease the property was to be divided between the minors, or, in case of the death of one, to go to the other, and one died, *held* that a moiety of the rents accruing between her death and that of the

So, in a case in the Supreme Court of the United States, the question of the construction of the word "education" as used in a will was in issue. The will provided for the sale of all the property, real and personal, of the testatrix, that the same should be invested in certain funds, and that the interest thereof should "be applied to the proper education" of B., S., and J., "so that they may be severally fitted and accomplished in some useful trade; and to each of them who shall have lived to finish his education, or to reach the age of twenty-one, I give and bequeath one hundred pounds to set him up in his trade;" and in a subsequent clause of the will, in making other provisions, the following terms were used; viz., "The education" of B., S., and J., "being completed," "To the education of my nephews," "To the education of the said" B., S., and J., and "shall have finished their education." It was *held* that an education to fit and prepare the legatees for some useful trade was intended, and not an education for one of the learned professions.¹

XIV. Trusts for Education. — A bequest is charitable, if for educational purposes.²

XV. Valid Trusts for Education. — The following trusts for education have been held valid as a charity:—

For the "education of scholars of poor people," in a certain district.³

For the "education of the freedmen of this nation."⁴

For the "education and tuition of worthy indigent females."⁵

For the "education of poor white citizens of Kent County generally."⁶

For the education of the "poor children belonging to said county."⁷

testator's wife became the estate of the deceased, and not of the surviving minor, and that "a gift for the education of the legatee is an absolute gift." *Webb v. Kelly*, 9 Sim. 469.

1. *Dandridge v. Curtis*, 2 Pet. (U. S.) 370. The court said, "This bequest seems to have been made, not with a view of adding to their private fortunes, but with a view to their education and preparation for that particular business which they were afterwards to pursue. They are not, therefore, entitled to the whole fund, whatever may be its amount, but to so much of it as is required for the object it is to accomplish. In ascertaining the amount which is so applicable, the plaintiffs contend that one of the learned professions may be taken as the standard with as much propriety as the trade or art of a mechanic. The court does not think so. The distinction between a profession and a trade is well understood. . . . If the testatrix had contemplated what in the common intercourse of society is denominated a profession, she would scarcely

have used a term which is generally received as denoting one of the mechanical arts. But we do not think the bequest is confined to the expense of acquiring the trade so as to be enabled to exercise it in the common way. Such does not appear to have been the intent of the testatrix. Her bounty is extended to the proper education of three relatives so that they may be severally fitted and accomplished in some useful trade. Their education is a primary object, as well as their acquisition of the trade; and . . . we cannot doubt that the testatrix intended such an education as would fit her relatives to hold a distinguished place in that line of life in which she designed them to move." Opinion by *Marshall, C. J.*

2. *De Camp v. Dobbins*, 29 N. J. Eq. 36, 46.

3. *Clement v. Hyde*, 50 Vt. 716.

4. *McAllister v. McAllister*, 46 Vt. 272. *Contra*, *Fairfield v. Lawson*, 50 Conn. 501.

5. *Dodge v. Williams*, 46 Wis. 70.

6. *State v. Griffith*, 2 Del. Ch. 392.

7. *Newson v. Starke*, 46 Ga. 88.

For the "education of the colored children of the State of Indiana." ¹

"To the education of — children of this town." ²

"To the support and management of . . . worthy, meritorious, charitable, and *educational* and religious institutions" of a certain faith. ³

For the education of the colored children of a certain county. ⁴

"For educating some poor orphans of" a certain county. "to be selected by the county court." ⁵

"To the education and tuition of all the pauper and poor children" of a certain "beat" (or county), etc. ⁶

"For the promotion of education and science among the Indian and African children and youth of the United States of America." ⁷

"For the *education* of pious indigent youths who are preparing for the ministry of the gospel, and those only who strictly adhere to the Westminster Confession of Faith, in its literal meaning." ⁸

"For the education and instruction of poor and needy children in the first school district" of a certain town. ⁹

"For the education and tuition of worthy indigent females." ¹⁰

"For the education of young students in the ministry of the German Lutheran congregation under the direction of the vestrymen" of a certain church. ¹¹

"For the purpose of *educating*" the poor orphan children of two certain townships, to be expended "in proportion to the number of inhabitants in each." ¹²

A gift to trustees to be applied in "their discretion for the benefit, advancement, and propagation of education and learning in every part of the world as far as circumstances will permit." ¹³

XVI. Void Trusts for Education. — The following trusts for education have been declared void as a charity: —

"To the education of free colored children in the city of Baltimore." ¹⁴

For the "education of the freedmen." ¹⁵

For the "Orthodox Protestant clergyman of" P. for the "*education* of colored children, both male and female, as they shall deem best." ¹⁶

For the "establishment of a school" at M. for the "education of children." ¹⁷

1. *Ex parte* Lindley, Ex'r, 32 Ind. 367.

2. *Richmond v. The State*, 5 Ind. 334.

3. *Quinn v. Shields*, 62 Iowa, 129.

4. *Craig, Adm'r, et al. v. Secrist et al.*, 54 Ind. 419.

5. *Moore's Heirs v. Moore's Ex'rs*, 4 Dana (Ky.), 354.

6. *Williams v. Pearson*, 38 Ala. 299.

7. *Treat's Appeal*, 30 Conn. 113.

8. *McCord Ex'rs v. Ochiltree*, 8 Blackf. (Ind.) 15.

9. *Swasey v. The American Bible Society et al.*, 57 Me. 523.

10. *Dodge et al. v. Williams et al.*, 46 Wis. 70, 97.

11. *Whitman v. Lex*, 17 S. & R. (Pa.) 88.

12. *Mason's Ex'rs v. Trustees of M. E. Church at Tuckerton, et al.*, 27 N. J. Eq. 47.

13. *Whicker v. Hume*, 14 Beav. 509, 521.

14. *Needles et al. v. Martin*, 33 Md. 609.

15. *Fairfield v. Lawson*, 50 Conn. 501.

Contra, *McAllister v. McAllister*, 46 Vt. 272.

16. *Grimes's Ex'rs v. Harmon*, 35 Ind. 198.

17. *Atty.-Gen'l v. Soule*, 28 Mich. 153. It was said in *Hadley v. Hopkins Acad.*

In *The Attorney-General v. Lord Lonsdale*,¹ the trusts of a deed and will were to found a school of learning in a certain county, *for the education of gentlemen's sons*. It was declared to be a valid gift, but was held to have failed for other reasons.

EFFECT. (See also MEANING; PURPORT; SUBSTANCE; TENOR.) — That which is produced as a result; the object, purpose, or intention.²

emy, 14 Pick. (Mass.) 253, that "It is a rule in equity, that a gift of real or personal estate, either *inter vivos* or by will, to promote education, is a charity."

As to gifts for educational purposes as a charity, the courts have gone very far in sustaining them; but even for such purposes, "where the bequest embraces unknown beneficiaries to an unlimited extent, so as to render it almost impossible to ascertain their number or character, and where no restriction as to the amount to be allowed to any of them is fixed or determined, such a bequest cannot be carried into effect." *Pritchard et al. v. Thompson*, 95 N. Y. 81.

See article on "Charitable Uses," 23 Central Law Journal, 364. See CHARITIES, vol. iii. Amer. & Eng. Ency. of Law, p. 128.

A society incorporated for the education of the deaf and dumb, which furnishes gratuitous instruction, and which obtains its funds for such purposes chiefly from donations and gifts from the public, and from private individuals, is an incorporated school for charitable purposes. *Asylum v. Phoenix Bank*, 4 Conn. 172.

1. 1 Sim. 109.

2. When it is necessary to set forth an instrument, or writing, as in case of forgery or threatening letters, it may be prefaced by the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following;" for though the setting forth the instrument by the tenor, which imports an accurate copy, has been considered to be most technical, yet it has been holden that "as follows" is equivalent to the words "according to the tenor following," or "in the words and figures following," and that if, under such an allegation, the prosecutor fail in proving the instrument *verbatim*, as laid, the variance will be fatal; and unless the indictment by these, or similar expressions, profess to set out a copy of the instrument in words and figures, it will be invalid. It would be improper to state in these cases, or in an indictment for a libel, that the writing was "to the effect following," or "to the substance following." 1 Chitty's Crim. Law, 233.

In an action of slander the declaration averred that the defendant stated that another had spoken certain slanderous words,

or words to that effect. The defendant pleaded justification on the ground that at the time of uttering the alleged slander, he had named the original author of it, and stated that the original slanderer used such and such words, or "to that effect." On demurrer it was held that the justification was not supported, inasmuch as the defendant did not give the very words used; *Ellenborough, C. J.*, saying, "In order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter as to give the plaintiffs a certain cause of action against the party named: now here they only state that the other uttered such words, or to that effect; and if the defendants when called as witnesses to support the action against the party named could only prove that he uttered words to the effect of those set forth, that would not be sufficient." *Maitland v. Goldney*, 2 East, 426, 437.

In an indictment for forgery in Maine, it has been held that the indictment must in itself purport to set forth the tenor of the instruments. It is not sufficient to set them forth according to their "purport and effect;" *Howard, J.*, saying, "The instrument should be set forth in the indictment according to its tenor, and not according to its purport and effect. By the former mode an exact copy is intended; but by the latter, the import, or substance only, is indicated." *State v. Bonney*, 34 Me. 383.

This case was confirmed in *State v. Witham*, 47 Me. 165.

To the same effect see *Dana v. State*, 2 O. St. 91.

But where a statute, namely, the Act 31 Geo. III. c. 21, sec. 4, enacted that all convictions against that act should be made out "in the form, or to the effect, following," and gave the form, it was held that an indictment, containing all the substantial parts of that subscribed, was good, although the exact words of the form given were not followed. *The King v. Jefferies*, 4 Term Rep. 767.

In New York a defendant was tried on an indictment for perjury in taking the oath required from insolvents on presenting their petitions, etc., for a discharge. In the indictment, it was stated that the defendant did falsely, etc., say, depose, and swear in substance, and to the effect fol-

This word is used in various phrases.¹

lowing, to wit, etc. On the trial the district attorney produced in evidence the oath, which was in writing; and it was found to vary from the oath set forth in the indictment, in that the indefinite article *an* was substituted for the definite article *the*. This variance was held to be immaterial; the court, *Marcy, J.*, saying, "If the public prosecutor was bound to set forth the oath with literal and perfect accuracy, the objection was well taken. Even if he has needlessly undertaken to state it *in hæc verba*, there are not wanting authorities which declare that a failure in the slightest degree—in half a letter, to use a hyperbolic expression of Lord Mansfield—will be fatal. It was scarcely contended, on the argument, that it was absolutely necessary to set forth the oath in its exact words. The rule on this subject seems to be, that written instruments, where they form a part of the gist of the offence charged, must be set forth *verbatim*. In the case of forgery, the spurious instrument must be set forth in its very words and figures,—Archb. Crim. Pl. 23; 1 East, 180; Leach, 721,—but in perjury the rule is different. 'It is not necessary,' says Mr. Archbold, 'to set forth the affidavit, answer, etc., on which the perjury is assigned, *verbatim*;' for the statute of 23 Geo. II. only requires the substance of the offence to be charged.' Our *revised laws* of 1813 contain a provision similar to the Act of 23 Geo. II.; and if it applies to this case, it was not necessary to state in the indictment more than the substance of the oath. . . . Whether we apply to this case the Revised Statutes, or the law as it stood previous to the last revision (and by one or the other it must be governed), it is quite evident that there was no necessity of setting forth the oath taken by the defendant with absolute accuracy; yet if the pleader has needlessly undertaken to do so, it may be, he should be holden to a strict performance. The indictment alleges that the oath on which the perjury is assigned, is *in substance and to the effect following, to wit, etc.* Whether it was intended in this case to set forth the oath *verbatim* depends upon the true definition of the word 'effect.' The word 'tenor' has a technical meaning, and requires an exact copy; and the defendant's counsel infers that, because 'effect' is often used with it, a like meaning is to be put on that word. This inference does not strike me as conclusive or correct. Because *tenor* and *effect* require an exact copy, it is not to be inferred that *substance* and *effect* require as much. The ordinary meaning of the word 'effect,' as well as judicial decisions thereon, refute the inter-

pretation which the defendant's counsel has given to it. Where an instrument was alleged to be 'to the effect following,' a literal copy was not required. Archb. Crim. Pl. 68. Even the words 'in manner and form following' do not require a perfect copy. 1 Doug. 193; 1 Leach, 227. It is expressly said in *King v. Bear*, 2 Salk. 417, that the words *ad effectum sequentem* were loose and useless when joined to *juxta tenorem*. To my apprehension, the 'substance and effect' of an instrument in writing cannot, either in common parlance or legal import, be understood to mean an exact copy of it." *People v. Warner*, 5 Wend. (N. Y.) 271.

1. Prosecute with Effect.—This phrase is used in replevin bonds, recognizances, and bonds of suretyship, and has been held to mean prosecute with success. Thus, where the plaintiff distrained, and the tenant replevied the goods, the sheriff taking a replevin bond from the tenant, conditioned, "for his prosecuting his suit with effect," and in the replevin suit, judgment was for the defendant in replevin, it was held, the tenant not having made a return of the goods, and the sheriff having lost the bond, that the bond was forfeited, and that the plaintiff might proceed against the sheriff; the court, *Holroyd, J.*, saying, "The failure of prosecuting the suit with success is, we think, a failure of prosecuting the same *with effect*." *Perreau v. Bevan*, 5 B. & C. 284, 300; s. c., 8 Dowl. & Ry. 72. See, to the same effect, *Gould v. Warner*, 3 Wend. (N. Y.) 54.

So where the plaintiff in replevin is nonsuited, it is held that he has not prosecuted his suit *with effect*, and the bond is forfeited. *Turner v. Turner*, 2 Brod. & B. 107; s. c., 4 Moore, 606.

Thus, in an action of debt on a recognizance given in an action *de nomine replegiando*, that the plaintiff who sued out the writ of replevin "should prove his liberty, etc., and personally appear in court and prosecute his suit *with effect*," and the plaintiff suffered a judgment of non-suit, and then surrendered himself to the defendant, who accepted him, and the bail paid the costs of suit, it was held that submitting to a non-suit was not prosecuting the suit *with effect*, and that the recognizance was forfeited; and that the acceptance of the plaintiff by the defendant, in the action of replevin, did not discharge the right of action on the recognizance against the bail; the court saying, "A party submitting to a non-suit does not prosecute the suit *to effect*, nor, if the writ be abated for any cause, will it save the recognizance, unless another writ be sued out with due

diligence. . . . The only question that can be raised is, whether the surrender to the plaintiff, and the acceptance by him, amounted to a discharge of the recognizance. We think there is no ground for that opinion. There were good reasons for the stipulations in the recognizance, that the suit should be prosecuted to *effect*, and the question of the freedom or servitude of the plaintiff in replevin be judicially determined. It would either silence the unjust pretensions of the plaintiff, and forever deliver the man from bondage, or it would quiet him in the lawful possession of his property." *Covenhoven v. Seaman*, 1 Johns. Cas. (N. Y.) 28.

But where a plaintiff, having appealed, in an action, became bound by a recognizance, with surety, to prosecute his appeal *with effect*, and to pay all intervening damages and costs, and he entered his appeal, but afterwards became non-suit, it was *held* that the appeal was *prosecuted with effect*; the court, *Wilde, J.*, saying, "The plaintiff has contended, that Trainer did not prosecute his appeal with effect; and so it is averred in both counts; but this averment is negatived by the fact admitted in the declaration, namely, that Trainer did enter his appeal, and that he prosecuted it until he became non-suit. Now this, we think, was prosecuting the appeal *with effect*, and with an effect most favorable to the defendant." *Hobart v. Hilliard*, 11 Pick. (Mass.) 143.

And a bond to *prosecute with effect* is not forfeited where the plaintiff in replevin has been stayed by injunction, and pending the injunction dies, whereby the suit is abated; the court, *Holt, C. J.*, saying, that this was a prosecution *with effect*, because there was neither a non-suit nor verdict against the plaintiff in replevin. The Duke of Ormond *v. Brierly*, 12 Mod. 380.

So where the declaration against a surety in a replevin bond, conditioned that the distrainee should appear at the next county court, and should make return, etc., assigned for breach that the distrainee did appear in the same court, but subsequently removed the cause into the Common Pleas, and that he did not appear in the Common Pleas at the return of the writ, and did not then and there, nor at any time or place, prosecute the action *with effect*, the plea was, that after the removal of the suit, and before the writ from the Common Pleas was returnable, the distrainee died, whereby the suit was abated. To this the plaintiff replied, that the distrainee in his lifetime, while the cause was proceeding in the county court, sued out the writ from the Common Pleas, and thereby delayed the suit, and prevented it from proceeding in the county court, wherefore the death of the distrainee was no excuse. On demur-

rer the court *held* that the record showed no breach of the condition; *Lord Denman, C. J.*, saying, "It is, I think, no strain on the meaning of the words to hold that a party who carries the suit regularly forward in any court *prosecutes with effect*; for he took the proper steps to try his right, but was interrupted by death; and the act of God cannot place the sureties in a worse position." *Morris v. Matthews*, 2 A. & E. 293.

Nor is there any breach so long as the suit is undetermined. Thus, it is a good defence, to an action on a replevin bond conditioned for the defendant to prosecute his suit *with effect*, and alleging a breach in his not prosecuting it, to plead that the defendant did appear at the next county court, and there prosecute his suit which he had there commenced against the plaintiff, and which suit was still depending and undetermined. Such a plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending, without showing how it was determined, and ceased to depend. *Brackenbury v. Pell*, 12 East, 585.

The replevin bond is sometimes conditioned to *prosecute with effect and without delay*. In this case it is a sufficient breach that the plaintiff in replevin did not use due diligence in the prosecution of the suit; but where the cause had been removed, and the plaintiff appeared, but the defendant not, whereby there was a delay, this was *held* no breach, the delay not being caused by the plaintiff, but by failure on the part of the sheriff to summon the defendant. *Harrison v. Wardle*, 2 Nev. & M. 703.

Like Effect. — Statute 5 & 6 W. 4, c. 76, providing for a revision of the voting or assessors' list, requires in section 17 the objector to give to the town clerk, and also to the person objected to, "notice thereof in writing according to form number 3, or to the *like effect*." An objector having given notice of the objection to the town clerk in the precise form, which was, "I hereby give you notice that I object to the name of A. B.," etc., delivered a notice to the person objected to as follows: "To Mr. A. B. I hereby give you notice that I object to your name," etc. *Held* that this notice was to the *like effect* with the form number 3. *The Queen v. Harwich*, 1 El. & Bl. 617. See *The Queen v. General Cem. Co.*, 6 El. & Bl. 419.

Take Effect. — The Constitution of Indiana, art. 1, sec. 4, prohibits the passing of any law, "the taking effect of which shall be made to depend upon any authority except as provided in this constitution." In a prosecution for retailing spirituous.

liquor without a license, under an act which provided for taking a vote by townships, annually at the April election, on the license question, and that without the consent of a majority of the legal voters of the proper township "for license" none could issue, the act was held unconstitutional; the court, *Stuart, J.*, saying, "Let us inquire whether the *taking effect* in whole or in part is made to depend upon any authority unknown to the constitution. The words, 'take effect,' 'be in force,' 'go into operation,' etc., have been used interchangeably ever since the organization of the State. The 'operation of the laws' as used in the 26th section, art. I, seems to be their *taking effect* and continuing in force. The act in question consists of two parts: the one points out the mode of obtaining license, the other prescribes the punishment for selling without license. The penal part of the act went into operation immediately upon publication. The provision for license did not. Between the 19th of March and the April election, no license could issue in any part of the State, the bond and the affirmative vote of the township being both essential. Had the people of each township voted 'no license,' there would have been no operative license law in the State for one year from April, 1853. And had the people so voted every year for all time to come, that part of the act relating to license could never have had any force, effect, or operation as a law; so that the *taking effect* of the act, or so much of it at least as provided for the issue of license, — in other words, whether there should be any power to issue license, — was made to depend on the vote of the people of each township. If the townships vote diversely, as it is understood they have, then, in practical operation, it is a local law. In the townships which vote 'license,' the license feature *takes effect* by virtue of that vote. In the townships voting 'no license,' it has no force or operation in consequence of such vote. Thus has the general assembly merely proposed the license feature to the people for them to give it vitality, or reject it by townships." *Maize v. State*, 4 Ind. 342.

To that Effect. — A Californian statute providing for the limitation of the hours of labor, declared in its first section that "Eight hours' labor shall be deemed and held to be a legal day's work in all cases within this State, unless otherwise expressly stipulated between the parties concerned;" and in the second section, that "eight hours' labor shall constitute a day's work in all cases where the same is performed . . . by the authority of any . . . municipal government within this State, or of any officer thereof acting as such; and a

stipulation *to that effect* shall be made a part of all contracts to which . . . any . . . municipal government shall be a party." The street-superintendent of San Francisco having refused to execute a contract which had been awarded by the board of supervisors for the grading of a certain street, because the contractors, who had tendered a contract as follows, "And it is hereby expressly stipulated that eight hours' labor shall constitute a legal day's work for all work to be performed under this contract," objected to the insertion of a provision, by which they agreed not to "require or permit any person so employed to work more than eight hours per day," and providing for a forfeiture of all sums due them on a violation of this agreement. On a petition by the contractors for a *mandamus* to compel the superintendent to execute the contract, the court held that the provisions of the statute were complied with by the contract tendered by the contractors; *Sawyer, C. J.*, saying, "It is plain to our minds that 'a stipulation *to that effect*' means nothing more nor less than a stipulation *to the effect* that 'eight hours' labor shall constitute a legal day's work' under the contract to which the stipulation is made applicable. This is the provision of the act to which '*to that effect*' manifestly refer." A dissenting opinion was filed by *Sprague, J.*, who said, "The second section is somewhat ambiguous; but when read in connection with the first, the intention of the legislature, although expressed in not very specific terms, is unmistakable. The first section provides, that eight hours shall be deemed and held to be a legal day's work in all cases, except when otherwise expressly stipulated by the parties concerned. The second section in substance provides, that in all cases where labor is performed under the authority of any State law, or under the direction, control, etc., eight hours shall constitute a legal day's work, and a stipulation is required to be inserted in all contracts for such labor *to that effect*. The words '*to that effect*,' used as descriptive of the character of the stipulation required to be inserted, evidently require a stipulation of a character to secure the performance of public work by laborers employed for the number of hours each day designated as a legal day's work by the preceding portion of the same section, and the first clause of the first section — in substance, *to the effect* that, in the performance of the work under the contract, eight hours shall constitute a day's work, and that in the performance of the work required by the contract, the contractor will not require, or be a party to, any stipulation for a different limit to the time for the performance of a day's labor." *Drew v. Smith*, 38 Cal. 325.

Effect of Evidence.—In an action for money had and received on an application for salt, the plaintiff adduced evidence tending to show a demand of the money, and also a demand of the salt; but the court excluded, on the defendant's motion, the evidence in relation to the salt. The defendant requested the court, in writing, to charge the jury, "That it devolves on the plaintiff to show that the salt was not furnished as alleged and set forth in the complaint." The court refused to give this charge, and instructed the jury *ex mero motu*, "That it devolves on the defendant to show that his intestate had accounted to the plaintiff, either for the money or the salt mentioned in the said original writing in evidence before them." *Held*, that this was a charge on the burden of proof, and not "on the effect of evidence," which the court, by Rev. Code, § 2673, is prohibited from giving unless requested. *Hill's Adm. v. Nichols*, 50 Ala. 336.

Faith, Credit, and Effect.—In *holding* that the conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness in the courts of this State, the court, *Parker, C. J.*, used the following language: "But it has been argued by the counsel for the prisoner, that although a conviction in a court of a country strictly foreign should not be held to take away the competency of a witness, yet that such is the relation of the several States, which compose the American Union, with each other, that the same law ought not to prevail here, as the States are not in fact foreign to each other. If this position is true, it must result from the Constitution of the United States only; for without that, the several States are entirely independent of each other, and as completely foreign one to the other, except so far as temporary confederacies may have united them, as any separate European governments. Whatever change exists in this relation must be sought for in the Constitution of the United States, and the laws of Congress made pursuant thereto. The provision of that Constitution is, that 'full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' By this provision, separate from any act of Congress pursuant to the authority therein given to that body, nothing more is established than that public acts, records, and judicial proceedings, when duly authenticated in the manner which Congress should afterwards prescribe, should be received as conclusive evidence of the facts they

were intended to establish, in all the courts of the Union, leaving to those courts the power of giving such effect to records so authenticated, as the laws, by which they were governed, should require; and this effect might be different in different States, according as their own local rules, or the principles of the common law, should prevail with them. But it was desirable that uniformity, upon so important a subject, should exist; and, therefore, the power was given to Congress to declare, by general laws, the effect of such records. The act of Congress, which was passed soon after the organization of the government under the Constitution, viz., in the year 1790, in execution of this power, unhappily is not expressed in such terms as to remove all doubt as to the effect of judgments in States other than those in which they were rendered. This act, after providing the manner in which records shall be authenticated, declares that they shall have the same faith and credit given to them in every court within the United States as they have, by law or usage, in the courts of the State from whence the said records shall be taken. If there is any difference between the faith and credit given to a record of a judgment, and the effect of such judgment, it would not seem that Congress, by this act, had done any thing more than was previously provided in the Constitution, except as to the mode of authentication. For by the Constitution itself full faith and credit must be given; and that could not be, unless it had the same faith and credit in another State which it would have in the State from whence it was taken. That there is an essential difference between *faith and credit*, and *effect*, would seem to follow from the different application of the terms as used in the Constitution. That instrument itself establishes the faith and credit of records; but their effect is left unprovided for, except in the power given to Congress to legislate upon the subject. Courts in the different States, and judges in the same State, have varied in their construction of the Constitution, and of the act of Congress upon this subject, some holding that the effect, by which they mean the legal import and obligation of judgments of another State, is still left open to be decided by the common law; others that the terms, 'faith and credit,' as used in the act of Congress, mean the same thing as the term 'effect,' and that this effect being the same in the State where they are used as in the State from whence they come, they are in all respects like domestic judgments, as to their conclusiveness against the party who is the subject of them." *Com. v. Green*, 14 Mass. 513, 543.

EFFECTS. (See also CHATTELS, GOODS, MOVABLES, PERSONAL PROPERTY, PROPERTY, SUBSTANCE).—A very general term, used to denote whatever a man has that can effect, produce, or bring forth money by sale. A man's possessions. It has received frequent construction, for examples of which see the notes,¹ both

1. **Effects** is a word often found in wills, and, being equivalent to property or worldly substance, its force depends greatly upon the association of the adjectives "real" and "personal." "Real and personal effects" would embrace the whole estate; but the word "effects" alone must be confined to personal estate simply, unless an intention appears to the contrary. A bequest of "all my effects" may doubtless be so controlled by associated words and the context and surrounding circumstances as to fail of their full natural force; but naturally those words carry the whole personal estate. Schouler on Wills, § 509.

Where a testator made a bequest "of all and singular his plate, linen, china, household goods and furniture, and effects that he should die possessed of," and also a devise, in trust, of certain real estate, and out of the moneys to arise from the sale thereof to pay funeral expenses, money due on mortgage, and all other debts, and the residue amongst the testator's children, it was *held* that the word *effects*, coupled with the context, operated as a specific bequest of the personal estate, and that the same was not liable to the payment of debts; the court, *Leach, Vice-Chancellor*, saying, "The word 'effects,' used *simpliciter*, will carry the whole personal estate, as a gift, 'of all my effects,' without more. But it is frequently used in a restricted sense, meaning 'goods and movables,' as in the common expression of 'furniture and effects.' In every case the court has to collect from the context the particular sense in which the testator has intended to use it. In *Campbell v. Prescott* (15 Vesey, 500) there were added to the word 'effects,' 'of what nature and kind soever;' and this addition excluded its restricted sense. And it appears to me that the words which follow 'effects' in the present case—"that he shall die possessed of"—lead to the same conclusion. It is further to be observed that the words here are not, 'household goods, furniture, and effects,' but 'household goods and furniture, and effects,' which imports a distinct sense in the word 'effects,' particularly with the addition of the words, 'that he shall die possessed of.' And further, unless this testator intended to describe his general personal estate by the word 'effects,' he has omitted all notice of it in his will. I think, therefore, the best construction here is, that this testator meant to give to his

daughters all the *effects* which he should die possessed of, or, in other words, all his personal estate." *Michell v. Michell*, 5 Mad. Ch. 69.

So, in Hovenden's note upon *Hockley v. Mawbey*, 1 Vesey Jun. 143, it is said, "Generally speaking, the word 'effects,' in a will, is equivalent to 'property' or 'worldly substance' (*Campbell v. Prescott*, 15 Vesey, 500); but that the interpretation may be limited, and restricted to articles *ejusdem generis* with those which the testator previously enumerated or specified. See *Rawlings v. Jennings*, 13 Vesey, 46" (*infra*); 1 Hov. Suppl. 53.

This general meaning was given to "effects," where a bank was chartered with power to "have, possess, etc., and enjoy to themselves and their successors, lands, rents, etc., goods, chattels, and effects, of what kind soever, nature, and quality; and the same to grant, etc., or dispose of, for the good of the bank;" and also "to receive money, etc., discount bills, etc."

In the course of business, the bank discounted and held promissory notes; and subsequently the legislature of the State passed a law declaring that "it shall not be lawful for any bank in the State to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt." This statute was *held* to be void, as impairing the obligation of a contract; the court, *Woodbury, J.*, saying, "That promissory notes are to be regarded as either goods, chattels, or *effects*, within the sixth section of the charter, can hardly be questioned, when it includes those 'of what kind soever, nature, and quality.' This addition evidently meant to remove any doubt or restriction as to the meaning of those terms, as sometimes employed in connection with peculiar subjects, and to extend the description by them to every kind of personal property belonging to the bank. This construction would go no farther than sometimes has been done in England, holding the words *goods and chattels* to include choses in action, as well as other personal property (12 Coke, 1; 1 Atkins, 1182); and by the word 'goods' alone, in a bequest, it has been *held* that a bond will pass (*Anon.* 1 P. Wms. 127). So, in respect to *effects*, it has been *held*, when the word is used alone, or *simpliciter*, it means all kinds of personal estate (*Rawlings v. Jennings*, 13 Ves. 39; *Michell v. Michell*, 5 Madd. 72; *Hearne v. Wiggings*—

ton, 6 Madd. 119; Hogan v. Jackson, 1 Cowp. 299). But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*. Here, however, instead of restraining terms being used with it, those most broad and enlarging are added, being 'effects of what kind soever, nature, and quality.' *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 320.

Held not to include Real Estate. — It is usually said that there must be something in the context to show that the word *effects* is intended to cover real estate. Thus, a devise of "all and singular my effects, of what nature and kind soever," has been held not to pass real estate; the court, *Lord Ellenborough, C. J.*, saying, "No case has ever yet come before the court touching either a will or any other subject, that I am aware of, where the court have been called upon to pronounce on the technical meaning of the word *effects*, denuded, as it were, of all context, unless, indeed, the words, 'of what nature or kind soever,' can be considered as context, and explanatory of it. In *Camfield v. Gilbert* (3 East, 576) and *Doe d. Andrews v. Lainchbury* (11 East, 290) it was taken for granted that 'effects,' in its natural signification, imports personal effects; and no case has yet occurred in which that signification, unaided by context, has been extended to 'real estate.' Where a testator has used the general introductory words, 'as to all my worldly substance,' and the word *effects* has been coupled with the words 'real and personal,' as in *Hogan v. Jackson* (1 Cowp. 299), there it has been considered that the context gave it a more enlarged and comprehensive sense than it would otherwise have borne, and the word *effects* has from the declared intention of the testator been holden to pass the whole interest in the lands. And so in *Doe d. Chillcott v. White*, the words 'said effects,' by reference to the antecedent bequest, which comprehended both real and personal, were holden to include the real also; but that was so held by the court, not upon the import of the word 'effects' simply, but as it derived force from the reference that was given to it. On the other hand, it may be said, that, in *Camfield v. Gilbert* (3 East, 576), the court, in holding that the word *effects* did not extend beyond the personalty, did not decide upon the general import of that word, because there was some context which favored the narrower construction; for the testatrix excepted, out of her *effects*, her wearing apparel and plate, which was an exception clearly of a personal nature, and also directed that her *effects* should be divided by her executors. In the present case, therefore, for the first time the court is called upon to give it a

sense unaided by the context. We have a familiar meaning attached to the word *effects*, in its common use, and as it is used in the statutes relating to bankrupts, where estate and effects, *reddendo singula singulis*, denote, the one, things personal; the other, things real: and I am not aware of any case where it has been holden, in its primary and original signification, to mean things real. . . . The rule of law is peremptory that the heir shall not be disinherited, unless by plain and cogent inference arising from the words of the will. Here, the subsequent words, 'of what nature or kind soever,' are tacitly implied in the preceding word, 'all,' and carry the sense no farther. They are not an expansion of the word 'effects' beyond its natural meaning. Admitting that they import that it shall be taken in its most enlarged sense, I am content to take it so; but I cannot go beyond its natural sense."

And in the same case, *Le Blanc, J.*, said, "In the present case there is no introductory clause, and the circumstance of the attestation by four witnesses is not enough of itself to show a clear intention by the testator to devise his real property. Then the words of the devise are, 'all and singular my effects, of what nature or kind soever.' The question is, what is the meaning of the word 'effects.' If the court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff; but if we are not perfectly satisfied upon that point, then the judgment must pass for the heir. It has been argued on behalf of the plaintiff that we are to construe the word 'effects' by looking to the different ways in which different testators may have used it in the several cases; but I doubt if that be a safe rule. The safer rule is, to abide by such construction as courts of justice have put on the word. Referring to decided cases, we cannot but collect from two of them at least, decided at considerable intervals, that the court has treated the word 'effects' in its primary sense as passing only the personal and not the real estate. If that be so, let us see whether, in this instance, it can be extended beyond its primary sense to carry the real estate. Without going through the cases which have been stated at the bar and commented on by my lord, it is enough to observe that they all turned upon the construction, which was due to the word 'effects' as it was aided by the context. But there is not the aid of context in this case, but the question resolves itself into what is its primary signification; and that, I take it, is confined to things personal. It has been so used in several acts of Parliament, and particularly in the acts relating to bankrupts. Upon the whole, I cannot see my

way clearly enough to say that in this instance the word was used with intent to pass the real estate; and therefore there must be judgment for the defendant." Doe d. Hick v. Dring, 2 Maule & Sel. 448, 453.

A testator seized in fee simple of certain freehold houses, in remainder expectant, made his will, by which he devised as follows: "I dispose of *all my effects* as follows: All my household goods, livestock, furniture, plate, wearing apparel, and *other effects* at this time in my possession, or that may hereafter become my *property*, unto my wife, J. H. I bequeath to J. P. two hundred pounds, to be paid to her at the death of my wife. But if my wife, after my decease, see fit to marry, her second husband shall have no claim whatsoever; that is, to sell or dispose of any part of the property now or may be hereafter in my possession: but the above sum of two hundred pounds shall be paid to J. P. at the time of my wife's marriage." It was *held* (*Platt, B.*, dissenting, on the ground that the context showed that the testator contemplated a disposition of his real estate) that the remainder in fee in the testator's real estate did not pass by this devise; the court, *Pollock, C. B.*, saying, "The question in this case turns upon the meaning which is to be put upon the word '*effects*' as appearing in the present will. The strongest case that was cited on the argument, on the meaning of the word '*effects*' in a will, is the case of Doe d. Hick v. Dring (see *supra*), which I apprehend remains untouched by any subsequent decision, and is a case binding on us as an authority. In that case it was decided that a devise of '*all and singular my effects*, of what nature and kind soever,' does not pass the real estate, where it cannot be collected from the other parts of the will that such was the testator's intention. Now, on reading this will, I certainly should not conceive that the testator intended to give his wife the estate of which he was seized in fee simple in remainder expectant. He says, '*I dispose of all my effects* as follows.' I think these words mean his personal estate, and not the real as well as the personal estate; and having thus declared in the introductory part of the will that he disposes of all his *effects*, which I read *personal effects*, he says, 'All my household goods, livestock, furniture, plate, wearing apparel, and *other effects* at this time in my possession, or that hereafter may become my *property*, unto my dearly beloved wife.' It seems to me that, in addition to the will professing in the beginning to deal only with the personal property, there is the additional argument derived from this, that the words '*other effects*' follow the enumeration of 'household goods, livestock, furniture, plate, and wearing apparel,' and

therefore *a fortiori* are to be considered as meaning personal property only. He goes on to say that all these things in his possession, 'or that may hereafter become my *property*,' that is, things of that description that he may become entitled to, are to go to his dear wife; and then he bequeaths, at her death, a legacy of two hundred pounds, or, if she shall marry, to be paid immediately on her marriage. It seems to me, therefore, that the word '*effects*'—although undoubtedly it *may*, if the words to be found in the will, as connected with the state of the property of the testator, warrant that interpretation, be sufficient to pass real property—is in the present instance to be confined to its natural and legal meaning, and that there are no words in the will to extend it beyond that, nor any circumstances to be coupled with the words to create an opinion that the testator intended to pass any thing beyond his personal property." Doe d. How v. Earles, 15 M. & W. 450. See Doe d. Hurrell v. Devereux, 5 B. & Ald. 21.

R. F. seized of a copyhold estate, mortgaged it, and, while abroad upon naval service, wrote a letter to his mother, which, in so far as it purported to be a will, was sufficient to pass the equity of redemption in the copyhold estate, if it contained sufficient words of disposition. The letter contained the following words: "I give and bequeath all my *effects* (after paying of every due demand) to you for life, and then to go to my younger sister Ann." It was *held* that these words did not include the equity of redemption of the copyhold; the court, *Lord Gifford, M. R.*, saying, "It was contended that the words 'I give and bequeath all my *effects*' would be sufficient to pass his equity of redemption of the copyhold. In answer to that argument, Doe v. Dring (see *supra*) was cited, where it was *held* that the word '*effects*' would not include real estate, unless there was something in the context to extend the term beyond its natural meaning. In the context of this letter I do not find any indication of its having been the intention of the writer to pass any thing, except what in common language is denominated *effects*." Henderson v. Farbridge, 1 Russell, 479.

Held to include Real Estate.—But where the context of the will shows that it was the intention of the testator to dispose of his realty, the courts have *held* that the word "*effects*" is sufficient to include the real estate.

Thus, where a testator, seized of lands, in fee, of C. & G., and of other lands of B. for lives and on leases, made the following devise: "And as to my *worldly substance*, I give to my mother my house and lands of G., with the appurtenances, during

her natural life, clear of any deduction; and also my lands of B., subject to a rent payable thereout for life, without liberty of committing waste thereon;" and after several legacies and annuities to different relations, to his heir-at-law, and to the natural children of his brother, devised to his mother as follows:—"I also give and bequeath unto my dearly beloved mother all the remainder and residue of all the *effects*, both real and personal, which I shall die possessed of;" it was *held* that the mother, by the residuary clause, took a fee in all the testator's fee-simple estates, and the whole of his interest in the rest of his real property, subject to the charges thereon; the court, *Lord Mansfield, C. J.*, saying, "The introductory words used by the testator in the present case are not strictly legal terms, but they are the words of a plain man of sound learning. He says, 'As to all my worldly substance, I give,' etc. What is *substance*? It is *every property* a man has. So, in the statute, 4 & 5 Phil. & M. C. 8, for the punishment of such as shall take away maidens that be inheritors, the word 'substance' is made use of, and means *worldly wealth*. Thus the testator sets out. He then proceeds to dispose of his property, and in the course of his will provides for everybody,—for his mother, his uncle, his mistress, his natural children, his cousins,—and makes a particular provision for his heir-at-law, which provision is to continue during his life. To be sure, that circumstance alone would not exclude the heir from taking any thing not disposed of. But it furnishes an argument in favor of the construction contended for by the representatives of the mother; namely, that he intended the remainder of every thing to go to her by the subsequent residuary devise, and that he did not mean to die *intestate* as to any part of his property. He adds the sweeping clause, after all the provisions before mentioned, at the same time not meaning to make his mother executrix. What purpose, then, was it to answer? I confess I can see none, unless it were to dispose of all his worldly substance agreeable to his declaration in the introductory part of the will. The words are, 'I also give to my mother all the *remainder and residue of all the effects*, both *real and personal*, which I shall die possessed of.' Now, is the true construction of these words to be confined to a gift of *personalty* only? Most clearly not, because the testator has expressly added the word 'real' to the word 'effects.' Do the words 'real effects' in law mean *real chattels* only? No authority has been produced to show that they do; and, in point of fact, there was but one lease belonging to the testator in this case which could come under that description: consequently, if the construc-

tion contended for by the defendant were the true one, only that lease would pass, which would be to narrow the construction of the word 'real' very much indeed. The natural and true meaning of *real effects*, in common language and speech, is real property; and *real and personal effects* are synonymous to substance, which includes every thing that can be turned into money. In several clauses of the bankrupt laws which make it felony in a bankrupt to conceal, remove, or embezzle any part of his goods, wares, merchandise, moneys, or *effects*, the word 'effects' is made use of in this sense. If that be the true construction, there can be no doubt but that the words '*remainder of real effects*' include the reversion of every thing not disposed of, in which case no words of limitation were necessary." *Hogan v. Jackson*, 1 Cowp. 299, 307; s. c., *Brown's Parliamentary Cases*, 388.

Where a testator, having, under a treaty between England and Spain, the right or privilege of occupying a definite parcel of land for the purpose of cutting timber thereon, in the Honduras, by his will emancipated his slaves, and made the following devise in their favor: "I leave them and their heirs and assigns all my *effects*, of what kind soever, I may have in the Bay Honduras, money in Great Britain or elsewhere (my lands and effects in Jamaica excepted)," it was *held* that such right or privilege to occupy the lot of ground in possession of the testator known as Grant's Work passed to the devisees; the court saying, "It has been argued that the word 'effects' would not carry 'Grant's Work,' if that were to be treated as landed property; and further, that, the testator himself not having mentioned the 'Work,' it may be presumed that it was not intended to pass by the will. Their lordships think that the word 'effects' would pass land; and that word is certainly sufficient to pass that which at the time he made his will Grant alone had, namely, the privilege under the treaty with the Spanish government of cutting logwood on a definite piece of land which, under some arrangement with his brother settlers, had been allotted to him. As to his intention to give the 'Work' to his slaves, the whole contents of the will leave no room for doubt." *Atty.-Gen. of British Honduras v. Bristowe*, 50 L. J. R. P. C. 15.

So in North Carolina it has been *held* that the word "effects," used by a testator in disposing of his estate, will be construed to include land, where it can be collected from other parts of the will that such was the testator's intention. In this case, the testator, Dempsey Page, devised certain lands to his son John A. Page. He also made similar devises to his two daughters,

Mary and Laura, and then in *item 4* of his will said, "It is my will, that, if any of my children die without legal bodily heirs, or children, then and in that case the *effects* herein willed to them return to the balance of my children then living, or their children if they are dead, and have left any legal bodily heirs. In case of Mary and her husband, should she die first, her husband is to have the use of her *effects* during his lifetime, and then return as afore stated." John A. Page died intestate and without issue, and his wife claimed dower in his real estate, alleging that her husband, the intestate, was seized and possessed of an estate in fee. The court, however, held that the land passed under *item 4* of the will upon the death of John A. Page to his sisters; *Smith, C. J.*, saying, "The result of the controversy depends upon the interpretation put upon the word '*effects*,' used by the testator in the contingent dispositions made in the event of the death of any of the devisees without issue. If it comprehends the lands previously given, as well as the personal estate, the title of the intestate ceased at his death, and the right to dower does not attach; if the term is used in its more restricted and common acceptation, and confined to the personal property bequeathed, the plaintiff is entitled to an allotment of dower in the lands devised to her husband. 'The fundamental rule in the construction of wills,' as is said by *Battle, J.*, 'is to ascertain the *intention* of the testator, and for that purpose all the parts of the will are to be taken in view, and effect is to be given, as far as possible, to every clause.'" *Owen v. Owen*, Busb. Eq. 124. It is also a well-established rule of construction that a testator is presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context it appears that he uses them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. *Wig. Wills Prop.* 1, p. 58. That the term "*effects*" is capable of expansion so as to embrace real and personal estate, when it is seen that such is the testator's intention, from all inspection of the provisions of the instrument, is established by past adjudications. "I take '*effects*,'" says *Lord Mansfield*, in interpreting a residuary disposition of all the testator's "*effects*," both real and personal, "to be synonymous to '*worldly substance*,' which means whatever can be turned to value; and that, therefore, real and personal effects mean all a man's property." *Hogan v. Jackson*, Cowp. 304. So *Sir William Grant*, Master of the Rolls, declares, in *Campbell v. Prescott*, 15 Vesey,

507, "There is no case for the restricted sense which the grandchildren put upon the words 'all my effects whatsoever;'" adding, "*Lord Mansfield* says that the word '*effects*' is equivalent to property or worldly substance." To the same general purpose are the cases of *Chillcott v. White*, 1 East, 394; *Andrews v. Lainchbury*, 11 East, 290; *Franklin v. Trout*, 15 East, 394; 2 *William's Exrs.* 854; *Theo. Law of Wills*, 159. In a recent case which came before the vice-chancellor, *Sir Richard Malins*, the authorities were carefully reviewed, and it was decided that by the use of the words "I give all the rest, residue, moneys, chattels, and all my other effects," notwithstanding the association of the latter words with articles of personal property before enumerated, "the testator meant to include every thing he had in the world, whether *real property* or *personal property*." *Smyth v. Smyth*, 8 Law Rep., Chanc. Div. 561. There are cases where the will disposes of "*effects*" with very comprehensive descriptive terms following, such as "of what nature soever," — *Hick v. Dring*, 2 M. & S. 448, — or where the language is, "all my effects," — *How v. Earles*, 15 M. & W. 450, — in which it is held that land was not embraced; but in all it is conceded that a larger scope will be given to the disposition where it can be collected from other parts of the will that such was the testator's intention. Thus, in the former of the two cases last cited, it is said, "If the court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff. The inquiry recurs as to the meaning of the testator in the use of the word found in the clause limiting the property given in remainder, and we are at no loss in arriving at the sense in which he employs it. *First*, Land only is devised to Mary, and in the concluding part of the fourth item it is in direct terms provided, that, in case of survivorship, her husband shall have the use of *her effects* during his lifetime. "*Effects*" are here applied to the devised land, and can have no other significance, for there is no other property to which they can attach. *Second*, Land is also given to the defendant Laura, with an allowance of provisions for the support of herself and children for one year. It cannot be supposed that articles intended to be consumed were to return to the other children in the event of the death of Laura without issue, and there is nothing but her land upon which this device can operate, so that it must have been in the mind of the testator when he described it as part of the '*effects*' thus limited. Whatever may be the significance of the word unexplained by the context, it is plain that in choosing it the testator meant to include the devised

lands given to each of his children, and in this sense we must give it operation." Page *v. Foust*, 89 N. C. 447.

Where a testator made a devise to E. F. of "all my *estate and effects* whatsoever and wheresoever," etc., in trust, to pay funeral expenses and debts, and then subjected "my said *effects* bequeathed to E. F." to the following legacies, amongst which was a gift to her nephew W. S. of "the house his father now dwells in at the decease of his said father," the rest being pecuniary legacies, and then, after desiring all the above legacies to be "paid out of my *effects* by the said E. F.," gave "all the *rest and remainder* of my said *effects* to the said E. F., her heirs and assigns forever," it was held that E. F. took the remainder in fee in the house left to W. S. on the death of his father and himself; the court, *Le Blanc, J.*, saying, "There is no doubt that the word *effects* is sufficient to pass real estate, if it appear to have been used by the testatrix in that sense; and the only question is whether, by the residuary clause, giving all the residue and remainder of her said *effects* to E. F., her heirs and assigns forever, she meant to give her real as well as personal *effects* which she had not before disposed of. We must collect her intention as to what all the residue embraced, from the disposition before made by her as to the particular parts. She begins by giving all her *estate and effects*, whatsoever and wheresoever, to Elizabeth Franklin, in trust, in the first place to pay her debts and funeral expenses; then, dropping the word *estate*, she subjects her said '*effects*' bequeathed to E. F. to the legacies which follow, amongst which is contained a disposition of the house in question: in this she gives by implication an estate for life to the father, and then she gives it to the son without words of limitation, by which the son also took an estate for life only; and then she gives all the rest of her said *effects* to E. F. and her heirs forever. The question is, whether she did not thereby mean to give her every thing in the realty which she had not before disposed of. I suspect, indeed, that she thought she had given all her interest in the house to the son by giving it to him in general terms, after the death of his father; but she uses no words of limitation, and therefore he only took for life. But it is clear that she meant to give, by the residuary clause, every thing that she had not before given; and, however we may suspect that she thought she had given the fee in the house to the son, yet we cannot give him that which she has omitted to give him." Denn d. Franklin *v. Trout*, 15 East, 394.

A testator by his will, after making several pecuniary bequests, devised to his sister-in-law, A. W., the income of a certain

cottage called "Burge's Cottage," and her living in it if she thought proper; and to another sister-in-law, E. W., the half of a certain estate; and all the rest and residue of his goods, etc., and also his lands, etc., he gave to his wife for life, with power "to give what she thought proper of her said *effects* to her sisters, the said A. and E. W., for their lives." And after the death of his wife and her two sisters he gave all his lands, etc., to his heir-at-law. It was held that under this will the widow had power to devise to her sisters the real as well as the personal estate before bequeathed to her by her husband, and, A. W. having died before the widow, that the latter might among the rest bequeath the cottage, in which A. W. had a life interest, to her other sister, E. W.; the court, Lord Kenyon, C. J., saying, "It is very plain what the testator meant. After giving a few legacies and bequests, he devises all the residue of his property, both real and personal, of every description, to his widow for her life, and then allows her to give what she thinks proper of her said *effects* to her sisters for their lives. This description must apply to the property which he had been before dealing out,—amongst which *Burge's Cottage* is mentioned by name, the income of which he had given to A. W., and her living in it if she thought proper,—over all of which not before disposed of he meant to give his widow a control. And this is confirmed by the terms of the devise to the heir-at-law, who is not to take any thing till after the death of all the sisters." Doe d. Chillingworth *v. White*, 1 East, 33.

A testator made his will, by which he gave two legacies, and then gave his "sheep and all the rest, residue, moneys, chattels, and all other my *effects*," to be equally divided among his four brothers. The father of this testator died two months before the date of this will, having devised certain real estate to the testator. It was held that all the freehold as well as the personal estate of the testator passed under these words. In this case *Vice-Chancellor Malins* reviews most of the cases to date (1878) at too great length to be quoted fully. His opinion is in brief as follows: "The testator in this case having both real and personal estate, the question is, whether the words of his will are sufficient to pass real estate. . . . My opinion is, that the testator could not have intended to die intestate, but he intended to dispose of every thing he had in the world. I believe, in using the words 'all the rest and residue,' he meant the rest and residue of every thing; that is, all the property of every description which he had not already given away. Then he adds, 'moneys, chattels, and all other my *effects*.' It has been argued that the word '*effects*' will not

pass real estate. Why it should not I cannot tell, but I certainly do not agree with the argument. There is the decision of *Doe v. Dring*, 2 M. & S. 448, which is, no doubt, the decision of a very eminent judge, *Lord Ellenborough*; but, like all judges at that period, he felt himself bound by the peremptory rule of law 'that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will.' . . . Mr. *Justice Bayley* in that case says, 'I have considerable doubts upon this case.' Then he says the word 'effects' might be made to pass the real, or might be confined to personal, estate, according to the context; but 'effects' *per se* had never been held to pass real property, and so they came to the conclusion that the real estate did not pass, although they admitted that the testator intended to give the whole of his property. In the case of *Glover v. Chancellor* (not reported) I expressed my dissent from that decision, and I do again express my dissent from it, and in such a case I should decide that every thing passed. . . . The authorities relied on are, in my opinion, entirely exploded. . . . Now, as regards the earlier cases, I have expressed my opinion that those cases, although decided by great judges, were decided at a time when there was that extraordinary leaning in favor of the heir-at-law. I believe, however, that they are not now considered as authorities, and I unhesitatingly express my opinion that they are no longer law. The decisions in more recent times have been very different, and are much more liberal in the construction of wills. . . . The same doctrine was applied in *Milsome v. Long* (3 Jurist N. S. 1073; see *infra*), where the vice-chancellor held that the words 'stock-in-trade, money, book-debts, and effects' carried the reversion in real estate; and in *Litchfield v. Horncastle*, 7 L. J. Ch. 279, the Master of the Rolls expresses an opinion very much in accordance with what I have said. *Lord Langdale* there observed, 'A great deal might be said as to the meaning of the word "effects." It was understood by *Lord Mansfield* to be equivalent to property or worldly substance. It has been certainly considered that its primary interpretation is to be confined to personal estate only, and that, unless it is connected with some other words, it will not comprise real estate. I do not mean to express any opinion of my own on that subject. I am not aware that the word "effects" may not be as applicable to real estate as to personalty, but I do not think it necessary to give any decision on such a point.' *Lord Langdale* must have thought, as I think, that the word 'effects' would carry every sort of property which the testator had. . . . The doctrines of the court

are more liberal at the present day. I am glad to find that the views I have expressed are supported by Mr. Jarman, who says, after referring to the cases I have cited, 'The last cases are certainly important authorities, and they demonstrate the inclination of the courts at the present day to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed.' My duty is to look at the words; and, finding here a man, a farmer unacquainted with law, using words which in the ordinary acceptance would mean every thing he had, and intending, as I believe, to give his property generally, I will do what I can to carry out his intention. By these words, 'I give all the rest, residue, moneys, chattels, and all other my effects,' I am of opinion that the testator meant to include every thing he had in the world, whether real property or personal property, and to pass all the residue of every kind soever not otherwise disposed of; and I also think that the testator did not intend to die intestate as to any of his property, but to pass every thing under his will." *Smyth v. Smyth*, L. R. 8, Ch. Div. 561.

A testator made his will, by which he devised to his wife the rents of all his lands during widowhood, "to be afterwards divided into three equal parts, according to value, between my three sons, Thomas and John and William." He then accurately enumerated his real estate, and continued, "My stock-in-trade, money, book-debts, and what other effects not cluded in the above statement to be equally divided between my two sons Thomas and William." The clause devising the rents contained no words of inheritance, and, the three sons having died, the heir-at-law claimed the real estate. A copy of the original will being inspected by the court, it appeared that a fresh line was used for each parcel of real estate enumerated. It was held that the word "effects" carried the reversion in the lands to the second set of donees in fee, subject to the life estate of the three first donees; the court, *Wood, V. C.*, saying, "If this illiterate testator had made his will thirty-four years later, there would have been no difficulty in giving to his words that full meaning which was, no doubt, his real intention. But under the old law the inheritance, of course, cannot pass, unless I can find some of the devices which have been laid hold of in different cases, in order

to effectuate the manifest intention of the testator. . . . The question is, whether the testator, by 'the above statement,' meant the enumeration, such as it is, of his personal property, or whether he referred also to the full and accurate enumeration of his real property; whether this general expression stands in contrast to the minute statement of his real estates, or whether it is to be confined to personal property *ejusdem generis*, but neither stock-in-trade, money, nor book-debts. The copy of the original will handed up to me, confirms the view at which I have arrived; and this is one of the cases in which I feel a doubt whether or not to look at the original will, to see if any light is thrown on the point by the form of the written document; but the enumeration of the several particulars in separate lines seems to me to confirm the opinion that the testator meant to include real or personal not given before, and I can therefore follow the two cases which were cited before *Lord Langdale* and in the Queen's Bench, — *Litchfield v. Horncastle*, 2 Jur. 610, and *Doe d. Chilcott v. White*, 1 East, 33, — where the word 'effects' has been held, in connection with the context, to pass real estate. And although it may seem a little fine-drawn to say that the reversion in the very things which the testator has enumerated should pass under the description of *effects* not included in the enumeration, still, as I have come to the conclusion that this general gift passes all his property which did not pass before, and as the reversion beyond the life estate did not pass by the previous words, it must pass under this residuary gift; and it therefore passed to Thomas and William in fee." *Milsome v. Long*, 3 Jurist (N. S.), 1073.

Where, however, a testator has made disposition of his real estate, this disposition will not be overthrown by a subsequent clause disposing of "all his effects." Thus a testator devised a copyhold estate to his wife, upon trust to sell, and invest the money in the funds, the interest and dividends thereof to be to her use. He also gave and bequeathed to her all his "effects whatsoever and wheresoever" for her maintenance, upon full trust and confidence that she would at her decease divide it among his children. It was held that under this will the widow was entitled to the income derived from the proceeds of the copyhold estate for life only, with a resulting trust as to the capital for the heir, but to an absolute interest in the personal estate; *Sir William Grant, M. R.*, saying, "The wife took only an interest for life in the money to be produced by the sale of the copyhold estate. This is an express trust, not a discretion: a trust to sell, and the money to be laid out. The testator

could not intend to give her the capital absolutely: the words exclude that supposition. The question then is, whether the subsequent words, 'all my effects,' enlarge the first words, giving only interest for life. He could not have intended to give her the absolute interest in that in which he had before given her a life interest. If I throw the capital of this fund into the general residue, it necessarily gives her the whole. I cannot agree that there are two residues. Nothing points to a double residue. If the wife takes only an estate for life by the first words, I cannot give her the absolute interest by the subsequent words. Here is no declaration of the trust of the money, produced by the sale of the copyhold estate, beyond the life of the wife. That, therefore, must result to the heir. The operation of the word 'effects' is controlled by the former part of the will, which gives her only an interest for life." *Wilson v. Major*, 11 Vesey, 205.

But where a testator fails to dispose of the reversion in fee of his real estate, the right of his heir-at-law to the said reversion is not defeated by the fact that he is given in the will a rent charge for life, payable out of the said real estate. Thus a testator by her will disposed of her real estate to two persons for life, reserving a rent charge out of the same, payable first to her uncle for life, and then to her heir-at-law for life, which, together with the repairs during the term, should be considered as *his rent* for the said farm. She then proceeded to dispose of her personal property, and finally bequeathed and devised "all the rest, residue, and remainder of her effects, wheresoever and whatsoever, and of what nature, kind, or quality soever (except her wearing apparel and plate), to certain nephews and nieces, to be equally divided between them by her executors." Held, that the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir-at-law; the court, *Le Blanc, J.*, saying, "The question arises on the word *effects* as used in the residuary clause, from whence we are to collect what was the intention of the testatrix. *Effects* standing alone must certainly be taken to mean personalty; but it may be extended, beyond that, and include real estate, by other words used showing such an intent. But no other words are used in this will which carry it beyond its natural signification. In the first part of her will she disposes of her real estate. And in the clause which has been alluded to in that part, I think she must have meant the word *their* instead of *his rent*; for she gives the estate to two persons for their lives, subject to a rent charge of £10 a year, which rent charge she first gives to her uncle for life, and then to her brother. This, there-

fore, was to be paid by those who were in possession of the estate during the lives of the uncle and brother. But there she stops in the disposition of her real property, and we are left in the dark as to how she intended to dispose of the estate afterwards. She then takes up the disposition of her personal property, and, after several specific bequests of it, she gives the residue of her *effects* in the manner stated. Taking *effects* in the natural meaning of the word, all the words in the will coupled with it will apply to it in that sense. Then she excepts out of these *effects* particular species of *personal* property, and then she gives the residue to be divided by her executors. The reading of the will with this obscurity about it must lead us to throw the real estate on the side where the will has thrown it, unless we can discover from other words of the will a contrary intent. But I cannot find any thing to lead to such a construction; and if we are left in the dark, which it must be confessed we are, as to what her further intent was in respect to the reversion of the real estate, that is sufficient to let the heir-at-law take." *Camfield v. Gilbert*, 3 East, 516.

By statute in New York, in the act legislating on moneyed corporations, it is declared that "the term 'effects,' as used in this title, shall be construed to embrace every species of property, real and personal, including things in action." 2 Rev. Stat. N. Y. (7th ed., 1882) p. 1371, § 54.

What Kinds of Personality included in. — Debts. — "Effects" is a most general word, and includes assets of every kind; not only property in hand, but even choses in action. Thus, in Ohio it has been held, *per curiam*, "that, under Rev. Stat. § 6020, an administrator or executor appointed to fill the place of one who has resigned or been removed, etc., is entitled to receive from the latter his indebtedness to the estate on account of assets received and converted to his own use. The language 'personal effects and assets of the estate unadministered,' as used in this section, includes such indebtedness, as well as such 'effects' and 'assets' as remain *in specie*; and he may maintain a suit against such former administrator or executor, and his sureties on his administration bond, and recover the same." *Slagle v. Entrekin*, 9 Western Rep. 403.

So where a testator domiciled in Great Britain made his will containing the following clause, "I hereby give to my third son all my estate and effects in the island of Mauritius," with a residuary clause for the benefit of all his children, and it appeared that shortly before his death the testator had sold certain real estate in the Mauritius, and the purchase-money was due to him from persons residing in Mauritius, on the administration of the estate, the

question came up, whether the words "all my estate and *effects* in the island of Mauritius" included *debts* due from persons resident in that island. It was contended on behalf of the testator's children other than the third son, as residuary legatees, that debts had no locality, and that, if they were to be considered as properly situated anywhere, the place of their situation was the domicile or abode of the creditor; and that, therefore, a general gift such as this of property in a particular place did not include debts from a person who happened to be living there, unless the testator had given some other indication that such debts should be included in the gift. The court held that *debts* due from debtors in the Mauritius would pass under the words in this will, "estate and *effects* in Mauritius;" *Fry, J.*, saying, "The question is a simple question of construction; that is to say, what meaning of the words is to be attributed to the testator. Now, it appears to me that the words are sufficient of themselves, and, looking at the position of the testator's affairs, and the relation which existed between some of the debts and his real property in the island of Mauritius, it appears to me that the meaning of the testator is to include debts due to him from persons in the Mauritius. The courts have had occasion to consider the meaning of similar general words with reference to debts." *Guthrie v. Walrond*, 52 L. J. Rep. Ch. 165.

What Kinds of Personality included in. — Ships. — In August, 1825, one Patrick Usher, a merchant of Wilmington, N.C., purchased from John Welsh of Philadelphia a certain ship. The bill of sale was not given to Usher until March or April, 1826, when he gave three notes of hand to Welsh for the purchase-money. Upon the register taken out by Usher at the custom house in Wilmington was indorsed a statement of the terms of purchase, in which Usher agreed that the ship should not be sold until the notes were paid. Patrick Usher, being about to go to the West Indies on business, gave his brother, William Usher, jun., a power of attorney to transact his business, which contained the following clause: "To sell all or any part of such goods, merchandise, or effects of the said Patrick which may come to his possession or knowledge;" but the power of attorney gave no special authority to make a sale and transfer of this vessel. Patrick Usher became insolvent in the summer of 1826, and in December of that year his brother, William Usher, jun., by virtue of the said power of attorney, made a sale or transfer of the vessel to John Welsh, the original vendor, for the nominal consideration of eight thousand dollars, the real consideration being, however, the balance due on the

notes given by Usher to Welsh. In January, 1827, the vessel arrived in the port of Charleston, whereupon she was attached by certain creditors of Patrick Usher. In an action to determine the title to the vessel between Welsh and the attaching creditors, the court *held* that a *ship at sea* is included in the general term "effects," and would pass in a conveyance under the words "goods, merchandise, and effects;" *Johnson, J.*, saying, "The letter of attorney from Patrick to William is very broad in its terms; the specifications extend to almost every thing in which he could have any concern, and authorizes him to act for him and in his name: amongst other things, that he might sell 'all or any part of such goods, merchandise, or effects of the said Patrick which may come to his possession or knowledge.' The first objection is founded upon the notion that a ship, on account of its magnitude and importance, ought not to be classed amongst goods, merchandise, and effects; and this idea is favored by some of the civil law writers (2 Valin, 223; 4 Robertson, Ad. Rep. 388). But the common law knows only two descriptions of property, real and personal; and ships, for the most obvious reason, fall within the latter. They do not, it is true, fall within the common acceptance of the terms 'goods' or 'merchandise;' but the word 'effects' has a very extensive signification, and, according to Lord Mansfield, is equivalent to property or worldly substance, and in a bequest passes the testator's whole personal estate. *Campbell v. Prescott*, 15 Vesey, 507. But the bill of sale for the vessel given to John Welsh by William Usher, jun., having been made in his own name as attorney, and not in the name of his principal, the court *held* that it was not well executed, and was therefore void, and decided the title in favor of the attaching creditors." *Welsh v. Parish et al.*, 1 Hill (S. C.), 155.

A libel was filed by the administrator of the estate of one Crossman against the Goodrich Transportation Company, owner of the steamer "Alpena," to recover damages for the death of Crossman, occasioned by the foundering of the "Alpena" in Lake Michigan. Upon the filing of the libel a writ of garnishment was issued requiring the Detroit Dry Dock Company to appear and make return concerning the "property" of the respondent in its possession or under its control. The garnishee made return to the writ, that it was constructing certain vessels for the Goodrich Transportation Company, the present value of which was over a hundred thousand dollars, and moved to quash the writ, upon the grounds that the admiralty rules did not authorize the issuing of the same, and that said rules only require garnishees to

answer as to the "credits and effects" of the principal defendant in their hands. The court refused to quash the writ, and *held* that *ships* and other tangible personal property are "effects" within the meaning of the admiralty rules, and may be reached by a writ of garnishment when in the hands of a third person; *Brown, D. J.*, saying, "The sole question in this case is, whether the practice of courts of admiralty in this country will authorize a garnishee to be held liable for *ships*, or other personal property of like nature, in his hands, belonging to the principal defendant. The second general admiralty rule allows, in suits *in personam*, a warrant of arrest, with a clause therein, that, if the defendant cannot be found, to attach his 'goods and chattels' to the amount sued for; or, if such property cannot be found, to attach 'his credits and effects' to the amount sued for, in the hands of the garnishees named therein. The second admiralty rule of the district court contains language of a similar import. District court rule 14, however, provides that, upon the service of a foreign attachment, it shall be the duty of the garnishee named therein to file with the clerk an affidavit containing a full and true statement of the 'property or funds' in his hands, belonging to the principal defendant at the time the writ was served and at the time the affidavit was made. It may be conceded at once that the power of this court to require garnishees to make disclosures under rule 14 cannot enlarge the power given by the second general admiralty rule in cases of garnishment, and therefore that the garnishee can only be required to make return of the 'credits and effects' of the principal defendant in his hands or under his control; and consequently, unless the word 'effects' is broad enough to include ships and other tangible personal property, the garnishee cannot be held liable in respect thereof. The word 'effects' is one of very extensive import, and is frequently used in wills as a synonym for personal estate. In *Hogan v. Jackson* (1 Cowp. 299, 304) Lord Mansfield considered it to be synonymous with 'worldly substance,' which means whatever can be turned to value, and therefore that 'real and personal effects' means all a man's property. A similar definition is found in *Campbell v. Prescott* (15 Vesey, 500, 507) and *Doe v. Earles* (15 M. & W. 450). This is substantially the definition given by Bouvier, who says that the word is equivalent to property or worldly substance, and may carry the whole personal estate when used in a will. But when it is preceded and connected with words of a narrower import, and the bequest is not residuary, it will be confined to species of property

ejusdem generis. Judge Conkling, in his work upon Admiralty (vol. 2, p. 141), concedes that the word ordinarily is one of comprehensive import, but treats it as being used in general admiralty rule 2 in contradistinction to goods and chattels, and may be supposed to refer more especially to kinds of property not strictly falling within the scope of the other terms employed, and not property susceptible of manual seizure; such, for example, as shares in the stock of corporate companies, money in the hands of a sheriff or of an agent, or the like. His opinion upon this point, however, is not supported by any adjudicated case or by any other elementary writer, and it seems to run counter to the established practice of courts of admiralty from the earliest days. In construing doubtful words in rules of practice, I think that great weight should be given to a practice which has immemorially existed, irrespective of written rules. . . . There is no doubt that, by the second general admiralty rule, an attachment is authorized against the goods and chattels of a defendant if found within the district, and in the possession of the defendant or his agent; and instead of regarding the words 'credits and effects' in that rule as used in contradistinction to 'goods and chattels,' it seems to me the natural object of the proceeding by garnishment was to enable the libellant to reach the same property — viz., goods and chattels, — if held by a third person not an agent of the owner, as well as any debts owing by such person to the owner. I regard the word 'effects' as practically equivalent to 'goods,' and including personal property, tangible as well as intangible." The *Alpena*, 7 Fed. Rep. 361.

What Kinds of Personality included in. — Limited to Articles *ejusdem generis*. — Where the word "effects" is associated with other words in a will, it is often restrained to "articles *ejusdem generis*" with those specified, as, where a testator gave to his wife "all my household furniture and effects, of what nature and kind soever, that I may be possessed of at the time of my decease," having further made her a particular bequest of two hundred pounds per year in bank securities, it was held that the word "effects" did not pass the residue of the testator's personal estate; *Sir William Grant, M. R.*, saying, "The second question arises upon the widow's claim of the whole residue of the personal estate, as passing to her under the general word 'effects.' That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles *ejusdem generis* with those speci-

fied in the preceding part of the sentence; viz., household furniture." *Rawlings v. Jennings*, 13 Vesey, 39.

Although it be the settled doctrine of equity that general expressions used in or at the conclusion of a specific bequest of goods, plate, linen, furniture, etc., are to be restrained to articles *ejusdem generis* with those particularly enumerated, and therefore not comprehending ready money or choses in action, yet, since the presumed intention of testators is the basis of that construction, if their intention appear to include, by the general words, ready money or choses in action, the terms will have that effect. This may happen when the intention is made apparent by a testator excepting out of such terms of bequest a species of personal estate that would not have passed by them. 1 *Roper on Legacies* (by White), ch. 4, § 1, p. 202.

Thus a testatrix made a residuary bequest in general terms. She then, by a codicil, revoked it as to "plate, linen, household goods, and other effects (money excepted)." It was held, that, as ordinarily the term "other effects" would not have, when thus used, included money, and therefore the codicil would not have revoked the bequest of money included in the general residuary clause, the use of the expression "money excepted" showed that the testatrix intended to include in the word "effects" all her personal estate, and not to restrain it to articles *ejusdem generis*, and that the codicil revoked the bequest of all her stock which does not pass under the word "money," her leasehold, and all her personal property, except money and bank-notes; *Lord Chancellor Eldon* saying, "With respect to the second question, the doctrine appears now to be settled in this court that the words 'other effects' in general mean 'effects *ejusdem generis*.' I cannot help entertaining a strong doubt whether this testatrix, if asked whether she meant 'effects *ejusdem generis*,' or contemplated the share of all, which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen, and household goods. The express exception of money out of the 'other effects' shows her understanding, that it would have passed by those words; that express words were required to exclude it; and, by force of the exclusion in the excepted article, she says she thought that the words of her bequest would carry things not *ejusdem generis*. This disposition must therefore be taken to comprehend all that she has not excluded, which is money only. The question then comes to be, whether stock, supposing it to be part of the residue, is

when standing by itself, and in conjunction with other words.¹

money, whether it was ever considered money in such a bequest as this. There is no instance of that. Stock does not pass by the word 'money,' and the argument is fortified by what I must, as a judge, take to be a deliberate contrast of stock and money throughout this will." *Hotham v. Sutton*, 15 Vesey, 319.

Gen. Kosciusko made four wills, — one in the United States in 1798, another in Paris in 1806. The third and fourth were made in Switzerland in 1816 and 1817. In the will of 1816 he expressly revoked his former wills, and in it he made no disposition of his American funds arising from the investment of a certain grant of money made him by act of Congress in acknowledgment of his services during the Revolutionary War. Upon his death, it was, however, contended that the second article of the will of 1817 was in effect a residuary bequest to the persons named in it, and that it included the American funds, no other disposition of these funds being made in that will. The will was in French. The article in question, translated, was as follows: "I bequeath all of my 'effects' (*effets*), my carriage and my horse included, to," etc. The court *held* that the American funds did not pass under this clause; *Wayne, J.*, saying, "The wills, then, of 1798 and 1806 were revoked by the will of 1816; and, as the testator did not make in it any disposition of his American funds, he died intestate as to them, unless the second article in the will of 1817 has the effect of a residuary bequest to the persons named in it. It is, 'I bequeath all my "effects" (*effets*), my carriage and my horse included, to Madame and to Mr. Xavier Zeltner above named.' It will be seen by the first clause in the will that they are the father and mother of Emilie Zeltner, to whom he bequeathed about fifty thousand francs of France, charged upon funds in England, in the hands of Thompson, Bouard, & Co. We shall be aided, in the construction of the second article of the will of 1817, by keeping in mind what were the relations between himself and the Zeltner family, as they are disclosed by his wills of 1816 and 1817. He makes them in both wills his legatees. . . . To the two daughters of his friend, Andrew Lewis Zeltner, with whom he had lived for fifteen years, he gives all his funds in France, amounting to ninety-five thousand francs, excepting a legacy to his executor. To the daughter of Xavier Zeltner, with whom he was staying when the wills of 1816 and 1817 were made, and where he died, he bequeaths fifty thousand francs; and it is to him and to his wife that he says, 'I bequeath all my effects, my

carriage and horse included.' From its place in the will in 1817, and from the connection of the words 'all my effects, with my carriage and horse included,' it would be a very strained construction to make the words 'all of my effects' comprehend his personal estate in the United States, it being neither alluded to in any way in this will nor in that of 1816, except in so far as it might, under the will of 1816, have been applied to the payments of the legacies given in that will upon the failure of the funds upon which they were first charged. 'Effects' in French, or the word *effets*, has the same meaning in common parlance and in law that it has in English. Its meaning properly in either, when used indefinitely in wills, but in connection with something particular and certain, is limited by its association to other things of a like kind. It is from the subject-matter of its use that intention of something else is to be implied, and that, of course, may be larger or less. In some instances, in wills, the word has carried the whole personal estate. When in connection with words of themselves of larger meaning or of fixed legal import, as there were in the case of *Bosley v. Bosley* (14 How. 391), decided at this term of the court, such a clause in a will is residuary. . . . Such being the rule, it is our opinion that the second article in the will of 1817 is not residuary, and that it has no relation to the funds in controversy." *Ennis v. Smith*, 14 How. (U. S.) 400, 420.

But in a recent English case, 1876, where a testatrix, after devising certain freehold property to her sister for life, with remainder to her brother's children, "all my plate, linen, furniture, and other effects that may be in my possession at the time of my death," and made no residuary bequest, it was *held* that the residuary personal estate passed by the bequest; *Jessel, M. R.*, saying, "I am of opinion that, under this gift, the residuary personal estate of the testatrix must be taken to pass. The words are, 'all my furniture, linen, and other effects that may be in my possession at the time of my death.' It is alleged that the words 'other effects' are to be cut down so as to mean that which is something like furniture, plate, or linen; but the answer is, that the words of a will ought to have their natural meaning given to them, unless there is some contrary intention appearing in the will. The mere fact that the testatrix enumerates some items before the words 'and other effects' does not alter the proper meaning of those words." *Hodgson v. Jex*, L. R. 2 Ch. Div. 122.

1. **Household Effects.** — Thus, under a bequest to the testator's wife, for her life, of

"all his furniture and other *household effects* in both of his residences," it was *held* that coffee in a bag, wine in bottles, and brandy in a cask, did not pass; the court, *Cranch, C. J.*, saying, "In the present case, if the coffee, wine, and brandy were bequeathed to Mrs. Foxhall, it must be because they are included in the expression 'household effects.' These words do not seem to comprehend more than the words 'household goods,' and they are used by the testator himself as equivalent terms; and in the marriage articles he has repeatedly used the words 'household furniture' as equivalent to 'household goods.' By his will he declares that his book-case, and books therein, shall be considered 'as forming a part of the household furniture which is limited to' his wife by the settlement; and if she shall choose to continue the occupation of both residences, he gives her 'all his furniture and other *household effects* in both his said residences not included in the settlement, to be held, used, and enjoyed by her in the same manner, etc., as the said furniture and other *household effects* included in said settlement.' The indiscriminate use which he makes of the expressions 'household furniture,' 'household goods,' and 'household effects,' seems clearly to prove that he considered them synonymous; and by limiting his wife to the use of the 'household effects' bequeathed in the same manner, upon the same terms, and for the same time, as the 'household effects' included in the settlement, it is strongly to be inferred that they were to be *effects* of the same kind. It had been decided, nearly a century before the date of this will, by *Lord Chancellor Talbot*, in the case of *Stanning v. Style*, 3 P. Wms. 334, that malt, hops, beer, and ale, 'which are victuals, and whose use is in their consumption, cannot, in their common, natural sense, be taken to be household goods, and pass under that denomination.' And the case is much stronger where the use of the *household effects* is limited to the life of the legatee. . . . It is evident, by the various clauses of the will which have been cited, that it was the intention of the testator to give Mrs. Foxhall those things only of which there could be use for life, and which might remain in specie at her death, and that such as would be consumed in their use were not in his contemplation, and therefore he could not intend to give them. And although from the general tenor of the will, and the solicitude it manifests to provide for the personal comfort of his wife, we may suppose that, if these household stores of coffee, wine, etc., had been the subject of his thoughts, he would probably have given them to her, yet, as it seems manifest that he did not think of them, and that he has not, in his

bequest, used such expressions as, according to settled rules of construction of wills, will comprehend them, I am compelled to say that they did not pass to her by the will. I am also of opinion that the bag, the bottles, and the cask go with coffee, wine, and brandy, as incidents thereto." *Foxhall v. McKenney*, 3 Cranch (U. S. C. C.), 206.

John Fitzgerald, by his will, gave to Elizabeth Cole his dwelling-house, garden, and premises at Ramsey, for her life, and also all and singular the household furniture and other "household effects" of and belonging to him in the said dwelling-house and premises at the time of his decease. The following articles were found in the dwelling-house and premises at the testator's death: four fowling pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, about a hundred volumes of books in general circulation, an organ, a parrot and cage, a gray pony, a cow, a haystack, and a considerable stock of wines and liquors. The question was, what articles passed to Elizabeth Cole under the bequest of "household furniture and other household effects;" and *Sir John Leach, V. C.*, said, "The words 'household furniture and other *household effects*' will comprise all property in the house and on the premises intended for use or consumption, or for the ornament thereof. Elizabeth Cole is therefore entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot, books, and wine and liquors, but not to the pony, cow, or fowling pieces, unless it is proved that they were kept for the defence of the house. If the haystack was only for use, it would pass; if for sale, it would not pass." *Cole v. Fitzgerald*, 1 Sim. & S. 189.

Means and Effects. — A testator left a holograph testamentary writing in these terms: "In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the *means and effects* in my *possession*, or belonging to me at the time of my decease, to be absolutely at her disposal." At the date of the writing the testator had no heritable property, but he subsequently acquired heritage. It was *held* that the will carried the heritage; the court, *Lord Justice Clark*, saying, "In this case the subject of discussion is a *mortis causa* settlement, written and executed by a non-professional man, without the intervention of a law agent. He does not use, nor intend to use, nor profess to use, technical language in a technical sense. . . . The will is in favor of the man's wife, and of no one else. He says his object is to prevent disputes after his death with

regard to the disposition of his 'property.' I think there is no ambiguity there. . . . He disposes of his 'property' by leaving his whole 'means and effects' to his wife. That that was meant to cover every thing, I see no reason to doubt. It is said, indeed, that in the former condition of our law it was necessary to use technical language in conveying land, and that, in that state of the law, 'means and effects' was understood to apply to movables, and not to heritage; and the question is, whether they retain that meaning still, contrary to their, popular meaning. . . . While, therefore, I do not doubt there is room for difference of opinion, I have, on the whole, no doubt for my own part that the deceased wished to include any heritage of which he might die possessed." And Lord Craighill said, in a concurring opinion, "The case is one of some nicety, but I have felt no great difficulty in regard to it. Had the only words been 'means and effects,' there would have been room for doubt; for, in their ordinary meaning, those words express movable property, and not heritage. But if we find that the testator intended to include house property, a wider meaning will be given to them. The case differs from most of those cited to us, in the testator using the word 'property' in the opening sentence, in which he says his purpose is 'to prevent all dispute after my death in regard to the disposal of my property.' It is conceded that 'property' will include land as well as movables; and there is, I think, no escape from holding that he did mean to include his heritage. It would be strange if, his purpose being to prevent disputes after his death, he intended only to prevent them as to his movable estate. He meant to prevent them as to heritage also, if he left any. Therefore, the question being what he meant by 'means and effects,' I think we must read that expression by the light of the word 'property,' and hold that he meant to include lands under his 'means and effects.'" Forsyth v. Turnbull, 15 Ct. of Sess. (Scot.) 175.

Claims and Effects.—In Texas it has been held that a power of attorney to sell "claims and effects" cannot be construed to authorize the sale of land or real estate. Cordova v. Knowles, 37 Texas, 19.

Property and Effects.—Where these words were used together in a devise, they were held to pass real estate, the testator appearing in other parts of the will to have applied the words *property and effects* to real estate; Lord Ellenborough, C. J., saying, "It is a known maxim that an heir-at-law is not to be disinherited but by express words or necessary implication. Here are no express words; but the question is, whether there be not a plain implication, from the

words used, that the testator meant to pass real as well as personal *property and effects* by the words used in the residuary clause. The word 'effects,' indeed, in its natural sense, more peculiarly imports movable personal property; but that this testator did not mean to confine it to that sense, the first sentence of his will shows. For he begins: 'As to the little money and effects, etc., I dispose thereof as follows; that is to say.' And then he first orders his chambers in Gray's Inn to be sold; that was not movable personal property: it was at least a chattel real; and, if no more, still it would show that he meant to include chattels real. But he proceeds next to devise lands, etc., freehold and copyhold; and that clearly shows, that, in his understanding of the word *effects*, it was sufficiently large to carry his real estate. He afterwards directs money to be laid out in the purchase of land to be added to his 'other adjoining property.' That gives us a standard of his meaning of the word *property*, and shows that he meant by it real estate. Then follows the residuary clause, by which he disposes of the rest of his 'money, stock, property, and effects, of what kind or nature soever,' etc. Then, having before shown his meaning of the word *effects* and of the word *property*, as comprehending real estate, are we to look for a different use of the word by other persons on other occasions, when we have an index of his own mind to resort to in the very instrument before us, where he has told us that by those words he meant real estate?" Doe d. Andrews v. Lainchbury, 11 East, 290.

Where by the terms of a partnership, at the expiration thereof an account was to be taken, and a valuation made, of all the "property and effects," with the value of the respective shares therein, the said *property and effects* to become the absolute property to one partner, upon payment of the debts and of the other partner's share in such *property and effects*, it was held that the good will of the business was an asset of the copartnership, and as such must be valued as part of the *property and effects*. Reynolds v. Bullock, 26 Weekly Rep. 678.

Goods, Chattels, and Effects.—In construing these words in an assignment for the benefit of creditors, the court held that they would include choses in action; Rogers, J., saying, "The clauses upon which the plaintiff in error mainly relies are those in the commencement of the assignment, and the clause in the deed where the assignor, after enumerating particular articles, proceeds to convey other articles of furniture, goods, and chattels and effects, which he owned and possessed. 'Other articles' is as strong an expression of intention as if the grantor had conveyed 'all other arti-

cles;' for if a man grant *omnia bona et cattalla sua*, all his goods and chattels, real and personal, pass. 2 Roll. Abr. 58 l. 17. So if he grant *bona sua*, without saying *omnia*. 2 Roll. 58 l. 17. Sir William Blackstone in his Commentaries, second book, p. 388, appears to consider that the term *chattels* comprehends all personal property, except what is denominated real estate. It is expressly so in the Norman Code, where it is put in opposition to a heritage or fief, which, according to us, is a real estate; the consequence of which, as deduced by the learned commentator, is, that in both laws a chattel is whatever comes under the appellation of personal estate. The word *goods* is *nomen generalissimum*, and, when construed in the abstract, the term will embrace all the personal estate of the testator, as bonds, notes, money, plate, furniture, etc. And such is its effect by the canon law as well as by the common law, which seems to have adopted the former. *Ryall v. Rolle*, 1 Atk. 180, 182; *Crichton v. Symes*, 3 Atk. 62; *Moore v. Moore*, 1 Bro. C. C. 123. Such is the effect of the word 'goods' in all cases where the bequest is of 'goods' generally. And this proposition is only untrue where the testator, instead of bequeathing his goods generally, restricts the import of the words by limiting its effect to those in a particular situation, as by specifically bequeathing all his goods in the house of A.; in such and in the like instances coming within the same reason, since the goods given are connected with a subject in its nature showing the sense in which the term was used by the testator, there the term will be controlled and limited in its signification. 1 Roper on Legacies, 189. The effect of 'goods and chattels' is the same in a deed of assignment for the benefit of creditors, unless there is something in the instrument indicative of an intention to restrict the general import of the words. The intention of the parties governs as well in deeds as wills, unless where the import of the deed is restrained by well-defined technical rules of construction. The term 'goods and chattels' includes *choses in action* as well as those in possession. *R. v. Ford*, 12 Co. 1; *Ryall v. Rolle*, 1 Atk. 182. The term 'chattels' is more comprehensive than 'goods,' and will include animate as well as inanimate property; and so of the term 'effects;' for the term 'goods' will not embrace fixtures, but the word 'effects' may. *Lee v. Risdon*, 7 Taunton, 188; *Salmon v. Watson*, 4 J. B. Moore, 73; *Pitt v. Shew*, 4 B. & A. 206. The term 'effects,' both real and personal' in a will, passes freehold estate, and all chattels, real and personal. 2 Chitty's Blackstone, in the note. Toller, in his 'Law of Executors,'

uses the term 'effects,' as including *choses in action*. In his third chapter he treats of the interest of the executors in the testator's 'choses in action.' He speaks of the testator's 'effects,' which were not in his possession at the time of his death, and in this class he treats of *choses*, or things, *in action*. And we come to the same result if we adopt the popular signification of the term. It means such funds in the hands of the executor as may be made effective or available for payment of debts or legacies." *Dowdel v. Hamm*, 2 Watts (Pa.), 61.

Goods, Effects, and Credits. — One Darling, a sheriff, collected a sum of money on an execution issued upon a judgment, in which Bailey was the creditor and Caleb Wilder was the debtor. While Darling held this sum of money, and prior to the date of the return of this execution, process was served on him, in foreign attachment, as garnishee, wherein one Samuel Wilder was plaintiff and Bailey defendant. It was held that the sheriff was not liable to a foreign attachment; *Sedgwick, J.*, saying, "The title of the Act" (giving this process of foreign attachment) "is, 'An act to enable creditors to receive their just demands out of the goods, effects, and credits of their debtors, when the same cannot be attached by the ordinary process of law.' The preamble recites, 'Whereas the goods, effects, and credits of persons are oftentimes so intrusted and deposited in the hands of others, that the same cannot be attached by the ordinary process of law, to satisfy such judgments as may be recovered against such persons;' to remedy which, it enacts 'that goods, effects, and credits so intrusted and deposited may be attached,' in whose hands or possession soever they may be found, 'by an original writ in any personal action excepting detinue, replevin, actions on the case for slanderous words or malicious prosecution, or actions of trespass for assault and battery.' So that goods, effects, and credits so intrusted and deposited are attachable on various actions for torts, such as *trover*, etc., and even in actions of trespass *quare clausum fregit*. This is a very extraordinary, and, as far as I know, unprecedented, authority for interfering in contracts, and a strong reason why a strict construction should be given to the statute. With this rule for the construction of the act, the question arises, Is money collected by a sheriff, on an execution, such goods, effects, and credits, so intrusted and deposited in his hands as to be attachable by a writ against the judgment creditor? 1st, Is it goods, effects, and credits of the judgment creditor? 2d, Is it so intrusted and deposited in the hands of the sheriff within the meaning of the act? 1st, Is such

money the *goods, effects, or credits* of the judgment creditor? I think not. It is neither the *goods* nor *effects* of the creditor. There cannot exist a property in any subject whatsoever, so as to constitute it the *goods* and *effects* of an individual, without an ownership in the identical subject. But in this case Darling, the officer, was under no obligation to pay to Bailey the identical money he received of Wilder, the judgment debtor, which he would have been were it either the *goods* or *effects* of Bailey. This question is decided in the case of *Turner v. Fendall*, 1 Cranch, 117, determined in the Supreme Court of the United States. The chief justice, in delivering the opinion of the court, has considered many of the cases on this subject. It appears to have been the unanimous opinion of the court that money collected by an officer is not, while in his hands, the property of the creditor. I have no doubt of the correctness of this principle, from all the notions which I have entertained as to property in personal chattels. But in that case the court does not seem to have adverted to the incalculable mischiefs which must result from the establishment of a contrary principle, in the means it would afford to prevent the execution of judgments of court. Neither can this money, in my opinion, be considered as a *credit* in the hands of the officer. There cannot be a credit without a creditor and a debtor. There is nothing, in the reason of the thing, resulting from the relation of a judgment creditor and an officer who has collected money for him, which renders the one a creditor and the other a debtor. There is nothing said in any of the books which implies that that relation exists between them. On the contrary, money so collected is in the custody of the law, and the sheriff is the trustee for its safe keeping. Money, then, I think, under such circumstances, is not the *goods, effects, or credits* of the judgment creditor in the sense of the act." *Wilder v. Bailey*, 3 Mass. 288.

In *holding* that the words "*effects* and *credits*," as used in the ancient writs of attachment, are sufficient to authorize the attachment of a legacy in the hands of an executor or administrator, the court, *Walton, J.*, said, "It was decided, in *Barnes v. Treat*, 7 Mass. 271, that an executor could not be charged as the trustee of one to whom a pecuniary legacy was bequeathed by the will of the testator. But the law has since been changed, and a legacy due from an executor or administrator may now be attached by trustee process (R. S. c. 86, § 36). And the only question to be decided in this case is, whether it can be done under the old form of writ, which avers that the supposed trustee has in his

hands '*goods, effects, and credits*' of the principal defendant, but makes no mention of the legacy, as such. We think it can. It is true that, in the case above cited, the court expressed the opinion that legacies could not be regarded as '*goods, effects, or credits*.' But when the legislature afterwards declared that legacies might be attached by trustee process, and yet made no mention of any change in the form of the writ, we think it was equivalent to a legislative declaration that legacies should be regarded as included in one of those terms. And certainly it would be no very great stretch of the meaning of the word '*effects*' to hold that it includes a pecuniary legacy. It is certain that, in many of the sections of the chapter on trustee process, the word '*effects*,' or the word '*credits*,' must be construed as including legacies, or an executor or administrator, when summoned as a trustee, will be deprived of very important rights to which others are entitled. So will the plaintiff in the suit (see §§ 23, 46, 64, 67, 73, 76). And we think the words '*effects* and *credits*,' as used in our trustee writs, are sufficient, under our statute, to authorize the attachment of a legacy in the hands of the trustee." *Cummings v. Garvin*, 65 Me. 301.

Goods, Merchandise, or Effects. — Under a Missouri statute, as follows, "If any person or persons knowingly and designedly, by any false pretence or pretences, obtain from any other person or persons, moneys, *goods, or merchandise, or effects* whatever, with intent to cheat or defraud such person or persons of the same, he shall, on conviction," etc., it was *held* that obtaining bills of exchange by false pretences is an indictable offence under our statute, the word "*effects*" in the statute embracing bills of exchange. In this case the court, *McGirk, C. J.*, said, "The first question is, Will the word '*effects*' embrace a bill of exchange? This appears to be a question of construction. The design of the legislature seems to have been to embrace every kind of case; they therefore, after mentioning all sorts of personal things in possession, say, or '*effects* whatever;' no doubt intending to embrace something more than money, goods, or merchandise. By name, *effects* will embrace lands, tenements, etc. *Effects* in law must mean every thing which is subject to the laws of property and ownership, whether real or personal; and of the personality, whether of possession or in action. A bill of exchange is not money, but is a security for money, because it contains the proof that money is due, and a promise to pay it. It is also a species of merchandise, or, rather, answers the end of money in passing like money. It is *effects* within the meaning of the statute, and this court have already decided that promissory notes are

effects (see the case of the Bank of Missouri *v. Douglass*). But it is said these bills are not *effects* till they have passed out of the hands of the drawer. My opinion is, that if A. by false pretences cheats B. into making a bill of exchange to be delivered to him, and to be used by him, that this is cheating B. of *effects*, or means of living. The statute was made to prevent the wicked and cunning part of mankind from preying on the less wicked and cunning; to protect the unwary; to be the guardian of the ignorant and unwise. The end and the means by which the fraud is effected is perfectly immaterial. Experience has shown that men grow cunning in new devices as speedily as law can be made to prohibit the old. The statute, therefore, uses general words, and prohibits the act to be done, without regarding the means by which it is effected. . . . If the bills passed from Newell, Orton could not even avoid them, in the hands of innocent holders. The object of the statute was, to throw a mantle of protection round men's rights, whether in possession or action. Here, by false pretences, a right or chose in action has been obtained; it is an *effect*, and the transaction is in an eminent degree the object of criminal law. And this opinion as to the exposition of '*effects*' is not singular to this court. The case came up directly, in the court of exchequer chamber, before the twelve judges. The case is *The King v. Aslett*, reported in 2 Leach's Crown Cases, 958, reported in 1808. The indictment is upon the statute of 15 G. II.; the statute enacts, 'that if any officer or servant of the bank, being intrusted with any note, bill, dividend, warrant, bond, deed, or any security money, or other effects belonging to the company, shall secrete, embezzle, or run away with such note, *effects*, etc., he shall be guilty of felony,' etc. The prisoner was a clerk, and charged with embezzling exchequer bills bought by the bank; but the bills were not signed by the right person, and so, not good as such. The question was, Were they *effects* of the bank? It is proper to remark here, that the prisoner had been indicted under said act for embezzling the bills as exchequer bills, and discharged because the bills were not signed by the right person, and so they were not exchequer bills; and then the question on the second indictment was, Were they '*effects*'? *Lord Alvanley, C. J.*, in delivering the opinion of the twelve judges, says (p. 972), '*They are effects*. This word is of a very comprehensive signification; it is not, in its legal acceptance, confined to any particular description of property, either in kind or in value, and was probably intentionally used by the legislature, with a view to throw every possible protection round every possible species of property which the bank could possess. But

whether considered as *effects* or securities, or mere papers, they are certainly valuable; for they give the legal holder a right and title, which cannot be defeated, to call on government to pay the moneys they were intended to secure.' And use an instance to show that if an executor found these papers among the papers of his testator, and should destroy them, he would be guilty of a *devastavit*, and say that these papers would be valuable *effects* of the testator." *State v. Newell*, 1 Mo. 248.

Goods, Specie, and Effects.—The terms of a policy of insurance were upon "*goods, specie, and effects* at and from," etc. The captain of the vessel claimed under this insurance three thousand pounds, advanced by him for stores in the course of the voyage, and for which he charged respondentia interest. Upon the question whether the captain's interest as to the three thousand pounds was covered by the words of the policy, "*goods, specie, and effects*," a verdict was found for the plaintiff. On a rule for a new trial, it was argued that, the captain having disbursed money for the use of the ship, for which he had charged respondentia interest, it would not come under the words in the policy, "*specie or effects*." It was a respondentia or bottomry interest, though not by bond, or, at all events, in the nature of a respondentia or bottomry interest, and ought to have been insured as such. But the court discharged the rule, *Lord Mansfield* saying, "There is a usage known to the parties, under which they contract. This kind of interest has been usually covered by this form of insurance. On that ground I think the insurance ought to be held sufficient." *Gregory v. Christie*, 3 Douglas, 419.

Securities or Effects.—A prisoner was tried and convicted for embezzling certain *effects* belonging to the governor and company of the Bank of England; the said *effects* consisting of certain papers, partly printed and partly written, purporting to be bills, commonly called exchequer bills. It was admitted on the part of the prosecution that these bills were not valid and legal exchequer bills, having been signed with the name of Lord Grenville, the auditor of the exchequer, by a person not legally authorized to sign for him, but that they had been issued as good and valid bills, and the governor and company of the bank had bought them and paid for them as such. Judgment was respited on an objection that the papers in question were not *effects* within the 15 Geo. II. c. 13, which provides "that if any officer or servant of the said company, being intrusted with any note, bill, etc., or any security, money, or other *effects*, belonging to the said company, or having any bill, etc., or any security or *effects* of any other person, etc., lodged or

deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or run away with any such note, bills, etc., security, money, or effects, etc., every officer or servant so offending, etc., shall," etc. The case was argued before the judges in the Exchequer Chamber, and the conviction was sustained; *Lord Alvanley* saying, "The more important question was, whether, on a true construction of the 15 Geo. II., the bills or papers stated do, in point of law, fall within the words 'effects or securities,' meant to be described in the act of Parliament. On this point the judges have not been unanimous, but a majority of them are of opinion that they are *effects or securities* within the true meaning of the act. That clause runs thus: . . . In the present case the bank had bought and paid for the bills in question; they had become the fair and honest property of the bank for a valuable consideration. This is allowed on all hands; but still, it was argued that they are not such *effects or securities* as fall within the true meaning of the act of Parliament, because, though they are unquestionably of a certain, they are not of any positive, intrinsic value. Now, whatever the bank have of their own, or whatever should be deposited with them as bankers by anybody else, was expressly protected from the embezzlement of their officers or servants by the words of the act; and though the bills in question may not on the face of them be of any descriptive legal value, yet they carry about them such a consequence at least as may make their preservation of infinite importance to the bank. In that view, therefore, they have a value. But there is another answer that appears, indeed, decisive: though they may not be, in strictness of expression, from the defects stated in their signature, the very exchequer bills they would be were that defect removed, yet the government of the country is notwithstanding pledged to pay them, even as as they are. They have been issued under the authority of Parliament; they were given as valid bills; and the holders of them have as strong a claim, I will not say on the honor only, but on the justice, of government for payment, as if they were technically correct in all their parts. They are, therefore, valuable papers at least, whatever they may be called. The holders of them received them as such; they were issued to them as having the stamp of property up to the value which they import to bear. They are therefore, in the true meaning of the word, securities which may be rendered available to any persons having the legal right to them. Nor are they less to be deemed *effects*. The word 'effects' is a very large and general term, and is confined to no particular description of

property, either in specie or value; it was, therefore, probably inserted in the act studiously, when the legislature were placing a special guard around the bank. Be they *effects or securities*, or both, they import value on the face of them. It should be observed, too, that the offence of embezzling them is not made larceny, where some value must attach on the thing taken; but it is created a felony, which induces no necessity for any value being ascertained, but the bills themselves are such a species of *securities or effects* as no man would hesitate to give the value for which they import to bear. If a bankrupt were in possession of them, they are such *effects* as he would be bound to deliver up to his creditors; and if an insolvent debtor were to retain them as not being *effects*, without inserting them in his schedule, the common sense of mankind would revolt at the idea. An executor who found such bills in the possession of his testator would be bound to pay the tax upon them, as making part of the personal estate coming to his hands; and he would be liable to a *devastavit* if he destroyed them. In short, many cases might be put to prove them 'effects.' But it was argued that if the word 'effects' was to be so largely construed, without any restriction, that would lead to the absurdity of descending to things so trifling as it would be perfectly ridiculous to state, such as the stumps of a few old pens, or a piece of blotting-paper, in the office. But the judges have not found themselves driven to that extreme length. Their judgment only determines that the words of the act necessarily extend to such *securities or effects* as are intrusted to their officers or servants, and that the bills in question fall under that description. Their only technical defect, therefore, being of such a nature as government would, if necessary, be bound instantly to correct and rectify, and the bills in question being the fair property of the bank, who had purchased them *bona fide* for a valuable consideration, the majority of the judges are of opinion that they are *effects or securities* falling within the true construction of the 15 Geo. II., and that their embezzlement by the prisoner under the circumstances of this case, being an officer and servant of the bank, subjects the prisoner in point of law to conviction upon the indictment of which he was found guilty." *The King v. Aslett*, 1 Bos. & Pul. New Rep. 1, 9; s. c., 2 Leach, Crown Law, 958.

Machinery and Effects. — Where a mortgage was made of certain real property used for a sugar refinery, "and also all the *machinery and effects* in the said sugar refinery," and it was recorded as a chattel mortgage, it was held that the mortgage covered the sugar upon the premises; the court,

Van Vorst, J., saying, "There is, in fact, only one question in this case, and that is, whether the mortgage from Harms and wife to Minturn covered the 'sugar' upon the premises. The mortgage is in the form used to affect real property; but the description of the land mortgaged is followed by the words 'and also all the machinery and effects in the said sugar refinery.' The instrument was filed as a chattel mortgage in King's County register's office.

The parties to the action who contest the right of the defendant Minturn to the sugar and its proceeds, under his mortgage, insist that the description of the property mortgaged does not include the sugar in the refinery. The word 'effects,' in its primary and accustomed sense, certainly would cover the sugar. Had the description been simply, 'and also all the effects in the refinery,' I suppose there would have been no question but what it would have included both the sugar and machinery. The primary meaning of the word 'effects' is sought to be cut down, on account of its connection with the preceding word 'machinery,' under a rule of frequent application in construction, where general words follow a particular one, and where they have been held to be *eiusdem generis*. The counsel for the parties who contest Minturn's right have cited numerous cases in which the construction of clauses in wills and contracts was involved, but the present case I do not think is logically within them. *Rawlings v. Jennings*, 13 Ves. 39; *Hotham v. Sutton*, 15 Ves. 319; *Van Hagen v. Van Rensselaer*, 18 Johns. (N. Y.) 420; and others, were so cited. The creditor Minturn was endeavoring to secure a large debt, and he took from his debtor—who was so much embarrassed that he, within a few days thereafter, made a general assignment—a mortgage. He had only the sugar refinery, already heavily encumbered with its contents, with which to secure the creditor. He gave an instrument which, by its terms, created a lien upon the refinery, the machinery and 'effects' therein, in favor of the creditor. I see no reason why the creditor should be deprived of his security to its full extent, and the court should not be astute in searching out technical grounds by which the rights of the vigilant creditor should be pared away. It appears to me that the intention was, that the sugar should be included. I can discover nothing to the contrary in the words or acts of the parties or in the circumstances. In the structure of the sentence there is evidently an ellipsis of frequent occurrence. By inserting the two words 'all the' before the word 'effects,' as they occur before the word 'machinery,' and the doubt, if any, is removed, and the intentions of the parties effectuated clearly."

Thurber v. Minturn, 62 Howard's Prac. Rep. (N. Y.) 27.

Master's Effects.—Where an insurance was effected on "master's effects, valued at a hundred pounds, free from all average," and some of the articles thus insured were totally lost by fire, one of the perils insured against, but others were saved, in an action upon the policy it was contended, on the part of the defendant, that, inasmuch as the insurance was expressly made "free from all average," and a portion of the subject of insurance had been saved, the plaintiff was not entitled to recover, upon the authority of the case of *Ralli v. Janson* (6 El. & Bl. 422), where it was held by the Exchequer Chamber—reversing the judgment of the Court of Queen's Bench—that, where memorandum goods of the same species, shipped in packages, are insured, and it is not expressed, by distinct valuation or otherwise in the policy, that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only (not being general average), if there be no standing, though one or more entire package or packages be entirely destroyed, or otherwise totally lost, by the specified perils. Upon the authority of that case, a nonsuit was granted, which was subsequently set aside, and a verdict entered for the plaintiff; the court, *Williams, J.*, saying, "Having heard and considered the argument upon the rule granted, to set aside the nonsuit, and enter verdict for the plaintiff, we are of opinion that the present case is distinguishable from *Ralli v. Janson* (*supra*), and that the rule to enter the verdict for the plaintiff must be made absolute. In that case the Exchequer Chamber thought, that, as the insurance was on goods generally, and by the memorandum 'seed was warranted free from average,' it was necessary, in the natural construction of the terms of the instrument, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the court could not apply the warranty to each bag in which seed happened to be packed, as a distinct object. But no such difficulty, we think, occurs in the present case. The articles which constitute the 'master's effects' have no natural or artificial connection with each other, but of necessity must be essentially different in their nature and kind, in their value, in the use to be made of them, and the mode in which they would be disposed on board. The word 'effects' is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc., of which they happened to consist. And although it is stipulated by the warranty that these effects shall be free of all average,—or, in

other words, that the insurer shall not be liable for any amount of sea damage to them short of a total loss, — we think, looking at the nature of the subject of insurance, and the terms of this exemption, it is doing no violence to the language used, to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consist. Suppose, instead of the general description of 'master's effects,' the body of the policy had enumerated them, and then the memorandum had said, 'the chronometer, the sextant, the hat, and the great-coat, above mentioned, to be free from average,' etc., might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance. The more strict construction leads to the very harsh and absurd consequence, that, if the assured happens to be successful in rescuing any portion of the articles insured — even the clothes he may be wearing — from the perils of the sea, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost. This result is so startling, that we find it impossible to believe the parties could have intended it. And it may be added that the contract so construed would be quite at variance with the object for which, as it is well known, the memorandum as to average was introduced into policies; viz., that, since it may be difficult to ascertain the true cause of the damage which goods of certain kinds, such as those usually specified in the memorandum, receive in the course of a voyage, — whether it arose from the nature of the articles themselves, or from the perils insured against, — the insurers thereby expressly provide that, as to some kinds of goods, they will not be answerable for any average or partial loss; and, as to others, that they will not be liable for such loss not amounting to a certain percentage on the goods." *Duff v. Mackenzie*, 3 C. B. N. S. 16, 28.

Estate and Effects. — A., the owner of an estate, entered into contract for sale of it. Part of the purchase-money was paid in his lifetime. The contract contained a stipulation, that, as the purchaser was a ward of court, the contract should be void if not approved by the lord chancellor. The vendor died in January, 1855, leaving a will by which he devised and bequeathed all his real and personal estate to C., his heirs, etc., absolutely, and appointed B. his sole

executor. After his death the formal approval of the contract was given by the court of chancery, the estate was accepted by the purchaser, and the whole of the purchase-money was then paid to the executor. It was *held* that the purchase-money was to be deemed part of the "estate and effects" of the testator within the 55 Geo. III. c. 184, schedule, part 3, and therefore was liable to probate duty. *The Attorney-General v. Browning*, 8 House of Lords Cases, 243.

Baggage and Effects. — Under a New Hampshire statute (June 1859, ch. 2230) which provides "that all boarding-house keepers shall have a lien upon the *baggage and effects* of their guests and boarders, except seamen and mariners, brought to their respective boarding-houses, until all the proper charges due to such keepers, for the fare and board of all such guests and boarders, shall be paid," it was *held* that an innkeeper who is accustomed to take boarders is a boarding-house keeper, and has a lien upon the horse of his boarder for his own fare and board, but not for the keeping of the horse; the court, *Belkows, J.*, saying, "Upon a careful examination of this law, we think it embraces innkeepers, who, in addition to their business as innkeepers strictly, also take boarders. The language is certainly broad enough to embrace them, and they are clearly within its equity; and there is nothing in the nature of the case, or in any view of public policy, that calls for a different construction. On the contrary, a large part of the boarders, within the meaning of this law, throughout the State, are to be found at the hotels, and we can see no reason for excepting them from the operation of this law. Such keepers of boarders, then, being entitled to a lien upon their 'baggage and effects' for their fare and board, the question is, whether the term 'effects' includes a horse kept in such innkeeper's stable. At common law the lien of an innkeeper undoubtedly extended to his guest's horse and carriage, and for every part of the bill; otherwise, there might be nothing upon which the lien could take effect. And we see no good reason for giving this law a construction that should restrict the lien of the boarding-house keeper within narrower limits than exist in the case of an innkeeper. The lien of the latter extends, in general terms, to the goods of his guest which are brought to his house; and the term 'effects,' in the law under consideration, is at least as broad. It would, indeed, include the clothes actually upon the person of his guest; but, interpreted in the light of the decisions touching the innkeeper's lien, there could be no pretence for holding that the boarding-house keeper would have the right to strip the clothes

from the person of his boarder. In the case of the innkeeper this was distinctly settled in *Simbolf v. Alford* (3 M. & W. 247). In determining the extent of the boarding-house keeper's lien, and its limitations, we must, then, look to the decisions which apply to the case of innkeepers, and which must have been in view of the legislature at the making of this law. We do not mean to say that the boarding-house keeper is placed in all respects upon the same footing with the innkeeper, but that the term 'baggage and effects,' in the statute before us, covers substantially the same things as the lien of the innkeeper upon the goods of his guest. It is true that the lien conferred by this statute is in terms only for the fare and board of the guest or boarder, and it may be urged that the legislature did not contemplate the case of a boarder taking with him his horse and carriage, and it is quite possible that such a case was not considered; but still, as the terms are sufficient to embrace such 'effects,' and they come within the equity of the statute, we think the lien for the defendant's board, as in the case of the innkeeper, will rightfully extend to his horse. . . . We are, however, of the opinion that the statute creates no lien for the keeping of the horse, but only for the fare and board of guests, and boarders. Such is the language of the law, and we perceive no ground for going beyond its terms." *Cross v. Wilkins*, 43 N. H. 332.

Sale of Effects.—A testator left to his cousin L. "whatever money remains at my agent's, also any money that may result from the sale of my effects; I also wish her to get my watch." L. asked the court to grant to her, letters of administration with the will annexed, as residuary legatee named therein, claiming that the word "effects" was sufficient, if it stands alone, and is not limited by the context, to pass the whole residue; but the court held her not to be entitled to letters as residuary legatee; *Lord Penzance* saying, "The words are, money that may result from the sale of my effects. 'Effects' must mean, therefore, something that may be sold; but a legacy would not be included in such a definition. I think by the word 'effects' the deceased alluded to that portion of his property only which was subject to sale. Again: he wishes the legatee to get his watch, and it would have been quite unnecessary to express such a wish if he had constituted her residuary legatee. I cannot hold the words sufficient to pass the residue. The next of kin must be cited. If they do not appear, Miss L. will be entitled to take administration as legatee." In the goods of O'Loughlin, L. R., 2 P. & D. 102.

Articles and Effects.—The following presentment was made by the grand jury

of the county of Galway: "County of Galway; to wit, We present the sum of £465, etc., Irish currency, to be levied off the county of Galway at large, and paid to the treasurer, and by him to Walter Blake, Esq., to compensate him for a malicious burning. For self and fellows. Dunlo, foreman." Mr. Blake's petition was for "setting fire to and consuming his yacht or pleasure-boat, which lay in the harbor of Oranmore in the barony of Dunkellin." In support of the presentment, reference was made, *inter alia*, to the 19th and 20th Geo. III. c. 37. The presentment was respited by *Smith, B.*, the judge of assize, who reserved for the consideration of the twelve judges the question whether a presentment for such an injury was warranted under the statute referred to. Eight judges (*Burke, C. J., Smith, B., McClelland, B., and Vandeleur, J.*, being absent) unanimously gave their opinion against the presentment; holding the words "articles and effects," in the 19th and 20th, Geo. III. c. 37, to be *ejusdem generis* with those that went before. *Galway Presentment, In re Walter Blake, Jebb's Reserved Cases*, 71.

Effects, Stock, Books, and Book-Debts.—

A trader, being embarrassed in circumstances, executed to her principal debtor an assignment of the "whole and every of my effects, stock, books, and book-debts," for the benefit of her creditors, and stated therein that she suspended business. The assignor kept a small shop and farm. She furnished her assignee with a list of her creditors. The shop was closed immediately on the execution of this assignment; but the assignor continued to occupy the house, and use the furniture, until the time of her death, when the whole was taken possession of by the assignee. An action was brought after her death against the assignee, treating him as an executor *de son tort*, on a promissory note made by the assignor in her lifetime in favor of the plaintiff, whose name was omitted from the list of creditors given to the assignee. This list was admitted in evidence, in order to prove the *bona fides* of the assignment, and the jury found for the defendant. The plaintiff obtained a rule for a new trial upon the admissibility of this evidence, and also on the question whether some small farming-stock,—namely, three cows and a mare,—possessed by the assignor, passed under the general words of the assignment. The plaintiff argued that the cows and the mare did not pass under the assignment, for that instrument was intended to transfer the effects of the assignor, who was a small shopkeeper, and the words used were appropriate to that purpose. They all had reference to her trade. "Stock" did not mean cattle, but stock-in-trade; and this, and the other words, "books," and "book-

EFFECTUAL. — That which tends to a result. This word is used in the phrase, *EFFECTUAL ATTACHMENT*, in the Massachusetts Gen. Sts. c. 126, § 1, in opposition to a *NOMINAL ATTACHMENT*.¹

EITHER. — One or the other ;² one and the other ; each.³

EJECTMENT.

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debts," indicated the meaning in which the more general word "effects" was to be taken. "Effects" must mean *effects ejusdem generis* with those after mentioned. But the court held that the general words of the assignment passed the cattle on the farm; *Lord Lyndhurst, C. B.*, saying, "The words of the assignment are sufficiently large to comprehend the cattle (for the cases decided upon the rule cited by the plaintiff are, where particular words are used, followed by general words, in which case the latter are held to extend only to matters *ejusdem generis*), and the instrument upon the face of it shows that the object of the assignor was to part with all her property for the benefit of her creditors. She states that she suspends her business, and part of her business was the cultivation of the small farm upon which the cattle were kept. It was her obvious intention, therefore, that they should pass under the assignments." And *Alderson, B.*, "With regard to the other point, the assignment, if made *bona fide*, extends to all the property. 'Effects' is a very comprehensive word. The general intent of the instrument also shows that the whole of the property was intended to pass." *Lewis v. Rogers*, 1 *Crompt. Mees. & Roscoe*, 48.

1. The restriction of this statute, that a party defendant must have been, before the time of the action brought, an inhabitant of the State, or that an "effectual attachment" must be made of his goods, estate, or effects, has application only to actions "against a person who is out of the State at the time of the service of the summons;" and where the sheriff's return of service was, "*Suffolk ss., Boston, Oct. 25, 1867. By virtue hereof, I this day attached a chip, as the property of the within named Charles K. Hamilton, and gave to him in hand, in said Boston, a summons for his appearance at court as within commanded. John B. Dearborn, Deputy Sheriff.*" the service was held good, the court, *Wells, J.*, saying, "The defendants contend, that ser-

vice by a separate summons, after a nominal attachment only, is not authorized by the statute. . . . No case is cited in which it has ever been held that such service is not good. The language of the provision does not necessarily import 'an effectual attachment,' such as is required to give jurisdiction against an absent defendant, who was never an inhabitant. See Gen. Sts. c. 126, § 1. For the purpose of determining the proper mode of service, the return of the officer, that he had attached the property of the defendant, cannot be contradicted by evidence, and is not contradicted by the apparent want of value in the article returned as attached." *Peabody v. Hamilton*, 106 *Mass.* 217.

2 "The word 'either' does not mean all, but does mean one or the other of two or more specified things." An ordinance authorizing a railway company to construct one or more lines on either of certain designated streets, empowers a construction on one only of the streets named, to be determined by the selection of the company, and not on all. *Fort Worth St. Ry. Co. v. Rosedale St. Ry. Co. (Tex.)*, 4 *S. W. R.* 534.

Under a policy of fire insurance "on all or either" of certain specified buildings, the insurers are liable for the full amount of a loss, not exceeding the sum insured, occasioned by the burning of a single one of the buildings. *Com. v. H. & L. Ins. Co.*, 127 *Mass.* 136; *s. c.*, 17 *Am. Rep.* 72.

3. "The word 'either' is sometimes used in the sense of one or the other of several things, and sometimes in the sense of one and the other. Its use in this last sense is not infrequent. Thus, it is common to say on either hand, on either side, meaning thereby, on each hand or side." Accordingly, a covenant to convey to a railroad company a right of way and seven acres of land adjoining on either side thereof, binds the covenantor to convey three and a half acres on each side of the right of way. *Chidester v. S. & I. S. E. R. W. Co.*, 59 *Ill.* 87.

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I. **History of Ejectment.** — The history of the action of ejectment must be understood, in order to comprehend the nature of the action itself. It must be remembered, that, under the old feudal system, an estate or interest in lands, other than a freehold estate, was a thing of rather a shadowy nature. It is true that the tenants might contract for a time certain for the use of lands, but this gave the person who went into possession and occupancy, no right to an action for dispossession other than a suit for breach of the agreement; and it is said that, prior to the statute of *quia emptores*,¹ even the owner in fee of lands was obliged to have recourse to the custom known as subinfeudation, in order to freely alien the same. This was a process whereby the middle lords obtained from the *terre tenant*, or land occupiers, of whom they were the immediate superiors, all the profits arising from that estate, and thereby deprived the superior lords of those profits. Such, in brief, were the relations between the occupiers of the land, and the lords in whom rested the fee.²

It appears, however, that a statute passed as early as A.D. 1278, makes mention of a lease for term of years³ showing that such a thing was known then, although these terms were simply a right to enter on the tenement, and did not vest any estate in the lessee, he being rather considered as a bailiff or servant from whom an account of the profits and receipts were due as a matter of right.⁴

The estate of the termor or lessee for years became by a succession of gradual changes enlarged and less precarious; and as his rights became more fixed and determined, his remedies for an infringement of those rights became more certain. The ancient remedy or writ of covenant to enable the lessee to obtain possession of the term as well as damages, when ousted by the lessor during its continuance, or to recover damages if dispossessed by a stranger after the term had expired, was abolished at about the same time with other real actions.⁵

Where it happened that some person claiming under the ejector instead of the ejector himself was in possession of the lands, a writ of *quare ejecit infra terminum* was the ancient remedy, and was devised by virtue of the statute of Westm. 2, c. 24.⁶ The

1. 3 Westminst. 18 Edw. I. A. D. 1290.

2. 2 Black. Comm.; 1 Shars. Black. 90 *et seq.* 141 *et seq.*; 3 Black. Comm. (2 Shars. Black.) 196, 197; 1 Wash. on Real Prop. (4th ed.) 433 *et seq.*

3. 6 Edw. I. cap. XI. In a statute relating to a "feigned recovery against him in the reversion to make the termor lose his term," it is declared "that if any man lease

his tenement in the city of London for term of years," etc.

4. 2 Shars. Black. Comm. 141 *et seq.* 157 *et seq.*; 1 Wash. on Real Prop. (4th ed.) 433 *et seq.*

5. 3 & 4 Will. IV. c. 27; 3 Black. Comm. (2 Shars. Black.) 157 and notes, 200.

6. 13 Edw. I.

recovery under this writ was of the unexpired term, together with damages for the deprivation of that portion out of which the termor had been kept. This action was subsequently abolished.¹

The writ of *ejectione firmæ* was an action in favor of the lessee against any one, as the lessor, a stranger, reversioner, etc., who had himself committed the wrong complained of, and under this writ the recovery was at its inception simply in damages for the trespass committed by the ejector; afterwards, however, to this judgment a species of remedy was added by the courts by virtue of which the term might be recovered as well as damages, and a writ of possession based upon said judgment might issue. The time when this writ in such form first came into use seems to be a matter of some degree of uncertainty, and is variously declared to have been in the time of Edward III., Edward IV., and Henry VII.²

This remedy, however, was not confined to the termor or lessee, but might be used to try the title to the freehold. The manner of its use for such purpose was formerly as follows: The lessor, or he who had the right of entry on the land, when wrongfully kept out of possession by a tenant, made a formal entry on the land with some third person, to whom he there executed and delivered a lease for years, this lessee being ousted by either the actual tenant or some other person called the *casual ejector*, who came upon the land by agreement or accident, and ejected him, — brought his action of ejectment against either the casual ejector or the actual tenant, whichever had ousted him, to recover his term, damages, and possession, for which the writ of possession was issued. The questions of title, lease, entry, and ouster were in issue in such action of ejectment, and were required to be proven. It was also necessary, when ejectment was brought against the casual ejector, that the actual tenant should be notified, in order that he might be enabled to come in and defend if he desired. Subsequently, the matters of formal entry, lease, and ouster were dispensed with, and became, so far as allegations and pleadings went, a mere fiction, though still necessary to be stated as fully as if they had formally taken place; the parties, plaintiff and defendant, being also generally fictitious persons. A copy of the complaint and notice of the pendency of the suit was served upon the actual tenant, warning him that judgment would be suffered by the defendant, whereby the tenant would lose possession; and, upon his non-appearance within a time stated, judgment was entered against him, and the lessor obtained possession. If the tenant appealed, he was only permitted to come in under the

1. 3 & 4 Will. IV. c. 27, sec. 36; 3 Black. Comm. (2 Shars. Black.) 207.

2. 1 Wash. on Real Prop. (4th ed.) 434, 435.

"This method seems to have been settled as early as the reign of Edward IV., though

it hath been said to have first begun under Henry VII., because it probably was then first applied to its present principal use, — that of trying the title to the land." 3 Black. Comm. (2 Shars. Black.) 200 *et*

seq.

consent rule, which compelled him to admit the lease, entry, and ouster, so that only the question of title came in issue for trial upon the merits.¹

Such, in brief, is the history of this action. It will be observed that ejectment, as it now exists, although material changes have been made in the form of procedure, is based upon the principles of the common law; and these principles, both in England and in the United States, subject, however, to such alterations as local circumstances have necessitated, are, to a large extent, a determining factor in litigation where this action is involved; and the

1. 3 Black. Comm. (2 Shars. Black.) 203 *et seq.*; 1 Rapalje & Lawrence's Law Dict. 434, title "Ejectment;" 1 Bouv. Law Dict. p. 518, titles "Ejectione Firmæ," "Ejectment;" Taylor's Landlord and Tenant (6th ed.), 538; 3 Field's Lawyer's Briefs, 1 *et seq.*; 2 Jacob's Law Dict. 356, title "Ejectione Firmæ," or, "Ejectment;" 1 Swift's Digest (Conn.), side page 506 *et seq.* top pages 516, 517.

"The nominal plaintiff and the casual ejector are judicially to be considered as the fictitious form of an action really brought by the lessor and the plaintiff against the tenant in possession, invented under the control and power of the court for the advancement of justice in many respects, and to force the parties to go to trial upon the merits without being entangled in the nicety of pleadings on either side. . . . The lessor of the plaintiff and the tenant in possession are substantially, and in truth, the parties and the only parties to the suit. The tenant in possession must be duly served; and, if he is not, he has a right to set aside the judgment. If, after he is duly served, he does not appear, but lets judgment go by default, such judgment is carried into execution against him by a writ of possession." *Aslin v. Parkin*, 2 Burr. 665; s. c., vol. i. part ii. Smith's Lead. Cases (8th ed.), p. 1396, and note; Wood's Mayne on Damages (1st Am. ed.), p. 477, sec. 481. Old paging, 330, 331. For a history of the action of ejectment, see *Den v. Morris*, 7 N. J. Law (2 Hals. 1822), 7 *et seq.*; *Den v. Craig*, 15 N. J. Law (3 Green, 1836), 192 *et seq.*; Tyler on Ejectment & Adverse Possession (ed. 1876), p. 33 *et seq.*; 1 Bouv. Law Dict. p. 518, title "Ejectment;" Pomeroy's Rem. & Remed. Rights (2d ed.), secs. 9, 21, 294; 2 Brown & Hadley's Comm. (ed. 1875, Wait's notes) 211 *et seq.* and notes; Jacob's Law Dictionary, title "Ejectment;" Practice in Civil Actions and Proceedings at Law, Spaulding, 1881, sec. 28, p. 60, citing *Heard's Civil Pl.* 31.

History of the Action in Virginia, West Virginia, etc.—"Originally the action of ejectment was only used to recover dam-

ages by lessee against any one who ousted him of his term. 2 Chit. Bl. Com. 157. In the reign of Henry VII. (1485) the action began to be applied to trying the title to land. When Blackstone wrote, it was the common method of trying title to lands or tenements, — 2 Bl. Com. 156, — and the writs of entry, assize, formedon, and writ of right, were out of use, although not abolished. *Id.* The remedy of ejectment and writ of right prevailed in *Virginia* from the Revolution until the revision of 1849 as they existed in England, but these were much simplified by act of 1818, and 1 R. C. ch. 118, p. 463, which superseded the various writs at common law, and for the enforcement of rights of possession and of property. In practice, although not abolished, all the possessory and droitural actions, such as writs of entry, of assize, of formedon, in descender, reverter, and remainder had become obsolete. In the revision of 1849, the revisors, as to this subject, reported a draft, taken substantially in its main features from part 3, title 1, ch. 5, New York Revised Statutes, vol 2, p. 302, as a substitute for the action prescribed in 1 R. C. ch. 118; to supersede the writ of right; to contain all the substantial provisions of the then existing laws as to this subject; to abolish all matters of form and fiction; and preserve all benefits of the writ of right and the action of ejectment, as well as of all other actions, possessory and droitural, as was accomplished in New York by adopting ejectment to the trial of conflicting titles to real property as well as to the recovery of the possession thereof. This draft by the revisors was adopted by the legislature as reported, except the changes made in §§ 8, 14, and 30, carried into Code Va. 1860, as thus adopted, and thence into Code W. Va. with but few changes, which are fully explained wherever they occur. The principles of the chapter have been adopted, not only in New York, but in England, by 3 & 4 Will. IV. ch. 26 (1830), and in Mass. R. S. ch. 101." *Headling*, ch. 71 Rev. Stat. 1879 of West Vir-

substance and principles of the English forms of real actions are embodied in the statutes and codes now in force. These actions are known under different names, as, Ejectment, Disseizin, Action for Recovery, and the like.¹

II. Statutes and Codes.—Statutory provisions as to ejectment in England and the United States, though depending upon essentially the same principles, vary in different localities. The value of precedents can only be appreciated when the statute law is understood, and the essential principles of the latter are accordingly herein set forth.

III. English Statutes.—The Common Law Procedure Act of 1852² regulated the action of ejectment in England until the Supreme Court of Judicature Act³ was passed in its amended form in 1875. These statutes govern the entire conduct of the action from its commencement, covering all such points of practice as the modes of defence, the parties, forms of judgment, etc.

IV. Statutory Provisions in the United States.—1. *But One Form of Action.*—In those States in which the code system prevails,⁴ it is usually provided that all forms of actions and suits existing prior to the adoption of the new procedure shall be abolished, and that there shall be but one form of action, called a civil action.⁵

1. Taylor's Land. & Tenant (6th ed.), sec. 698, p. 539; 1 Rapalje & Lawrence's Law Dict. pp. 434, 435, title "Ejectment;" 1 Bouv. Law Dict. p. 518, title "Ejectment." But see Pom. Rem. & Remed. Rights (2d ed.), sec. 111 and sec. 294, where it is said that "Wherever the new procedure is adopted, it far more nearly resembles in all its essential features the ancient *real actions* which were displaced in use by 'ejectment.' . . . One fact is certainly true, that it does not bear the slightest resemblance to the action of 'ejectment,' as that was contrived by the old judges and lawyers, and only confusion and misconception result from applying to it that name. Undoubtedly, the courts have continued to connect with it some of the special rules and doctrines which belong to the action of ejectment; but many of them, I am sure, could never have been retained if the courts had fully appreciated the completeness of the change wrought by the reformed system of procedure in abolishing all the forms of legal actions, and had reflected that the technical rules resulting alone from the absurd fictions which characterized ejectment have no legitimate connection with the simple action to recover possession of and try the title to land which has been introduced by the codes in place of the former modes."

2. Common Law Procedure Act (June 30, 1852), 15 & 16 Vict. c. 76, §§ 168-221.

3. First Schedule, Rules of Court; Supreme Court of Judicature Act (1873)

amended, 38 & 39 Vict. 1875. See 12 & 13 Vict. (1849, Ireland) c. 105, §§ 20, 21; 16 & 17 Vict. (1853, Ireland) c. 113, §§ 194-227; known as the Common Law Procedure Amendment Act (Ireland); 19 & 20 Vict. (1856, Ireland) c. 102, also §§ 94, 95; 23 & 24 Vict. (1860, Ireland). This Common Law Procedure Act seems to be based on that passed as to England in 1852.

4. See article "Equity Pleading" for a list of the code States.

5. *Arkansas.*—Digest 1884, secs. 4914, 4915; Digest 1874, secs. 4450, 4451.

Colorado.—Civil Code (Session Laws, 1887), ch. 1, sec. 1.

Connecticut.—Gen. Stat. 1888 (Rev. 1887), sec. 872.

Indiana.—Code of Civ. Proced. 1881, sec. 1.

Iowa.—McClain's Annot. Stats. 1884, sec. 2507.

Kansas.—Dassler's Comp. Laws, 1885, chap. 80, art. 4, sec. 10, p. 606.

Kentucky.—Bullitt's Code Civ. Pract. 1876, title 2, sec. 4.

Minnesota.—Stats. 1878, ch. 66, sec. 1.

North Carolina.—Code Civ. Proced. (Code 1883) sec. 33, p. 49.

Ohio.—Williams, Rev. Stat. 1886, sec. 4971.

Oregon.—Code of Civ. Proced. (Gen. Laws, 1872) ch. 1, title 1, sec. 1; Hill's Annot. Laws, 1887, sec. 1.

South Carolina.—Rev. Stat. 1869, part 2, title 1, sec. 92, p. 586. See also Code Civ. Proced. 1882 (Stat. 1882). See last note.

2. *Ejectment generally. — Definition.* — The New York Code thus defines the action of ejectment: An action of ejectment is an action to recover the immediate possession of real property.¹ In Wisconsin, actions for the recovery of specific real property, or of the possession thereof, with damages for the holding thereof, are styled actions of ejectment.²

3. *When the Action may be maintained.* — In the notes will be found abstracts and references to the statutory provisions in various States which will show when the action may be maintained.³

1. Code of Civ. Proc. (Banks & Bros.' Rev. Stat. 1883) sec. 3343, par. 20.

2. Rev. Stats. Wisconsin, 1878, sec. 3073.

3. *Alabama.* — Plaintiff may elect to proceed as at common law, or by writ in the nature of an action of ejectment. Rev. Code, 1876, sec. 2970 (2621).

Plaintiff may elect, — lease, demise, or ouster need not be stated. Walker's Rev. Code, 1867. "Real Actions," secs. 2610, 2621.

The act formerly in force; fictitious proceedings abolished; law in force relative to ejectment to govern; exceptions; trespass to try title. Aikin's Digest, 1833, p. 265, secs. 41, 42, 43.

Arkansas. — When it lies. Digest 1874, sec. 2257; Dig. 1884, sec. 2631.

When it may be maintained. Digest 1874, sec. 2254; Dig. 1884, sec. 2648.

Action against purchaser at sheriff's sale, etc.; when maintained; improvements. Digest 1874, sec. 2267; Digest 1884, sec. 2649.

California. — The code makes provisions relative to the action of ejectment and its conduct, but there is apparently no material change in the action as it formerly existed. Deering's Annot. Codes & Stats. 1885, vol. 3, secs. 385, 740, 741, 742, 743, 1022.

It is also provided in this State that the title of every action shall appear in the complaint. Deering's Annot. Codes & Stats. 1885, vol. 3, sec. 426.

Colorado. — Action for recovery of real property takes the place of ejectment; concurrent remedy with forcible entry and detainer. Civil Code (in Session Laws, 1887), sec. 265.

See "Colorado" under title "New Trial," *post*.

Connecticut. — Other remedies. Gen. Stat. 1888 (Rev. 1887), sec. 1364.

Election. — See "Connecticut" under title "Improvement," *post*.

Delaware. — Legal title may be tried in ejectment. Rev. Stat. 1874, ch. 119, sec. 1; Rev. Code, 1852, Am'd 1874, p. 706.

Illinois. — Ejectment is a real action. Rev. Stat. 1887, Cothraus' Annot. Ed. p. 604, sec. 2 and note.

When it may be brought, and by whom.

Starr & Curtis's Annot. Stats. 1885, ch. 45, par. 2; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 603, sec. 2.

Action of ejectment retained. Starr & Curtis's Annotated Stats. 1885, ch. 45, par. 1; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 603, sec. 1.

When grantee of the State may maintain ejectment; right of possession authorizes a recovery. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 3; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 604, sec. 3.

Action by lessees of the United States or the State; right of possession authorizes a recovery. Rev. Stat. 1887, Coth. Annot. Ed. p. 604, sec. 3.

Indiana. — Rules in ejectment to apply to partition cases. Rev. Stat. 1881, sec. 1071.

Iowa. — Action to be like ordinary proceedings; no joinder and no counter-claim except. McClain's Stat. 1884, sec. 3245.

Louisiana. — Real action defined. "A real action is that which relates to claims made on immovable property or to the immovable rights to which they are subjected." Voorhies' Code of Pract. (3d ed. 1882), p. 2, art. 4.

Object of the action. "The object of this action is the ownership or the possession of such property, and they are therefore subdivided into petitory and possessory actions." Voorhies' Code of Pract. (3d ed. 1882) p. 2, art. 4.

Petitory action defined. Voorhies' Code of Pract. (3d ed. 1882) p. 2, art. 5.

Possessory action defined. Voorhies' Code of Pract. (3d ed. 1882) p. 2, art. 6.

Mixed action defined. Voorhies' Code of Pract. (3d ed. 1882) p. 2, art. 7.

Incorporeal rights. Voorhies' Code of Pract. (3d ed. 1882) p. 3, art. 12.

When a possessory action may be brought. Voorhies' Code of Pract. (3d ed. 1882) p. 10, art. 46.

Petitory action after judgment in possessory action. Voorhies' Code of Pract. (3d ed. 1882) art. 55.

Petitory action after settlement. Voorhies' Code of Pract. (3d ed. 1882) p. 13, art. 56. Art. 46 to art. 60 inclusive make provisions relative to the averaging and conduct of possessory actions which are

4. *Interest required to sustain the Action.* — The interest which the plaintiff must have to sustain the action is well expressed in the *Illinois* statute: "No person shall recover in ejectment unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial." ¹ Sub-

defined above. Voorhies' Code of Pract. (3d ed. 1882) pp. 10 to 14, arts. 46 to 60 inclusive.

Maine. — Writ of entry lies for recovery of real property. Rev. Stats. 1883, tit. 9, chap. 104, secs. 1, 2.

Action to try title; person in possession; kind of estate to be alleged; premises to be described; parties; easement. Rev. Stat. 1882, ch. 104, tit. 9, § 47.

Maryland. — Action; how commenced; real claimants to be plaintiff; declaration; allegations. Rev. Code, 1878, art. 64, sec. 13.

Massachusetts. — Recovery of estates of freehold to be by writ of entry. Pub. Stats. 1882, ch. 173, sec. 1.

When action lies for the recovery of land. Pub. Stats. 1882, ch. 175, sec. 1.

New York. — Action for real property. Sec. 1642 provides for an action to compel the determination of a claim to real property. Banks & Bros.' Rev. Stats. 1883 (7th ed.).

Michigan. — When it lies. It may be brought as formerly, and also instead of a writ of right and for dower. Howell's Annot. Stats. 1882, secs. 7788, 7789.

After recovery; recoverer's remedy against lessee for years. Howell's Annot. Stats. sec. 7973.

Minnesota. — Vacant possession; provisions of act to apply. Stats. 1878, ch. 75, sec. 24.

Missouri. — In what cases the action lies. Wagner's Stats. 1872, ch. 50, sec. 2; Rev. Stat. 1879, sec. 2241.

Nebraska. — Statutes as to occupying claimants in force in actions for recovery of land. Comp. Stats. 1886; Code Civil Proc. sec. 632 (p. 714).

New Hampshire. — Nature of writ. Gen. Laws, 1878, ch. 222, sec. 6.

New York. — Ejectment defined. Code of Civ. Proc. (Banks & Bros.' Rev. Stat. 1883) sec. 3343, par. 20.

Action to compel the determination of a claim to real property. Code Civ. Proc. vol. 4; Banks & Bros.' Rev. Stats. 1883, tit. 1, ch. 14, art. 5.

Proceedings the same as in ejectment. Code of Civil Procedure, in vol. iv. Banks & Bros.' Rev. Stats. 1883, sec. 1642.

May not be maintained where dower lies. Banks & Bros.' Rev. Stats. 1883, vol. iv.; Code Civ. Proc. sec. 1499.

Pennsylvania. — Ejectment is a real action. Brightly's Purdon's Dig. 1885, tit. "Actions."

When it may be brought. Brightly's Purd. Dig. 1885, p. 636, sec. 4, vol. 1.

South Carolina. — In addition to the statutes considered herein, see also "Forcible Entry and Detainer," Gen. Stat. 1882, chap. 90, secs. 2290-2298 inclusive, which relate to actions for recovery in behalf of party ousted or disseized.

Tennessee. — What actions may be brought. Code 1884, sec. 3444.

Texas. — Rules in force before introduction of common law to govern. "Nothing under this title shall be so construed as to alter, impair, or take away the rights of parties as arising under the laws in force before the introduction of the common law; but the same shall be decided by the principles of the law or laws under which the same accrued, or by which the same were regulated or in any manner affected." Rev. Stat. 1879, sec. 4812.

Explanatory Note — So far as the author is able to determine from the authorities which are accessible to him, this statute refers to the law recognized in this State prior to the adoption (so far as applicable) of the English common law by the legislature in 1840.

Trespass to try title. "The method of trying titles to lands, tenements, or other real property, shall be by action of trespass to try title, which shall be conducted conformably to the principles of trial by ejectment, unless otherwise expressly provided." Rev. Stats. 1879, arts. 4784, 4785.

Virginia. — Action of ejectment retained. Ch. 131, secs. 1, 2, Code of 1873.

Ejectment and other actions not barred. Code 1873, ch. 111, § 7.

West Virginia. — Action of ejectment retained. Kelly's Rev. Stats. 1879, ch. 71, sec. 1. Takes place of writ of right also. Rev. Stats. 1879, ch. 71, sec. 2.

Writ of right, etc., not to be brought. Rev. Stat. 1879, ch. 71, § 38.

1. *Interest required to sustain the Action.* — *Illinois.* — Starr & Curtis's Annot. Stats. 1885, ch. 45, par. 4; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 604, sec. 4.

Wisconsin. — Action of ejectment defined. Rev. Stat. 1878, sec. 3073.

Arkansas. — Lies upon patent certificates

stantially the same statute has been enacted in *Indiana, Iowa, Michigan, Tennessee, Virginia, West Virginia, and Wisconsin.*

5. *Feigned Issues.* — In many of the States, the use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimant and the real defendant, and the statements of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are abolished.¹ The suit is usually to be prosecuted in the name of the real party in interest.²

issued by recorder. Digest 1874, sec. 2256; Dig. 1884, 2630.

If legally entitled to the possession. Digest 1874, sec. 2253; Dig. 1884, sec. 2627.

Georgia. — Bare right of possession required. Code 1882, sec. 3014.

Prior possession against one subsequently acquiring possession. Code 1882, sec. 3366.

Indiana. — A valid subsisting interest and a right to possession required; against whom. Rev. Stats. 1881, sec. 1050.

Iowa. — A valid subsisting interest or right to immediate possession; against whom. McClain's Annot. Stats. 1884, sec. 3246.

Plaintiff must recover on his own title. McClain's Stat. 1884, § 3247.

Maine. — Must have a right of entry at commencement of action. Rev. Stat. 1883 (817), ch. 104, tit. 9, sec. 5.

Massachusetts. — Interest required. See "Massachusetts" under title "Practice," *post*.

Michigan. — Valid subsisting interest required, or right to recover possession, etc. Howell's Annot. Stat. 1882, sec. 7790.

Missouri. — Must be legally entitled to possession. 1 Rev. Stat. 1879, sec. 2240; Wagner's Stat. 1872, chap. 50, sec. 1, p. 557.

Oregon. — Title under Donation Act of Congress will maintain action. Hill's Annot. Laws, 1887, sec. 332.

Tennessee. — A valid subsisting legal interest and right to immediate possession required. Milliken & Vertree's Code, 1884, sec. 3953.

Virginia. — A subsisting interest and right to recover the land, or a right to possession. Code 1873, chap. 131, § 4.

West Virginia. — Same as Virginia. Rev. Stat. 1879, ch. 71, sec. 4.

Wisconsin. — Substantially the same as in Virginia. Rev. Stat. 1878, sec. 3074.

1. *Feigned Issues.* — *Alabama.* — Fictitious proceedings abolished. Aiken's Digest, 1833, p. 265, secs. 41, 42, 43; Walker's Rev. Code, 1867; "Real Actions," secs. 2610, 2621.

As to the consent rule, see Rules of Practice, Rule 24; Walk. Rev. Code, 1867.

Florida. — Fictions not necessary; suit may be brought directly. McClellan's Digest, 1881, ch. 96, sec. 1.

Georgia. — Distinctions of actions abolished. Code 1882, sec. 3252.

The consent rule considered as filed; fictitious forms sufficient. Code 1882, sec. 3365.

Illinois. — Consent rule. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 20; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 606, sec. 20.

Fictitious names abolished; fictions as to lease, demise, etc. Starr & Curtis's Annot. Stats. ch. 45, par. 8; Rev. Stat. 1877, Cothraus' Annot. Ed. p. 604, sec. 8.

Massachusetts. — Suit to proceed as though actual entry and ouster. Pub. Stats. 1882, ch. 173, sec. 4.

Michigan. — Consent rule same as Virginia. Howell's Annot. Stat. 1882, secs. 7810, 7811.

Fictitious names and forms abolished. Howell's Annot. Stats. 1882, sec. 7793.

Mississippi. — Consent rule and all fictions abolished. Rev. Code, 1880, ch. 68, sec. 2479.

New Jersey. — Consent rule abolished. Rev. Stat. 1877, title "Ejectment," secs. 1-3, p. 326.

North Carolina. — Feigned issues abolished. Code Civ. Proced. (in Code 1883) sec. 135 (p. 49).

Ohio. — No feigned issue. Rev. Stats. 1886, sec. 4972.

South Carolina. — No feigned issue. Rev. Stats. 1869, pt. 2, tit. 1, sec. 95.

Texas. — Fictitious proceedings abolished. Rev. Stat. 1879, arts. 4784, 4785.

Virginia. — No consent rule; lease entry and ouster, actual entry not to be proven. Code 1873, ch. 131, sec. 14.

West Virginia. — Same rule as Virginia. Rev. Stat. 1879, ch. 71, sec. 14.

Wisconsin. — Same provisions as Virginia, except the words, "the consent rule is abolished." Rev. Stat. 1878, sec. 3079.

2. Suit is to be prosecuted in the name of the real party in interest, in —
Arkansas. — Digest of 1874, sec. 2250; Digest 1884, sec. 2624.

Colorado. — "Except as otherwise provided." Civil Code (Session Laws, 1887), ch. 1, sec. 3.

Indiana. — "Except as otherwise provided." Code of Civ. Proced. 1881, sec. 3.

6. *Limitation of Action.*—The statutes of the various States prescribe a period of limitation for bringing an action of ejectment which differs somewhat in the different localities. In *Connecticut* the period named is fifteen years after right or title to lands or tenements shall have descended or accrued, unless the person claiming is under a disability, in which case the period is extended for five years after the disability has been removed.¹ In *Delaware*,² *Maine*,³ *Minnesota*,⁴ and *New Hampshire*,⁵ the period named is twenty years; *Louisiana*,⁶ thirty years; *Nebraska*,⁷ ten years; and for limitations in other States, see the notes.⁸

7. *Adverse Possession.*—Adverse possession for the period of forty years is a bar to an action of ejectment in *Maine*.⁹ In *North Carolina* the period is twenty years, and the State is barred by adverse possession for thirty years, or if under a colorable title for twenty years.¹⁰ In *Ohio* adverse possession for twenty-one years bars both individuals and the State.¹¹ For provisions in the other States, see the notes.¹²

Iowa.—Same as Indiana. Code Civ. Proc. sec. 2543.

Kentucky.—Same as Indiana. Bullitt's Code Civ. Proc. 1876, title, 3, ch. 1, sec. 18.

Michigan.—Same as Virginia. Howell's Annot. Stat. 1882, sec. 7792.

Mississippi.—"Declaration to be filed in the name of the person claiming the premises in question as plaintiff." Rev. Code, 1880, ch. 68, sec. 2479.

Missouri.—Shall be prosecuted in real name of plaintiffs. Wagner's Stats. 1872, ch. 50, sec. 4; Rev. Stat. 1879, sec. 2243.

New Jersey.—Real party plaintiff. Rev. Stats. 1877; title "Ejectment," secs. 1-3, p. 326.

Oregon.—Code of Civ. Proc. (in Gen. Laws, 1874) ch. 1, title 3, sec. 27; Hill's Annotated Laws, 1887, sec. 27.

Tennessee.—Code 1884, sec. 3954.

Virginia.—Action, how commenced; name of real party. "The action shall be commenced by the service of a declaration, in which the name of the real claimant shall be inserted as plaintiff, and all the provisions of law concerning a lessor of a plaintiff shall apply to such plaintiff." Code 1873, ch. 131, § 6.

West Virginia.—Same as in Virginia. Rev. Stat. 1879, ch. 71, sec. 6.

1. *Connecticut.*—Gen. Stat. 1888 (Rev. 1887), sec. 1368.

2. *Delaware.*—Rev. Code, 1852, Am'd 1874, ch. 122, sec. 1, p. 727.

3. *Maine.*—Rev. Stat. 1883, ch. 105, tit. 9, § 1.

4. *Minnesota.*—Stats. 1878, ch. 66, sec. 4.

5. *New Hampshire.*—Gen. Laws, 1878, ch. 221, sec. 1.

6. *Louisiana.*—Rev. Civ. Code, 1872 (ed. 1882), p. 425, art. 3584 (3512).

7. *Nebraska.*—Comp. Stats. 1886, Code Civ. Proc. sec. 6 (p. 629).

8. *North Carolina.*—**Limitation.**—See "North Carolina" under title "Judgment," *post*.

Pennsylvania.—Sheriffs' sales; when action to be brought. Rule to bring ejectment within ninety days, in case of sales by the sheriff, etc., service, etc., prescribed. Brightly's Purd. Dig. (Supplement, 1885-1887) 2192, secs. 1, 2, 3. See "Pennsylvania" under title "Damages," *post*.

South Carolina.—Must have been seized or possessed within twenty years. Rev. Stat. 1873, p. 588, § 102.

Action cannot be sustained unless seized or possession within twenty years. Rev. Stat. 1873, p. 588, § 101.

Within forty years. Code of Civ. Proc. 1882, sec. 109.

Limitation after entry or right of entry. Code of Civ. Proc. 1882, sec. 100.

Limitation within which action to be commenced; plaintiff limited to two actions. Code of Civ. Proc. 1882, sec. 98.

Must be within ten years before act committed. Code of Civ. Proc. 1882, sec. 99.

9. *Maine.*—Limitation of action. Rev. Stat. 1883, ch. 105, tit. 9, § 15.

10. *North Carolina.*—When State will not sue. Stat. of limitations; adverse possession. Code Civ. Proc. (in Code 1883) sec. 139, p. 71.

Adverse possession for twenty years a bar. Code Civ. Proc. (Code 1883) sec. 144, p. 531.

11. *Ohio.*—Action must be brought within twenty-one years after cause accrues; so of lands with title in government. Rev. Stats. 1886, vol. iii. (Suppl.) sec. 4977.

12. *South Carolina.*—What is adverse possession. Rev. Stat. 1873, p. 589, § 107.

8. *When Right of Entry accrues.* — In *Maine*, the statutes define when the right of entry accrues to a person disseized, an heir or devisee, a remainderman or reversioner, etc.¹ In *Connecticut*, the assignee of a reversion is given the same right of entry on land as the original grantor and the same remedy.²

9. *Parties generally.* — Statutory provisions regulating or specifying generally who may sue and be sued in ejectment are cited in the notes.³

10. *Mortgagee and Mortgagor as Parties.* — It is commonly provided that no action of ejectment shall be maintained by a mortgagee or his assigns or representatives for the recovery of the mortgaged premises until the title thereto shall have become absolute upon foreclosure.⁴

Adverse possession; written instrument. Code of Civ. Proc. 1882, sec. 103.

Adverse possession not upon written instrument. Code Civ. Proc. 1882, sec. 104.

What constitutes adverse possession not under written instrument. Code of Civ. Proc. 1882, sec. 105.

Written instrument; adverse possession, what is. Code of Civ. Proc. 1882, sec. 102.

West Virginia. — Adverse possession under patent, etc. Rev. Stat. 1879, ch. 71, sec. 19.

Disseizor defined. — *Maine.* — "If the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election, be considered a disseizor for the purpose of trying the right, although he claims an estate therein less than a freehold" Rev. Stat. 1883 (p. 815, ch. 104, tit. 9, § 7) See "Parties Defendant" herein under Massachusetts. See "Maine" under title "Pleadings," *post*.

Massachusetts. — **Disseizor defined.** — See "Massachusetts" under title "Parties Defendant," *post*.

1. *Maine.* — Person disseized; heir or devisee; remainder or reversion, etc; right accrues. Rev. Stat. 1883, ch. 105, tit. 9, § 3.

2. *Connecticut.* — Gen. Stat. 1888 (Rev. 1887), sec. 1053.

South Carolina. — **Right of Entry.** — See "South Carolina" under title "Disability," *post*.

3. **Parties generally.** — *California.* — Assignee or devisee to have same remedy as the grantor or devisor. Cal. Civ. Code, 1885, vol. 2, § 821.

Kansas. — Who may sue and be sued. Dassel's Comp. Laws, 1885, chap. 80, art. 24, sec. 594 (p. 680).

Minnesota. — Who may sue and be sued, and for what purpose; vacant land. Gen. Stats. 1878, chap. 75, sec. 2.

Several claimants from the same grantor or from a common source of title may be made party. Stats. 1878, chap. 75, sec. 4.

Mississippi. — Action may be discontinued. Rev. Code, 1880, sec. 2489.

Reversioner or remainderman rights. Rev. Code, 1880, sec. 2517.

Ohio. — Who may sue and be sued. Rev. Stat. 1886, secs. 5095, 5779, 5781.

Legal representative defined. Rev. Code, 1880, sec. 2515.

Vermont. — Who may sue and be sued. Rev. Laws, 1880, ch. 69, sec. 1247.

4 **Mortgages and Mortgagor as Parties.** — *Colorado.* — Mortgagee not to bring ejectment. Civil Code (in Session Laws, 1887), sec. 261.

Connecticut. — Ejectment by a mortgagee is barred by a tender of the mortgage debt with interest and costs. Gen. Stat. 1888 (Rev. 1887), sec. 1054.

When execution in ejectment may issue in action for foreclosure of a mortgage or other equitable relief. Gen. Stat. 1888 (Rev. 1887), sec. 1056.

Maine. — Mortgagor to bring writ of entry when premises in mortgagee's, etc., possession. Rev. Stat. 1883, chap. 90, tit. 9, sec. 31.

Massachusetts. — **Mortgagee** — See "Massachusetts" under title "When the Action may be maintained," *ante*.

Michigan. — Mortgagee not to bring ejectment until title becomes absolute. Howell's Annot. Stats. 1882, sec. 7847.

Minnesota. — Mortgagee barred from bringing ejectment; must foreclose. Stats. 1878, ch. 75, sec. 29.

New York. — Mortgagee may not bring ejectment. Code of Civ. Proc. sec. 1498.

Oregon. — Substantially the same as Minnesota. Gen. Laws, 1872, ch. 4, sec. 323; Hill's Annot. Laws, 1887, sec. 326.

Pennsylvania. — Provisions relative to action by mortgagee and service. Brightly's Purdon's Dig. pp. 637, § 9.

Rhode Island. — Ejectment against holder

11. *Vendor and Vendee.* — In *West Virginia*, a vendor, or any person claiming under him, cannot at law recover against a vendee, or those claiming under him, lands sold by such vendor when there is a writing signed by the vendor and his agent stating the purchase and its terms.¹

12. *Heir or Devisee.* — In *Vermont*, an heir or devisee can have no action until there is a decree assigning such lands to him, unless the executor or administrator surrenders possession.²

13. *Co-tenants, Tenants in Common, Joint Tenants.* — It is commonly provided that the action of ejectment may be brought by co-tenants, tenants in common, or joint tenants.³

14. *Joinder of Co-tenants, Tenants in Common, etc.* — Such joint holders of property may sue jointly or individually in ejectment.⁴

of right of redemption; mortgage void; writ of possession. Pub. Stats. 1882, ch. 216, sec. 7.

Vermont. — After judgment in ejectment execution to be stayed, if title that of mortgagee. Rev. Laws, 1880, sec. 1253.

Mortgagor has legal right to possession against mortgagee. Rev. Laws, 1880, sec. 1258.

Wisconsin. — Action does not lie for mortgaged premises. Rev. Stat. 1878, § 3095.

1. *Vendor and Vendee.* — *West Virginia.* — When recovery may be had. Rev. Stats. 1879, ch. 71, sec. 20.

2. *Heir or Devisee.* — *Vermont.* — Heir or devisee to have no action until lands are assigned. Rev. Laws, 1880, sec. 2137.

3. *Co-tenants, Tenants in Common, Joint Tenants.* — *Arkansas.* — Co-tenant may bring action if actually ousted, etc. Gantt's Digest, 1874, sec. 2259; Digest 1884, secs. 26, 36.

Colorado. — Co-tenants may sue; proof required of actual ouster. Civil Code (in Session Laws, 1887), sec. 275.

Georgia. — Co-tenant may sue alone; effect of judgment. Code 1882, sec. 3358.

Indiana. — Co-tenants; what must be proven. Rev. Stat. 1881, sec. 1063.

Iowa. — Same as in Indiana. McClain's Annot. Stats. 1884, sec. 3248.

Kansas. — Co-tenant; allegations of petition. Com. Laws, 1885, art. 24, ch. 80, § 597.

Michigan. — Co-tenants, etc.; ouster, etc. Same statute as in West Virginia. Howell's Annot. Stat. 1882, sec. 7812.

Minnesota. — Co-tenant; denial of plaintiff's right must be shown, etc. Gen. Stats. 1878, ch. 75, sec. 9.

Missouri. — Co-tenants; actual ouster, or denial of plaintiff's right. Wagner's Stats. 1872, ch. 50, sec. 9; Rev. Stat. 1879, sec. 2248.

Nebraska. — Substantially the same as in Minnesota. Code Civ. Proced. (Comp. Laws 1886), sec. 628.

New Jersey. — Co-tenants; any co-tenant may defend as such, and admit plaintiff's right to undivided share; actual ouster to be proven; verdict. Revis. of Stats. 1877, tit. "Ejectment," sec. 24.

New York. — Co-tenants may bring ejectment. Code Civ. Proced. (Banks & Bros.' Rev. Stat. 1883) sec. 1500.

Ouster or denial of right to be shown. Code Civ. Proced. (Banks & Bros.' Rev. Stat. 1883) sec. 1500.

Ohio. — Co-tenant, etc.; allegations of denial of plaintiff's right. Rev. Stat. 1886, vol. 3 (Supp'l't), sec. 5783.

Oregon. — Co-tenant, etc.; denial of plaintiff's right. Same statute as Minnesota. Code. Civ. Proced. (Gen. Laws, 1872) ch. 4, tit. 1, sec. 324; Hill's Annot. Laws, 1887, sec. 327.

Tennessee. — Co-tenants, etc.; actual ouster or some equivalent act to be proven. Substantially same statute as in New York. Code 1884, sec. 3967.

Virginia. — Co-tenants, etc.; actual ouster, etc. to be shown. Code 1873, ch. 131, sec. 15.

West Virginia. — Co-tenants, etc.; ouster, etc. Substantially same statute as in Virginia. Rev. Stats. 1879, ch. 71, sec. 15.

Wisconsin. — Co-tenants, etc.; ouster, etc. Same statute as in West Virginia. Rev. Stat. 1878, sec. 3080, p. 39.

4 *Joinder of Co-tenants, Tenants in Common, etc.* — *Maine.* — Co-tenants, etc., may join. Rev. Stat. 1883 (ch. 104, tit. 9, § 9).

Maryland. — All persons holding jointly may join. Rev. Code, art. 64, sec. 18.

Massachusetts. — Joint tenants and the like may sue jointly or severally. Pub. Stats. 1882, ch. 173, sec. 7.

Missouri. — Tenants in common may sue jointly. Wagner's Stats. 1872, ch. 50, sec. 3; Rev. Stat. 1879, sec. 2242.

Illinois. — Joint tenants, etc., may join or sue alone. Same statute as in Massachusetts. Starr & Curtis's Annot. Stat. 1885,

15. *Joinder of Parties generally.* — Various provisions as to the joinder of parties plaintiff and defendant are set forth in the notes.¹

16. *Landlord and Tenant.* — The relation of landlord and tenant has, of course, given rise to a variety of provisions determining their respective rights in actions of ejectment.²

ch. 45, par. 5; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 604, sec. 5.

Pennsylvania. — Co-tenants, etc., may join. Brightly's Purd. Dig. 1885, p. 636, sec. 4, vol. 1.

Rhode Island. — Joint tenants, etc., may sue jointly or individually. Pub. Stats. 1882, tit. 29, ch. 230, sec. 1.

Wisconsin. — Tenancy in common, heirship, etc.; joint or several action lies. Rev. Stats. 1878, sec. 3192.

1. *Joinder of Parties generally.* — *Arkansas.* — Who may be co-defendant. "The person from or through whom the defendant claims title to the premises may, on his motion, be made a co-defendant." Digest 1874, sec. 2252; Digest 1884, sec. 2626.

Iowa. — **No Joinder.** — See "Iowa" under title "When the Action may be maintained," *ante*.

Missouri. — Joint plaintiffs; recovery to be same as if separate suits were brought. Wagner's Stat. 1872, ch. 50, sec. 10; Rev. Stat. 1879, sec. 2249.

New Jersey. — Landlord, remainderman, or reversioner, may be joined. Revis. of Stats. 1877, tit. "Ejectment," sec. 4.

New York. — Joinder of defendants. Code Civ. Proced. (in Banks & Bros.' Rev. Stats. 1883) sec. 1503.

Ohio. — All interested may be joined as plaintiffs. Rev. Stats. 1886, sec. 5005.

All interested may be joined as defendants. Rev. Stats. 1886, sec. 5006.

Character of interest as to parties. Rev. Stats. 1886, sec. 5813.

Tennessee. — Several parties may be sued jointly or separately. Code 1884, sec. 3960.

Texas. — Landlord, reversioner, remainderman, etc., joined as defendants. Rev. Stat. 1879, sec. 4791.

Virginia. — When action is against all, verdict against all. Code 1873, ch. 131, sec. 16.

Wisconsin. — Who may be joined as defendant. Rev. Stats. 1878, sec. 3076.

2. *Landlord and Tenant.* — See, generally, "Parties Defendant," *ante*. See also "Pleadings," *post*.

Arkansas. — Action lies for recovery of premises on non-payment of rent. Ark. Dig. 1874, sec. 4024; Dig. 1884, sec. 4170.

Tenant to notify landlord. Dig. 1884, sec. 4162; Dig. 1874, sec. 4016.

Double rent to be recovered. Dig. 1874, sec. 4018; Dig. 1884, sec. 4164.

Lease for life, same remedy as if lease

for years. Digest 1874, sec. 4014; Digest 1884, sec. 4160.

California. — Same remedy lies against lessee's assignee; exceptions. Cal. Civ. Code, 1885, sec. 822, vol. ii.

Same remedy lies against lessor's assignee; exceptions. Cal. Civ. Code, vol. 2, 1885, sec. 823.

Recovery of rent upon lease for life. Cal. Civ. Code, vol. 2, 1885, sec. 824.

Tenant to notify landlord. Cal. Civ. Code, vol. 2, 1885, sec. 1949.

For the statutes relating to summary proceedings, see Deering's Codes and Stats. 1885, secs. 1159-1175.

Delaware. — Landlord to be defendant; to enter into common rule; possession admitted. Rev. Stats. 1874, ch. 119, sec. 2. See also ch. 122, sec. 2. Rev. Code, 1852, Am'd 1874, p. 706.

Lease, etc. Sec. 120 Rev. Code, 1852, Am'd 1874, relates to leases, notice to quit, holding over, and distress.

Neglect to notify landlord. Rev. Stat. 1852, Am'd 1874, ch. 119, sec. 3; Rev. Code, 1852, Am'd 1874, p. 706.

Georgia. — When relation of landlord and tenant exists; kind of estate in tenant; no estate passes out of the landlord; usufruct only. Code 1882, sec. 2279.

Other provisions are that tenant cannot dispute the landlord's title nor attorn. Code 1882, sec. 2283.

Tenant to deliver possession at expiration of term, or a summary remedy lies. Code 1882, sec. 2282.

Illinois. — Right to re-enter; when ejectment lies; judgment; writ of possession; lease to cease and determine; tender before final judgment. Starr & Curtis's Annot. Stat. 1885, ch. 80, par. 4; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 916, sec. 4.

Tenancy terminated; notice, no further demand necessary before ejectment. Starr & Curtis's Annotated Stat. 1885, ch. 80, par. 7; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 916, sec. 7.

Preliminary notice before ejectment. Starr & Curtis's Annotated Stat. 1885, ch. 80, par. 8; Rev. Stat. 1887, Cothraus' Annot. Ed. pp. 916, 917, sec. 8.

Tenant to notify landlord. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 17; Rev. Stat. 1887, Cothraus' Annotated Ed. p. 606, sec. 17.

Indiana. — Action against tenant. Rev. Stat. 1881, sec. 525.

17. *Parties Plaintiff.* — As to who are proper parties plaintiff in actions of ejectment, such as administrators, personal representatives, grantees, heirs or devisees, minors, lessors, the State and its grantees, etc., see the notes.¹

Kansas. — Landlord and tenant, provisions relative to. Dassler's Comp. Laws, 1885, ch. 55, secs. 3204-3234, pp. 518-521.

Kentucky. — Provisions are made by statute relative to landlord and tenant, the recovery of rent, etc. Bullitt's Codes, 1876, ch. 66; Kentucky Gen. Stat. 1883, ch. 66.

Louisiana. — Landlord and tenant, provisions relative to; manner of compelling tenant to give possession to owner, etc. Voorhies' Rev. Stat. 1876, secs. 2155-2165, pp. 559-561.

Maryland. — When landlord may bring ejectment. Rev. Code, 1878, art. 64, sec. 14.

See also Rev. Code, 1878, art. 67, ch. 7, secs. 1-23, for provisions in general as to landlord and tenant.

Massachusetts. — **Landlord and Tenant.** — See "Massachusetts" under title "When the Action may be maintained," *ante*.

Michigan. — **Landlord and Tenant.** — See "Michigan" under title "When the Action may be maintained," *ante*.

No imparlance, voucher, etc., allowed; landlord or person having privy of estate to be defendant. Howell's Annot. Stats. 1882, sec. 7979.

Minnesota. — Action equivalent to demand for rent and re-entry. Tender after limited time by the defendant. Stats. 1878, ch. 75, sec. 33.

Mississippi. — Tenant to notify landlord. Rev. Code, 1880, ch. 68, sec. 2482. See also ch. 50, secs. 1301-1358, for Landlord and Tenant.

New Hampshire. — Landlord and tenant; cases of unlawful possession. See Gen. Laws, 1878, ch. 250, also sec. 23, making provisions of act applicable to cases of unlawful possession.

New Jersey. — Tenant to notify landlord. Revis. of Stats. 1877, tit. "Ejectment," sec. 8.

New York. — Action may be brought without demand for rent or re-entry. Code Civ. Proced. in Banks & Bros.' Rev. Stats. 1883, sec. 1504.

Grant reserving rent or right of re-entry when action lies for land. Code Civ. Proced. (Banks & Bros.' Rev. Stats. 1883), sec. 1505.

Summary proceedings. See Banks & Bros.' Rev. Stats. 1883, secs. 2231-2265.

North Carolina. — When tenant may be removed. Code 1883, ch. 40, sec. 1766.

When possession of tenant is possession of landlord unless held twenty years, etc. Code 1883, vol. i. sec. 147.

Landlord and tenant, ejectment. For general provisions relating to the action, see Code 1883, secs. 1766-1776, pp. 670-674.

Oregon. — Action for recovery; demand for rent and re-entry. Code Civil Proced. (in Gen. Laws, 1872) ch. 4, tit. sec. 325; Hill's Annot. Laws, 1887, sec. 328.

Pennsylvania. — Tenant to notify landlord. Brightly's Purd. Dig. 1885, title "Ejectment," secs. 2, 3.

Rhode Island. — Landlord and tenant. For provisions relative to the recovery of land, and the manner of proceeding against tenants, see Pub. Stats. 1882, ch. 232, 234.

Landlord and Tenant. — See "Rhode Island" under title "Parties Plaintiff," *ante*.

South Carolina. — When possession of tenant is possession of the landlord unless held twenty years; or written lease, etc. Same statute as in North Carolina, under same heading. Rev. Stat. 1873, p. 590, sec. 109.

Limited to ten years by Code of Civ. Proced. 1882, sec. 106.

Landlord and tenant generally. See Gen. Stats. 1882, ch. 59, secs. 1805-1843 inclusive; Gen. Stats. 1882, sec. 1815; Rev. Stats. 1869, p. 434, sec. 9; Gen. Stats. 1882, sec. 1818; Rev. Stats. 1869, p. 425, secs. 1, 2.

Tennessee. — When tenant is not liable for rent in action for recovery of land. Code 1884, sec. 3991.

Virginia. — Landlord and tenant. Code 1873, pp. 903-976.

Wisconsin. — Tenant to notify landlord. Rev. Stats. 1878, sec. 2197. See title "Parties Defendant" for States in which provisions are made that landlord may be defendant.

Landlord and tenant. Rev. Stat. 1878, ch. 99.

1. **Parties Plaintiff.** — *Alabama.* — Administrator may sue. Rev. Code, 1876, sec. 2588 (2216).

Plaintiff recovering to notify plaintiff in pending action. Rule 26.

Arkansas. — Personal representative; public lands. Digest 1874, sec. 2255; Dig. 1884, sec. 2629.

Indiana. — One entitled to sue in name of another may sue in his own name. Rev. Stat. 1881, sec. 1073.

Louisiana. — Who may bring petitory action. Voorhies' Code of Pract. (3d ed. 1882) p. 10, art. 45.

What possessors may bring the action.

18. *Parties Defendant.* — As to who are proper parties defendant in actions of ejectment under the various statutes, see the notes.¹

Voorhies' Code of Pract. (3d ed. 1882) p. 10, art. 47.

Who not entitled to bring possessory action. Voorhies' Code of Pract. (3d ed. 1882) p. 10, art. 48.

Maryland. — **Plaintiff.** — See "Maryland" under title "When the Action may be maintained," *ante*.

New York. — Grantee, heir, or devisee may bring action. Code Civ. Proced. (in Banks & Bros.' Rev. Stats. 1883) sec. 1501.

Oregon. — Who may sue in ejectment. Code of Civ. Proced. (Gen. Laws, 1872) ch. 4, title 1, sec. 313; Hill's Annot. Laws, 1887, sec. 316.

Pennsylvania. — Minors. Brightly's Purd. Dig. 1885, p. 636, sec. 4, vol. 1.

Rhode Island. — Lessor or owner may bring action. Pub. Stats. 1882, tit. 29, ch. 232, sec. 7.

South Carolina. — State or its grantee or patentee may bring action in certain cases. Code of Civ. Proced. 1882, sec. 97.

State will not sue unless. Code of Civ. Proced. 1882, sec. 95.

Grantee of State not to sue in certain cases. Code of Civ. Proced. 1882, sec. 96.

Wisconsin. — When administrator may sue. Rev. Stat. 1878, sec. 3083.

1. *Parties Defendant.* — *Alabama.* — Landlord may be defendant. Rev. Code, 1867, sec. 2606; Rev. Code, 1876, sec. 2955.

Lessor may be permitted to defend after recovery. Rule 27.

Plaintiff in another suit to be defendant. Rule 25.

Arkansas. — Person in possession, or lessor, or both. Digest 1874, sec. 2251; Dig. 1884, sec. 2625.

Colorado. — Actual occupant, person claiming adversely; one exercising acts of ownership, or claiming title at commencement of action. Civil Code (in Session Laws, 1887), sec. 266.

Georgia. — Previous warrantor of title, co-defendant. Code 1882, sec. 3364.

Service upon true claimant makes him defendant. Code 1882, sec. 3360.

Illinois. — Actual occupant and all others claiming interest to be defendants. Rev. Stat. 1887, Coth. Annot. Ed. p. 604, sec. 6.

If premises not occupied, who to be defendant. Starr & Curtis's Annot. Stats. 1885, ch. 45, par. 7; Rev. Stat. 1887, Coth. Annot. Ed. p. 604, sec. 7.

Landlord may be defendant. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 18; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 606, sec. 18.

Indiana. — Landlord substituted. Rev. Stats. 1881, sec. 1051.

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Iowa. — Landlord substituted. McClain's Annot. Stat. 1884, sec. 3253.

Kentucky. — Person claiming right in property; how made defendant. Bullitt's Codes, 1876, tit. 3, ch. 1, sec. 29.

Louisiana. — Against whom a real action lies. Voorhies' Code of Practice (3d ed. 1882), p. 9, art. 41.

Against whom the petitory action lies. Voorhies' Code of Pract. (3d ed. 1882) p. 9, art. 43.

Lessor; how made defendant. Voorhies' Code of Pract. (3d ed. 1882) p. 9, art. 43.

Maryland. — **Defendant.** — See "Maryland" under title "When the Action may be maintained," *ante*.

Massachusetts. — Disseizor to be defendant; who is a disseizor. Pub. Stats. 1882, ch. 173, sec. 5.

Person who has actually ousted demandant, etc., a disseizor. Pub. Stats. 1882, ch. 173, sec. 6.

Michigan. — Persons claiming adversely to be defendants. Howell's Annot. Stats. 1882, sec. 7791.

Mississippi. — Reversioner or remainderman. Rev. Code, 1880, ch. 68, sec. 2516.

Landlord may defend. Rev. Code, 1880, ch. 68, sec. 2482.

Missouri. — Who to be co-defendant. Wagner's Stats. 1872, ch. 50, sec. 5; 1 Rev. Stat. 1879, sec. 2244.

Person in possession. Wagner's Stats. 1872, ch. 50, sec. 4; 1 Rev. Stat. 1879, sec. 2243.

New Jersey. — Landlord and others admitted to defend. Rev. Stat. 1877, tit. "Ejectment," sec. 17.

What party to be defendant. Rev. Stat. 1877, tit. "Ejectment," secs. 1-3, p. 326.

Landlord made defendant to be declared against; may defend jointly or separately. Rev. of Stats. 1877, tit. "Ejectment," sec. 18.

New York. — Defendant; some person claiming title; or actual occupant, etc. Code Civ. Proced. in Banks & Bros.' Rev. Stats. 1883, sec. 1502.

North Carolina. — Landlord or person claiming title or interest to be defendant. Code Civ. Proced. (Code 1883) sec. 184, p. 69.

Oregon. — Person in possession or acting as owner; defendant. Code Civ. Proced. (Gen. Laws, 1872) ch. 4, tit. 1, sec. 313; Hill's Annot. Laws, 1887, sec. 316.

Actual occupant may plead that he holds as tenant; landlord to be defendant. Hill's Annot. Laws, 1887, sec. 317; Gen. Laws, 1872, sec. 314.

Pennsylvania. — Landlord may defend;

19. *Plaintiff's Title terminating.*—It is commonly provided, that if the right of the plaintiff to the possession of the premises expires after the commencement of the action, and before the trial, the verdict shall be returned according to the facts, and judgment shall be entered only for the damages and costs.¹

20. *Alienation by Person in Possession.*—It is also provided that alienation of the land in controversy, either before or after the commencement of the action of ejectment, shall not prejudice it.²

admits possession. Brightly's Purdon's Dig. p. 636, § 4, vol. i.

Landlord may be made defendant upon notification. Brightly's Purdon's Dig. 1885, tit. "Eject." sec. 3.

Tennessee.—Action to be against actual occupant or some one interested. Code 1884, sec. 3955.

Landlord may be a party. Code 1884, sec. 3956.

Texas.—Defendant to be person in possession or claiming title, etc. Rev. Stats. 1879, art. 4790.

Landlord may enter as defendant or on tenant's motion. Rev. Stat. 1879, art. 4789.

Real owner or warrantor may be defendant. Rev. Stat. 1879, sec. 4788.

Vermont.—Neglect to join landlord; judgment by collusion; landlord not to be prejudiced. Rev. Law, 1880, sec. 1248.

Virginia.—Who to be made defendant; landlord, etc. Code 1873, ch. 131, sec. 5.

West Virginia.—Actual occupant or party claiming interest; landlord, etc.; defendants. Rev. Stats. 1879, ch. 71, sec. 5. See title "Disseizor defined," "Maine," ante.

Wisconsin.—Who to be made defendant at commencement of the action. Rev. Stat. 1878, § 3075.

1. *Plaintiff's Title terminating.*—*Arkansas.*—Plaintiff's right expiring after suit commenced. Digest 1874, sec. 2261; Dig. 1884, sec. 2638.

Rent dependent on another's life; remedy after death. Digest 1874; sec. 4012; Dig. 1884, sec. 4158.

California.—Right terminating; recovery for withholding the property. Cal. Civ. Code, vol. 3, 1885, § 740.

Colorado.—Right terminating; recovery for withholding the property. Same statute as in California. Civil Code (Session Laws, 1887), ch. 22, sec. 257.

Illinois.—Plaintiff's right expiring; rule of damages. Substantially the same statute as in California. Rev. Stat. 1887, Coth. Annot. Ed. p. 608, sec. 31.

Indiana.—Plaintiff's title expiring before verdict. Rev. Stat. 1881, sec. 1059.

Iowa.—Plaintiff's right expiring before verdict. Same statute as in Indiana. McClain's Annot. Stat. 1884, sec. 3260.

Kansas.—Plaintiff's right terminating

during pendency of suit; rule of damages. Same statute as in California. Comp. Laws, 1885, art. 24, ch. 80, sec. 598.

Michigan.—Plaintiff's right expiring; damages. Same statute substantially as in Virginia. Howell's Annot. Stat. 1882, sec. 7816.

Minnesota.—Plaintiff's right terminating; damages. Same as in Nebraska. Gen. Stat. 1878, ch. 75, sec. 10.

Nebraska.—Plaintiff's right terminating; damages. Code Civ. Proced. (Comp. Laws, 1886) sec. 609.

Missouri.—Plaintiff's right terminating; damages. Wagner's Stats. 1872, ch. 50, sec. 14.

New York.—Plaintiff's right terminating; damages. Banks & Bros'. Rev. Stats. 1883, vol. iv.; Code Civil Proced. sec. 1520.

Ohio.—Plaintiff's right terminating; damages. Same as Nebraska statute. Rev. Stat. 1886, sec. 5784.

Oregon.—Plaintiff's right terminating; damages. Same as Missouri statute. Hill's Annot. Laws, 1887, sec. 322; Code Civ. Proced. (Gen. Laws, 1872) ch. 4, tit. 1, sec. 319.

Pennsylvania.—Plaintiff's title changing after action brought by sale or assignment. Brightly's Purdon's Dig. p. 638, sec. 13.

South Carolina.—Descent cast; death of person in possession. Code of Civ. Proced. 1882, sec. 107; Rev. Stat. 1873, p. 590, sec. 110.

Tennessee.—Plaintiff's right expiring; damages. Code 1884, sec. 3973.

Vermont.—Plaintiff's right expiring. Rev. Laws, 1880, ch. 69, sec. 1251.

Virginia.—Plaintiff's title terminating; damages. Same substantially as Tennessee statute. Code 1873, ch. 131, sec. 28.

West Virginia.—Plaintiff's title expiring; verdict; right not to be affected by transfer. Rev. Stats. 1879, ch. 71, sec. 28.

Wisconsin.—Plaintiff's title expiring; damages. Same substantially as statute in Virginia. Rev. Stat. 1878, sec. 3085.

2. *Alienation by Person in Possession, etc.*

—*Colorado.*—Action not to be prejudiced by alienation before or after suit. Civil Code (in Session Laws, 1887), sec. 264.

Iowa.—Alienation after suit does not prejudice. McClain's Stat. 1884, § 3255.

Minnesota.—Alienation by person in

21. *Service of Process.*—For provisions regulating the service of process in this action, see the notes.¹

22. *Jurisdiction.*—Outside of the general statutory provisions relative to actions, certain special enactments exist in relation to ejectment.²

23. *Pleadings.*—For various statutory regulations of pleadings under the different systems, see the notes.³

possession; or in receipt of the rents and profits; action against purchaser. Stats. 1878, ch. 75, sec. 31.

Oregon.—Alienation by person in possession not to prejudice action; purchaser. Gen. Laws, ch. 4, sec. 322; Hill's Annot. Laws, 1887, sec. 325.

1 *Service of Process.*—*Florida.*—Writ of summons to be issued; service of declaration not necessary. McLellan's Dig. 1881, ch. 96, § 3.

Georgia.—Service where land in two counties. Code 1882, sec. 3355.

Service.—See "Georgia" under title "Parties Defendant," *ante*.

Illinois.—To be commenced by summons.—Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 9; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 604, sec. 9.

Indiana.—Service; non-resident. Rev. Stat. 1881, sec. 1053.

Iowa.—Service; non-resident. McClain's Annot. Stats. 1884, sec. 3249.

Minnesota.—Heirs' names and residence unknown; service. Gen. Stat. 1878, ch. 75, secs. 5 & 6.

Pennsylvania.—Service on party in possession. Brightly's Purd. Dig. 1885, title "Ejectment." See "Pennsylvania" under title "Mortgagee and Mortgagor," *ante*.

2. *Jurisdiction.*—*California.*—Action in district court. Cal. Civ. Code, vol. 2, 1885, § 793.

Maryland.—Land in adjoining counties; writ of *habere facias possessionem*. Rev. Code, 1878, art. 64, sec. 15.

New York.—City land. Code of Civil Proc. (Banks & Bros.' Rev. Stat. 1883) sec. 263.

Rhode Island.—District court. Pub. Laws, 1886, 1887.

3. *Pleadings.*—*Alabama.*—Plaintiff's claim to be stated in complaint; premises to be described. Rev. Code, 1867, sec. 2611; Rev. Code, 1876, sec. 2960.

Landlord and tenant; defendant may plead not guilty. Rev. Code, 1876, sec. 2962 (2613).

Plea of not guilty admits possession. Rev. Code, 1867, § 2614; Rev. Code, 1876, sec. 2963 (2614).

Pleadings.—See "Alabama" under title "When the Action may be maintained," *ante*.

Arkansas.—Declaration must set forth plaintiff's title; defendant's answer. Dig. 1884, sec. 2632.

Defendant's answer; objections to documentary evidence to be set forth or considered waived. Dig. 1884, secs. 2633, 2634.

Colorado.—Land to be described. Civ. Code (Session Laws, 1887), ch. 4, sec. 64.

Nature and extent of estate to be alleged; possession under laws or rules, of mining of the State or the United States; ouster by the defendant; damages claimed; how damages recovered and assessed. Civil Code (Session Laws, 1887), sec. 267.

Answer to deny material allegations; disclaimer; character of defendant's estate or right of possession to be set forth. Civil Code (Session Laws, 1887), sec. 268.

Florida.—Plaintiff shall allege merely the facts on which he relies to recover land and mesne profits; form of. McLellan's Digest, 1881, ch. 96, sec. 1.

Plea of not guilty puts title in issue. McLellan's Dig. 1881, ch. 96, sec. 2.

Plea of not guilty admits possession; if possession claimed, it must be by special plea. McLellan's Dig. 1881, ch. 96, § 6.

Georgia.—Defendant may disclaim. Code 1882, sec. 3361.

Defendant must admit possession. Rule 25, Superior Court, Appendix D. Code 1882.

Illinois.—General rules of pleading to apply, if applicable. Starr & Curtis's Annot. Stats. 1885, ch. 45, par. 10; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 605, sec. 10.

Premises to be described, but recovery to be of actual interest. Starr & Curtis's Annot. Stats. 1885, ch. 45, par. 12; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 605, sec. 12.

Nature of plaintiff's claim to be stated. Starr & Curtis's Annot. Stats. 1885, ch. 45, par. 13; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 605, sec. 13.

Possession to be stated as of a day certain; premises described; ouster or unlawful detainer; damage. Starr & Curtis's Annot. Stat. 1885, ch. 45, par. 11; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 605, sec. 11.

Declaration; several counts; several parties named. Starr & Curtis's Annot.

Stat. 1885, ch. 45, par. 14; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 605, sec. 14.

Defendant may demur, plead general issue, or not guilty; filing plea an appearance; evidence. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 19; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 606, sec. 19.

Pleadings.—See "Illinois" under title "Damages," *post*.

What not in issue by plea of not guilty. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 21; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 606, sec. 21.

Indiana.—What declaration should allege; premises to be described; ouster; unlawful detention. Rev. Stats. 1881, sec. 1054.

Answer to deny material averments; evidence under same. Rev. Stat. 1881, sec. 1055.

Equitable as well as legal defence may be pleaded. Rev. Stats. 1881, sec. 1056.

Relief by defendant; allegations. Rev. Stat. 1881, sec. 1075.

Iowa.—Petition to allege possession, describe premises; quantity and interest in estate; ouster; damages claimed. McClain's Annot. Stats. 1884, sec. 3250.

Answer to state interest; tenants to give landlord's name and residence. McClain's Stat. 1884, § 3252.

Defence admits possession. McClain's Stat. 1884, sec. 3254.

No Counter-claim.—See "Iowa" under title "When the Action may be maintained," *ante*.

Kansas.—Petition to state interest; describe land; allege right of possession, and unlawful detainer therefrom; plaintiff's ownership. Dassler's Comp. Laws, 1885, chap. 80, art. 24, sec. 595, p. 680; art. 8, sec. 127, p. 621.

Allegations of Petition.—See "Kansas" under title "Co-tenants," *ante*.

Defendant may deny title and other facts alleged; possession admitted by denial of title; defence only to part. Com. Laws, 1885, art. 24, ch. 80, § 596.

Kentucky.—Description of land; defendant's answer; burden of proof. Bullitt's Codes, 1876, ch. 7, sec. 125.

Maine.—Petition to set forth estate claimed; what need not be stated; when statement of title to be filed. Rev. Stat. 1883 (p. 816), ch. 104, tit. 9, sec. 3.

Premises to be described; tenant; only part demanded; when writ is to abate; declaration amended. Rev. Stat. 1883, ch. 104, tit. 9, § 21.

Person in possession a disseisor; plea of tenancy in abatement; may disprove the alleged possession; disclaimer; in possession of part; what to allege. Rev. Stat. 1883 (817), ch. 104, tit. 9, § 6.

Pleadings.—See "Maine" under title

"When the Action may be maintained," *ante*.

Maryland.—Names of plats need not be stated in declaration. Rev. Stat. 1878, art. 64, sec. 27.

Plats not considered pleading or evidence; counter-location, proof. Rev. Code, 1878, art. 64, sec. 26.

Pleadings.—See "Maryland" under title "When the Action may be maintained," *ante*.

Massachusetts.—Seizin of demandant to be alleged without day; ouster by tenant; profits; averment of estate claimed; no allegation of title. Pub. Stats. 1882, ch. 173, sec. 2.

Michigan.—Plaintiff to aver possession on day certain; entry by defendant; unlawful withholding; damages claimed. Substantially same as Virginia statute, *post*. Howell's Annot. Stat. 1882, sec. 7794.

Plea; when suggestion of claim for damages is filed. Howell's Annot. Stat. 1882, sec. 7832. See title "Damages," "Michigan," *herein*.

Premises to be described. Same as Virginia statute, *post*. Howell's Annot. Stat. 1882, sec. 7795.

Undivided shares to be stated. Howell's Annot. Stat. 1882, sec. 7796.

Action for dower, allegations; other cases, allegations. Howell's Annot. Stat. 1882, sec. 7797.

Actions other than dower; several counts and parties. Howell's Annot. Stat. 1882, sec. 7798.

Defendant may demur; plead general issue; appearance; evidence under plea. Howell's Annot. Stat. 1882, sec. 7808.

Minnesota.—Disclaimer by defendant in his answer. Stats. 1878, ch. 75, sec. 3.

Mississippi.—Action, how commenced; declaration to describe premises; quantity of interest to be stated; several counts; recovery of actual interest. Rev. Code, 1880, ch. 68, sec. 2479.

Plea limiting defence to part; judgment for the rest. Rev. Code, 1880, ch. 68, sec. 2488.

When defendant's plea admits possession. Rev. Code, 1880, ch. 68, sec. 2483.

Special plea denying possession; title when admitted. Rev. Code, 1880, sec. 2486.

Joint and several plea; plea of not guilty; defence as to part only; such part to be described. Rev. Code, 1880, ch. 68, sec. 2481.

Amendment of pleadings. Pleading may be amended if premises not described with sufficient certainty. Rev. Code, 1880, sec. 2484.

Landlord to state that he defends as such; what he may allege. Rev. Code, 1880, ch. 68, sec. 2482.

Missouri.—Action to be conducted as

other civil actions. Wagner's Stats. 1872, ch. 50, sec. 7; Rev. Stat. 1879, sec. 2246.

Plaintiff, to aver his right, as of a day certain; premises described; possession of defendant unlawful; damage to be stated. Wagner's Stats. 1872, ch. 50, sec. 6; Rev. Stat. 1879, sec. 2245.

Petition as to improvements; averments of. Wagner's Stat. 1872, ch. 50, sec. 21; Rev. Stat. 1879, sec. 2260.

Nebraska. — Plaintiff to state that he has a legal title; a right to the possession; description of premises; unlawful detention by defendant. Code of Civil Procedure (in Compiled Laws, 1886), sec. 626.

New Hampshire. — Defendant's answer; improvements under peaceable possession; averments concerning same. Gen. Laws, 1878, ch. 232, secs. 6 and 7.

New Jersey. — **Form of Action**. — Action shall be commenced by summons. Rev. Stat. 1877, title "Ejectment," secs. 1-3 (p. 326).

Form of summons; premises described; quantity of interest to be stated. Revis. of Stats. 1877, tit. "Ejectment," sec. 5.

Declaration to describe the premises; time when right accrued; several counts; form. Revis. of Stats. 1877, tit. "Ejectment," sec. 10.

Defendant's plea admits possession, etc. Revis. of Stats. 1877, tit. "Ejectment," sec. 13.

Defendant. — Joint and separate plea. Revis. of Stats. 1877, tit. "Ejectment," sec. 14.

Landlord or other person to state that he defends as such; what defence may be set up. Revis. of Stats. 1877, tit. "Ejectment," sec. 17.

Defendant not an actual occupant may disclaim. Rev. Stat. 1877, tit. "Ejectment," sec. 22.

Pleadings. — See "New Jersey" under title "Co-tenants," *ante*.

New York. — Property claimed to be described. Banks & Bros.' Rev. Stats. 1883, vol. iv.; Code of Civ. Proced. sec. 1499.

Pleadings. — See "New York" under title "When the Action may be maintained," *ante*.

Ohio. — Legal estate and right to possession to be averred; premises described; unlawful keeping out of premises by defendant. Rev. Stats. 1886, secs. 5779, 5781, 5995.

What defendant's answer shall deny; denial of title admits possession; defence as to part of the premises. Rev. Stats. 1886, sec. 5782.

Allegations. — See "Ohio" under title "Co-tenants," *ante*.

Oregon. — Nature of plaintiff's estate to be alleged; his right to possession and unlawful withholding by defendant to be

set out; the damage; property to be described. Code Civ. Proced. (in Gen. Laws, 1872) ch. 4, tit. 1, sec. 315; Hill's Annot. Laws, 1887, sec. 318.

Nature and extent of claim; defence as to part to specify what part. Code Civ. Proced. (Gen. Laws, 1872) ch. 4, sec. 316; Hill's Annot. Laws, 1887, sec. 319.

Where merits of the title may not be inquired into; what possession a bar. Hill's Annot. Laws, 1887, 3524; Gen. Laws, ch. 23, sec. 16.

Defendant may plead possession as tenant. Hill's Annot. Laws, 1887, sec. 317; Gen. Laws, 1872, sec. 314. See "Oregon" under title "Parties Defendant," *ante*.

Allegations. — See "Oregon" under "Parties Defendant," *ante*.

Pennsylvania. — Title of defendant. "The defendant may defend upon his own title, or the title of third persons." Brightly's Purd. Dig. 1885, p. 636, sec. 4, vol. i.

May defend for whole or part. "And the defendant shall enter his defence (if any he hath) for the whole or any part thereof, before the next term, and thereupon issue shall be joined." Brightly's Purdon's Dig. p. 637, § 10.

Plea to be not guilty. Brightly's Purd. Dig. 1885, title "Ejectment," sec. 15.

Tennessee. — Plaintiff to allege possession at time specified; premises unlawfully withheld by the defendant; amount of damage claimed. Code 1884, sec. 3958.

Quantity of estate; extent of interest to be averred; premises described. Code 1884, sec. 3959.

Defendant may demur. Code 1884, sec. 3962.

Plea of not guilty. Code 1884, sec. 3963.

Plea of not guilty admits possession. Code 1884, sec. 3964.

Texas. — Declaration to state; names of parties; describe premises; the interest claimed; right of possession withholding by defendant; amount of damages; relief. Rev. Stats. 1879, art. 4786.

Defendant's answer; plea of not guilty; may claim for improvements. Rev. Stat. 1879, sec. 4792.

Plea of statute of limitations. Rev. Stat. 1879, sec. 4793.

Plea of not guilty or answer to the merits admits possession, unless extent of possession be set out. Rev. Stat. 1879, sec. 4794.

Virginia. — Declaration to describe the premises. Code 1873, ch. 131, sec. 8.

Vermont. — **Pleadings**. — See "Vermont" under title "Abatement," *post*.

Declaration to aver possession on day certain; entry and unlawful withholding by defendant; damage claimed. Code 1873, ch. 131, sec. 7.

Nature of interest to be stated; if undivided share or interest, to be set out. Code 1873, ch. 131, § 9.

24. *Abatement.* — It is commonly provided that actions of ejectment shall not abate by the death of either party, but the proceedings may be continued by or against his successor in interest.¹

25. *Joinder of Actions.* — Provision is often made for the joinder of claims for damages, rent in arrears, waste, etc., with the action of ejectment.²

Several counts and several parties. Code 1873, ch. 131, § 10.

Demurrer or plea, or both, may be filed; general issue, proceedings under. Code 1873, ch. 131, sec. 13.

Defendant may set up equitable defence. Code 1873, ch. 131, secs. 20, 21.

West Virginia. — Declaration to describe premises. Same as Virginia statute, *ante*. Rev. Stats. 1879, ch. 71, sec. 8.

Declaration to aver possession on day certain; entry and unlawful withholding by defendant; damage claimed. Same as in Virginia statute, *ante*. Rev. Stats. 1879, ch. 71, sec. 7.

Plaintiff to allege his estate in the premises. Rev. Stats. 1879, ch. 71, sec. 9.

Demurrer, or plea, or both, may be filed; general issue. Same words as in Virginia statute, *ante*. Rev. Stat. 1879, ch. 71, sec. 13.

Equitable defence may be set up. Rev. Stat. 1879, ch. 71, sec. 20.

Pleadings. — See "West Virginia" under title "Improvements," *post*.

Wisconsin. — How premises are to be described; nature and extent of estate to be set out; unlawful withholding; general and special damage may be averred; demand for judgment claimed. Rev. Stat. 1878, sec. 3077.

Defendant may demur or answer; may set up equitable defence; may demand on such defence the judgment claimed. Rev. Stat. 1878, § 3078.

Action by administrator; interest to be stated and right to possession. Rev. Stat. 1878, § 3083.

1. **Abatement.** — *California.* — Action not to abate, but proceedings to continue. Deering's Annot. Codes & Stats. 1885, sec. 385.

Colorado. — Not to abate by death. Civil Code (in Session Laws, 1887), sec. 270.

Connecticut. — Abatement; actions for disseizin. Gen. Stat. 1888 (Rev. 1887), sec. 1012.

Disseizin; abatement by death; new action after. Gen. Stat. 1888 (Rev. 1887), sec. 1369.

Illinois. — Abatement; suggestion of death; personal representatives. Starr & Curtis's Annot. Stat. 1885, ch. 45, par. 51; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 612, sec. 51.

Louisiana. — Death of one of the parties. Voorhies' Code of Pract. (3d ed. 1882) p. 5, art. 21.

Maine. — Death or intermarriage not to abate. Rev. Stat. 1883, ch. 104, tit. 9, § 16.

Abatement. — See "Maine" under title "Pleading," *ante*.

Maryland. — Death not to abate. Rev. Code, 1878, art. 64, secs. 32, 34.

Massachusetts. — Death of either party; action to proceed. Pub. Stats 1882, ch. 173, sec. 11.

Michigan. — Death of plaintiff; legal representatives may sue. Howell's Annot. Stat. 1882, sec. 7826.

Mississippi. — Suit does not abate. Rev. Code, 1880, sec. 2493-2502.

Suit to be continued. Howell's Annot. Stat. 1882, sec. 7817.

Plaintiff dying after issue joined; suggestion of death to be entered. Howell's Annot. Stats. 1882, sec. 7844.

New Hampshire. — No abatement because all tenants are not named; answer and disclaimer by those served. Gen. Laws, 1878, ch. 226, sec. 10, p. 526.

No abatement by death. Gen. Laws, 1878, ch. 222, secs. 11, 13.

General rule. Laws of 1885, ch. 11, sec. 1.

New Jersey. — Death not to abate action; sole plaintiff; no survivorship. Revis. of Stats. 1877, "Ejectment," secs. 28-39.

Pennsylvania. — Death not to abate. Brightly's Purd. Dig. 1885, title "Ejectment," sec. 12.

Rhode Island. — Action survives to legal representative in case of death of either party. Pub. Stat. 1882, tit. 26, ch. 204, sec. 11.

Tennessee. — Death does not abate action. Code 1884, sec. 3986.

Vermont. — Suit not to abate because all the tenants are not joined; answer for part of premises; disclaimer. Rev. Laws, 1880, sec. 1249.

Wisconsin. — Death not to abate; legal representative to carry on suit. Rev. Stat. 1878, secs. 2806, 3091.

2. **Joinder of Actions.** — *California.* — Joinder of claim for recovery, with damages or waste. Deering's Annotated Codes & Stats. 1885, vol. iii. sec. 427 (subd'n 2).

Colorado. — All claims for real property, joined with claims for rent in arrears or profits, or waste. Civ. Code (in Session Laws, 1887), ch. 4, sec. 70.

Georgia. — Several parcels of land claimed under distinct titles; no joint action or joint recovery for the land or mesne profits. Code 1882, sec. 3359.

26. *Abstract of Title.* — One or both of the parties to the action is usually entitled to demand an abstract of title.¹

27. *Practice.* — Several provisions relating to matters of practice are referred to in the notes.²

Ejectment and claim for damages by way of mesne profits; count for mesne profits in whose name. Code 1882, sec. 3356.

No separate action for mesne profits. Code 1882, sec. 3357.

Kentucky. — What actions may be joined. Bullitt's Codes, 1876, ch. 3, sec. 83.

Louisiana. — Possessory action after petitory action; possessory action and ownership of property. Voorhies' Code of Pract. (3d ed. 1882) p. 13, art. 54.

Petitory and possessory actions not to be cumulated and joined except. Voorhies' Code of Pract. (3d ed. 1882) art. 55.

Joinder by consent; ownership decided. Voorhies' Code of Pract. (3d ed. 1882) art. 57.

Claim for possession and ownership joined. Voorhies' Code of Pract. (3d ed. 1882) p. 39, art. 150.

New York. — Claim for recovery and damages may be joined. Code Civ. Proc. (Banks & Bros.' Rev. Stats. 1883) secs. 1496, 1497.

North Carolina. — Claim to recover real property united with claim for damages. Code of Civil Procedure (Code 1883), p. 101 (sec. 267).

Ohio. — Claim for damages and recovery of property united. Rev. Stats. 1886, sec. 5019.

Oregon. — Recovery lies for property and for damages. Code Civil Proc. (Gen. Laws, 1872) ch. 4, title 1, sec. 313; Hill's Annot. Laws, 1887, sec. 316.

1. **Abstract of Title.** — *Alabama.* — Defendant may demand abstract of title on tender of his own. Walker's Rev. Code, 1867, sec. 2612; Rev. Code, 1876, sec. 2961.

Georgia. — Abstract of title to be annexed to the declaration. Code 1882, sec. 3401.

Iowa. — Petition and answer to have abstract of title attached; written evidence of title not to be referred to on trial unless. McClain's Stat. 1884, § 3251.

Maine. — **Abstract of Title.** — See "Maine" under title "Pleading," *ante*.

Mississippi. — Abstract of title to be furnished. Rev. Code, 1880, sec. 2491.

New Jersey. — Bill of particulars of claim or abstract of title may be demanded. Revis. of Stats. 1877, "Ejectment," secs. 25, 26.

Pennsylvania. — Description of land and declaration of title to be filed. Brightly's Purd. Dig. p. 637, sec. 10.

Texas. — Abstract of title. Rev. Stat. 1879, art. 4796.

2. **Practice.** — *Alabama.* — Rules can be found in Revised Code, 1876, pp. 160, 161.

Colorado. — Rules of practice in general applicable. Civil Code (in Session Laws, 1887), sec. 277.

Illinois. — Action against several occupying distinct parcels; plaintiff to elect. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 29; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 608, sec. 29.

Maryland. — When warrant of resurvey not to issue. Rev. Code, 1878, art. 64, § 21.

Defendants may sever in defence. Rev. Code, 1878, art. 64, § 16.

North Carolina. — **Practice.** — See "North Carolina" under title "Parties generally," *ante*.

Pennsylvania. — Other parties appearing to be in possession at time of service; judgment by default; writ of possession; return of sheriff when evidence of actual possession. Brightly's Purdon's Dig. p. 606, § 5, vol. i.

Tennessee. — **Practice.** — See "Tennessee" under title "Joinder of Parties generally," *ante*.

Texas. — What plaintiff shall indorse on his petition. Rev. Stats. 1879, art. 4787.

Writ of Estrepement. — When writ of estrepement may be awarded. "During the pendency of an action of ejectment, the court in which such action is may award a writ of estrepement to prevent waste being committed on the premises which are the subject of such action." Rev. Stats. 1874, ch. 88, sec. 10; Rev. Code, 1852, Am'd 1874, p. 536 (Delaware).

Discovery of Plaintiff. — Defendant may apply for discovery of plaintiff's name. "A defendant in ejectment may at any time before pleading apply to the court or to any judge thereof in vacation to compel the attorney for the plaintiff to produce to such court or judge his authority for commencing the action in the name of any plaintiff therein. Such application shall be accompanied by an affidavit of the defendant that he has not been served with proof in any way of the authority of the attorney to use the name of the plaintiff stated in the declaration." Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 15; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 605, sec. 15 (Illinois).

28. *Presumptions.*—In *North Carolina* and *South Carolina*, a person establishing a legal title is presumed to have been in possession within the time required by law.¹

29. *Evidence.*—What must be proven to authorize a recovery, and what evidence is admissible, has been regulated by statute in many of the States.²

1. *Presumptions.*—*Maryland.* See “*Maryland*” under title “*Evidence*,” *post*.

North Carolina.—Person establishing a legal title presumed to have been in possession within time required by law; occupation by any other person. Code 1883, vol. i. sec. 146.

South Carolina.—Person establishing a legal title presumed to have been in possession within time required by law; occupation by any other person. Rev. Stat. 1873, p. 589, sec. 104; Am'd by Code of Civ. Proc. 1882, sec. 101.

2 *Evidence.*—See title “*Co-tenants*,” *ante*.

Alabama.—Landlord and tenant; defendant's evidence.

The defendant, upon a plea of not guilty, “may give the same matter in evidence as upon the plea of not guilty in the action of ejectment.” Rev. Code, 1867, sec. 2613; Rev. Code, 1876, sec. 2962.

Arkansas.—What must be shown to entitle plaintiff to recover. “To entitle the plaintiff to recover, it shall be sufficient for him to show that at the commencement of the action, the defendant was in possession of the premises claimed, and that the plaintiff had title thereto, or had the right of possession thereof.” Digest 1874, sec. 2258; Dig. 1884, sec. 2635.

Colorado.—When plaintiff need not prove defendant in possession. Civil Code (in Session Laws, 1887), sec. 276.

Evidence to be confined to respective claims of the parties and their privies; legal fee title in United States. Civil Code (in Session Laws, 1887), sec. 274.

Illinois.—Plaintiff need not prove possession by defendant, or demand for premises; unless. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 22; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 606, sec. 22.

Neither actual entry, nor receipt of the profits, only right of possession to be proven. Starr & Curtis's Annotated Stat. 1885, ch. 45, pars. 23 & 33; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 607, sec. 23; p. 609, sec. 33.

Lease, entry, and ouster need not be confessed or proven except. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 24; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 607, sec. 24.

Title from a common source; what to prove. Starr & Curtis's Annotated Stat.

1885, ch. 45, par. 25; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 607, sec. 25.

Co-tenants, etc.; actual ouster to be proven. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 26; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 607, sec. 26.

Evidence of title by one of several plaintiffs. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 27; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 607, sec. 27.

See “*Illinois*” under title “*Pleadings*,” *ante*.

Indiana.—Party defending need not be proved to be in possession. Rev. Stat. 1881, sec. 1056.

Weight of evidence as to title. Rev. Stat. 1881, sec. 1057.

See “*Indiana*” under title “*Pleadings*,” *ante*.

Kentucky.—See “*Kentucky*” under title “*Pleadings*,” *ante*.

Maine.—Actual entry need not be proven; must show his right to estate and right of entry. Rev. Stat. 1883 (p. 816, ch. 104, tit. 9, sec. 4).

Title-deed may be impeached for fraud, if defendant in possession twenty years. Rev. Stat. 1883, ch. 104, tit. 9, § 44.

See “*Maine*” under title “*Pleadings*,” *ante*. See also “*Maine*” under title “*Judgment*,” *ante*.

Maryland.—Lands need not be proven patented; patent presumed; actual enclosure not necessary to be shown; exclusive user and ownership other than enclosure need not be proven; provided. Rev. Code, 1878, art. 64, sec. 20.

See “*Maryland*” under title “*Pleadings*,” *ante*.

Massachusetts.—Actual entry not to be proven; nature of interest and right to same; right of entry at commencement of action necessary. Pub. Stats. 1882, ch. 173, sec. 3.

See “*Massachusetts*” under title “*Feigned Issues*,” *ante*.

Michigan.—Defendant's evidence. Howell's Annot. Stat. 1882, sec. 7809.

When suggestion of claim for damages is filed. Howell's Annot. Stat. 1882, sec. 7832. See title “*Damages*,” “*Michigan*,” *herein*.

Time of defendant's possession; mesne profits, time enjoyed, and their value; record not evidence. Howell's Annot. Stat. 1882, sec. 7834.

See “*Michigan*” under title “*Pleadings*,” *ante*.

30. *Damages and Mesne Profits.* — The plaintiff, it is commonly provided, may recover damages in an action of ejectment for the injury done to the land by cultivation, waste, etc., which shall not exceed a fair valuation of the property exclusive of improvements; but they are usually limited to those accruing within five years before the commencement of the action.¹

Pennsylvania. — See "Pennsylvania" under title "Practice," *ante*.

Mississippi. — Evidence under plea of not guilty. Rev. Stat. 1880, ch. 68, sec. 2481.

Missouri. — Sufficient to show defendant was in possession when action commenced, and right of plaintiff to possession. Wagner's Stats. 1872, ch. 50, sec. 8; Rev. Stat. 1879, sec. 2247.

Oregon. — Evidence of defendant confined to pleadings in answer. Gen. Laws, 1872, ch. 4, sec. 316.

Action of dower or by co-tenant; denial of plaintiff's right to be shown. Gen. Laws, 1872, ch. 4, § 324; Hill's Annot. Laws, 1887, sec. 327.

Rhode Island. — Actual entry need not be shown; right to estate and right to enter, sufficient. Pub. Stats. 1882, tit. 27, ch. 214, sec. 47.

Tennessee. — Actual entry need not be proven; nor receipt of profits; nor lease, entry, or ouster; right to possession sufficient. Code 1884, sec. 3966.

Vendor and vendee; title-bonds may be evidence. Code 1884, sec. 3968.

Texas. — Evidence under plea of not guilty; except limitations. Rev. Stat. 1879, sec. 4793.

Vermont. — Demand for rent, nor right of re-entry not to be shown. Rev. Laws, 1880, ch. 69, sec. 1259.

Virginia. — See "Virginia" under title "Feigned Issues," *ante*.

Evidence under general issue and plea of not guilty. Code 1873, ch. 131, § 13.

West Virginia. — Evidence under general issue or plea of not guilty. Rev. Stat. 1879, ch. 71, § 13.

1. *Damages and Mesne Profits.* — See title "Plaintiff's Title terminated," *ante*.

Alabama. — When damages may be recovered for use and occupation of land. Rev. Code, 1867, sec. 2607; Rev. Code, 1876, sec. 2956.

Damages; to be computed to time of verdict. Rev. Code, 1867, sec. 2608; Rev. Code, 1876, sec. 2957.

Tenant liable for rent in arrear and during possession. Rev. Code, 1867, sec. 2616; Rev. Code, 1876, sec. 2965.

Who not responsible for damages; time limited. Rev. Code, 1867, sec. 2617; Rev. Code, 1876, sec. 2966.

Arkansas. — Fair and reasonable compensation against occupant. Dig. 1874, sec. 4023; Dig. 1884, sec. 4169.

Mesne profits not allowed; unless. Dig. 1884, sec. 2646.

Rents and profits; unless; improvements to offset. Digest 1874, sec. 2260; Dig. 1884, sec. 2637.

Colorado. — See "Colorado" under title "Pleadings," *ante*. See also "Colorado" under title "New Trial," *post*.

Georgia. — Bare possession authorizes recovery of damages. Code 1882, sec. 3015.

Illinois. — Rents and profits to be recovered. Starr & Curtis's Annot. Stat. 1885, ch. 45, par. 33; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 609, sec. 33.

Persons evicted have record, or other good title, not liable for rents, etc.; damages. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 52; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 612, sec. 52.

Mesne profits; suggestion of claim for to be filed. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 43; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 611, sec. 43.

Indiana. — Damages for use and occupation limited as to time. Rev. Stat. 1881, sec. 1058.

When exemplary damages to be awarded. Rev. Stat. 1881, sec. 1062.

Jury to assess. Rev. Stat. 1881, sec. 1076.

Iowa. — Exemplary damages same as Indiana statute, *ante*. McClain's Annot. Stat. 1884, sec. 3263.

Use and occupation; recovery limited. McClain's Stat. 1884, sec. 3261.

Kentucky. — Jury to assess; what damages may be recovered; improvements. Kerr, Gen. Stat. 1883, ch. 80, art. 1, sec. 5.

Maine. — Damages for rent and profits may be had, and for destruction and waste. Rev. Stat. 1883, chap. 104, tit. 9, sec. 11.

Action for mesne profits and damages. Rev. Stat. 1883, ch. 104, tit. 9, sec. 15.

Maryland. — Mesne profits and damages for detention. Rev. Code, 1878, art. 64, sec. 13.

Massachusetts. — Trespass lies for mesne profits; or for damages. Pub. Stats. 1882, ch. 173, sec. 47.

Michigan. — Rents and profits recoverable; dower excepted. Howell's Annot. Stat. 1882, sec. 7829.

Nominal damages; suggestion of claim to be filed after judgment. Howell's Annot. Stats. 1882, sec. 7830.

31. *Improvements.* — Where the defendant, with confidence in his title, has made improvements and paid taxes upon the land, provision is made to permit the defendant to set these off against the damages. Should the improvements exceed in value the amount of the damages, the plaintiff is prevented from securing title in his action until the value of the improvements has been refunded; otherwise, their value constitutes a lien upon the land.¹

Limitation as to rents and profits. Howell's Annot. Stat. 1882, sec. 7840.

Minnesota. — Damages not to exceed fair value, less improvements. Gen. Stats. 1878, ch. 75, sec. 13. See "Improvements" herein, *post*.

Mississippi. — Mesne profits recovered in same or separate action. Rev. Code, 1880, sec. 2512.

Missouri. — Damages; for what and how determined. Wagner's Stats. 1872, ch. 50, sec. 13; Rev. Stat. 1879, sec. 2252.

Nebraska. — Triple damages. Code Civ. Proced. (in Comp. Laws, 1886), sec. 633.

New Jersey. — Mesne profits, action for, and damage, lies after judgment or in action of ejectment. Revis. of Stat. 1877, tit. "Ejectment," sec. 45.

Mesne profits; measure of damages. Rev. Stat. 1877, tit. "Ejectment." See title "Improvements" herein, *post*.

See "New Jersey" under title "Co-tenants," *ante*.

New York. — Rents and profits as damages; value of use and occupation for time limited; value of improvements. Code Civ. Proced. (Banks & Bros.' Rev. Stats. 1883) sec. 1531.

Oregon. — Damages for withholding property less improvements. Code Civ. Proced. (Gen. Laws, 1872), ch. 4, tit. 1, sec. 318; Hill's Annot. Laws, 1887, sec. 321. See title "Improvements" herein, *post*.

Pennsylvania. — Mesne profits, action for, lies before or after ejectment; against whom; when to be tried; statute of limitations. Brightly's Purd. Dig. 1885, title "Ejectment," secs. 29, 30.

South Carolina. — Mesne profits; no recovery for. Pub. Stats. 1869, tit. 4, ch. 121, sec. 6; Gen. Stat. 1882, sec. 1840.

Tennessee. — Action lies for mesne profits. Code 1884, sec. 3990.

Texas. — What damages may be had. Rev. Stats. 1879, art. 4809.

Vermont. — Damages for mesne profits to be just and equitable; improvements to be considered. Rev. Laws, 1880, sec. 1264.

Virginia. — Mesne profits and damages to be recovered against other person than defendant. Code 1873, ch. 131, sec. 37.

Period limited for damages. Code 1873, ch. 131, sec. 30.

West Virginia. — Mesne profits and damages to be recovered against other than defendant. Same as statute in Virginia, *ante*. Rev. Stat. 1879, ch. 71, sec. 37.

1. *Improvements.* — Period limited for damages same as statute in Virginia, *ante*. Rev. Stat. 1879, ch. 71, sec. 30.

Wisconsin. — Damages for rents and profits; special damages for waste or otherwise; improvements to be allowed. Rev. Stats. 1878, sec. 3082.

See titles "Damages" and "Judgment," *ante*.

Alabama. — Defendant may gather crop. Rev. Code, 1876, secs. 2949 (2600), 2950 (2601).

Value of use and occupation and value of improvements to be assessed. Rev. Code, 1867, secs. 2602, 2603; Rev. Code, 1876, secs. 2951, 2952.

Value of improvements in excess; writ of possession barred for one year, unless. Rev. Code, 1867, sec. 2604; Rev. Code, 1876, sec. 2953.

Arkansas. — Improvements and taxes to be paid. Dig. 1884, sec. 2644.

Improvements to be assessed, and also damages; if balance in favor of improvements, no writ of possession to issue until; amount of balance to be a lien. Dig. 1884, sec. 2645.

Equitable proceedings; what may be set off against improvements. Dig. 1884, sec. 2647.

See "Arkansas" under title "When the Action may be maintained," *ante*. See also "Arkansas" under title "Damages," *ante*.

California. — Improvements to be set off against damages. Cal. Civ. Code, vol. 3, 1885, § 741.

Colorado. — Improvements to be set off against damages, except. Civil Code (in Session Laws, 1887), sec. 258.

Connecticut. — No judgment until improvements ascertained; exceeding value of use and occupation; election to have title confirmed; sum to be paid to be ascertained. Gen. Stat. 1888 (Rev. 1887), sec. 1055.

Illinois. — Allowance for improvements to be made. Starr & Curtis's Annot. Stats. 1885, ch. 45, pars. 55-61. Rev. Stats. 1887, Cothraus' Annot. Ed. p. 613, secs. 55, 56; p. 614, sec. 57.

Improvements are defined in *Minnesota* as including all kinds of

Indiana. — Improvements to be set off. Rev. Stat. 1881, sec. 1061.

Plaintiff may take property after paying improvements and taxes, with interest, deducting the value of the rents and profits and the damages sustained, as assessed. Rev. Stat. 1881, sec. 1077.

Occupying claimant to recover for improvements. Rev. Stat. 1881, sec. 1082.

Iowa. — Improvements to be set off to extent of damages. McClain's Annot. Stat. 1884, sec. 3262.

Kentucky. — Value of improvements to be paid. Bullitt & Feland's Gen. Stats. 1883, ch. 80, art. 1, sec. 1. See also title "Damages," "Kentucky," *ante*.

Massachusetts. — Exception to rules as to improvements. Rev. Stat. 1883, ch. 104, tit. 9, sec. 32.

Tenant when allowed for improvements. Rev. Stat. 1883, ch. 104, tit. 9, sec. 20.

Value of improvements to be recovered by tenant by action; provisions extend to other parties; lien created; what is not a bar. Rev. Stat. 1883, ch. 104, tit. 9, § 42.

Sum allowed for improvements shall be set off. Pub. Stats. 1883, ch. 173, sec. 25.

When improvements allowed. Pub. Stats. 1882, ch. 173, secs. 17 and 18.

Value of improvements exceeding value of rents and profits. Pub. Stats. 1882, ch. 173, sec. 26.

Michigan. — Improvements, value of to be set off; how estimated. Howell's Annot. Stat. 1882, sec. 7835.

Compensation allowed for improvements; provided; peaceable possession; color of title, etc. Howell's Annot. Stats. 1882, sec. 7836.

Minnesota. — Value of improvements allowed as a set-off. Gen. Stats. 1878, ch. 75, sec. 13. See also title "Damages," "Minnesota," *ante*.

Buildings erected by the defendant may be removed. Gen. Stats. 1878, ch. 75, sec. 14.

Mississippi. — Improvements to be set off. Rev. Code, 1880, sec. 2512; Am'd Laws, 1884, p. 79, ch. 67.

Growing crop to be gathered. Rev. Code, 1880, sec. 2507.

New Hampshire. — See "New Hampshire" under title "Pleadings," *ante*.

Missouri. — Improvements to be allowed, etc. Wagner's Stats. 1872, ch. 50, secs. 20, 24, 26, 27; Rev. Stat. 1879, secs. 2259, 2263, 2265, 2266.

See "Missouri" under title "Pleadings," *ante*.

Nebraska. — Defendant to be compensated for improvements. Comp. Laws, 1886, ch. 63, sec. 1.

New Hampshire. — See "New Hampshire" under title "Judgment."

New Jersey. — Value of improvements to be allowed, and offset against damages. Revis. of Stats. 1877, tit. "Ejectment," sec. 47.

New York. — Improvements, how far allowed as a set-off. Code of Civ. Proc. (Banks & Bros.' Rev. Stat. 1883) sec. 1531.

Ohio. — Improvements to be fully paid, or no eviction. Rev. Stats. 1886, sec. 5786.

Oregon. — Improvements, how far a set-off. Substantially same as the Minnesota statute, *ante*. Code Civ. Proc. (Gen. Laws, 1872) ch. 4, tit. 1, sec. 318; Hill's Annot. Laws, 1887, sec. 321.

South Carolina. — Full value of improvements may be recovered after judgment. Pub. Stat. 1869, tit. 4, ch. 121, sec. 1.

May be sued for after judgment in ejectment. Pub. Stat. 1869, tit. 4, ch. 121, sec. 3.

Growing crop; tenant not to be dispossessed until finished. Gen. Stat. 1882, sec. 1807.

Full value of improvements to be given. Gen. Stat. 1882, secs. 1835, 1836.

Tennessee. — Bill in equity for improvements. Code 1884, sec. 3990.

Improvements to be set off when defendant holds in good faith under color of title. Code 1884, sec. 3992.

Texas. — Claim for use and occupation and damages to be considered with claim for improvements. Rev. Stat. 1879, sec. 4810.

Improvements to be set off; estimate how made. Rev. Stat. 1879, art. 4813-4816.

See "Texas" under title "Pleadings," *ante*.

Virginia. — Improvements to be recovered; value exceeding the damage. Code 1873, ch. 132, secs. 1-6.

Statement of claim for improvements to be filed with plea, or subsequently. Code 1873, ch. 131, § 32.

Balance to be ascertained. Code 1873, ch. 131, sec. 33.

Vermont. — When provisions relating to betterments are not to apply. Rev. Laws, 1880, sec. 1267.

Improvements to be recovered. Rev. Laws, 1880, ch. 69, sec. 1260.

West Virginia. — Statement of claim for improvements to be filed with plea, or subsequently. Same statute as in Virginia, *ante*. Rev. Stat. 1879, ch. 71, sec. 32.

Improvements to be recovered; value exceeding the damage. Same statute as in Virginia, *ante*. Rev. Stat. 1879, ch. 72, secs. 1-6.

Wisconsin. — Improvements to be set off; excess. Rev. Stats. 1878, sec. 3096.

building, fences, ditching, draining, grubbing, clearing, or other necessary or useful labor of permanent value to the land.¹

32. *Judgments.*—A judgment in ejectment is usually made conclusive and a bar to further actions where the same title is involved. It is frequently required to specify the amount awarded by it.²

Improvements to be allowed. Rev. Stat. 1878, sec. 3082. See title "Damages," "Wisconsin," *herein, ante*.

1. Minnesota Gen. Stats. 1878, ch. 75, sec. 19.

2. *Judgments.*—See title "Plaintiff's Title terminated," *ante*.

Alabama.—Growing crop; value of premises; writ of possession when issued; unless. Rev. Code, 1867, sec. 2600; Rev. Code, 1876, sec. 2949.

Judgment by default an admission of title; costs, what to be proven. Rev. Code, 1867, sec. 2619; Rev. Code, 1876, sec. 2968.

Judgment conclusive. Rev. Code, 1867, sec. 2620; Rev. Code, 1876, sec. 2967.

Arkansas.—Character of judgment; damages; writ of inquiry. Digest 1874, sec. 2262; Dig. 1884, sec. 2639; Gantt's Digest, 1874, sec. 2265; Dig. 1884, sec. 2642.

See "Arkansas" under title "Landlord and Tenant," *ante*.

Colorado.—Verdict may be for what; how rendered. Civil Code (in Session Laws, 1887), sec. 269.

Delaware.—Tenant refusing to appear; landlord defendant; judgment. Rev. Stat. 1874, ch. 119, sec. 2. See also ch. 122, sec. 2; Rev. Code, 1852, Am'd 1874, p. 706.

Florida.—Verdict to describe the land. McLellan's Dig. 1881, ch. 96, § 4.

Judgment to state quantity of estate. Dig. 1881, ch. 96, § 5.

Georgia.—Judgment conclusive unless. Code 1882, sec. 3362.

Effect of judgment. See "Georgia" under title "Co-tenants," *ante*.

Illinois.—Several action; joint recovery. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 28; Rev. Stat. 1887, Cothraus' Annot. Ed. pp. 607, 608, sec. 28.

Judgment. Rev. Stat. 1887, Cothraus' Annot. Ed. p. 608, sec. 30, makes provision as to the judgment.

Judgment conclusive. Starr & Curtis's Annot. Stat. 1885, ch. 45, par. 34; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 609, sec. 34.

Possession taken by plaintiff not affected by vacating the judgment; new trial; recovery by defendant. Starr & Curtis's Annotated Stat. 1885, ch. 45, par. 41; Rev. Stat. 1887, Cothraus' Annot. Ed. p. 610, sec. 41.

See "Illinois" under title "Landlord and Tenant," *ante*.

Indiana.—Judgment binds landlord having notice. Rev. Stat. 1881, sec. 1052.

Recovery by part of plaintiffs against part of defendants; recovery of actual interest. Rev. Stat. 1881, sec. 1060.

Execution for possession. Rev. Stat. 1881, sec. 1083.

Iowa.—Judgment conclusive. McClain's Annot. Stats. 1884, sec. 3253.

Maine.—Premises to be recovered unless tenant proves better title. Rev. Stat. 1883 (ch. 104, tit. 9, § 8).

Specific or undivided part may be recovered. Rev. Stat. 1883 (ch. 104, tit. 9, § 10).

Possession more than twenty years; verdict as to improvements; value of premises; sum found to be taken. Rev. Stat. 1883, ch. 104, tit. 9, § 25.

Tenant or heirs evicted by a better title; demandant or representatives notified to defend; money to be recovered back; action against demandant; evidence. Rev. Stat. 1883, ch. 104, tit. 9, § 30.

Judgment rendered to demandant; effect of death thereafter. Rev. Stat. 1883, ch. 104, tit. 9, § 39.

See "Maine" under title "Writ of Possession," *post*.

Maryland.—May recover to extent of title. Rev. Code, 1878, art. 64, sec. 19.

Massachusetts.—When no recovery lies against the defendant. Pub. Stats. 1882, ch. 175, sec. 10.

Rents, profits, damages for waste, etc., may be recovered. Pub. Stats. 1882, ch. 173, sec. 12.

Extent of liability by tenant for rents and profits, waste and damage. Pub. Stats. 1882, ch. 173, sec. 16.

See "Massachusetts" under title "Feigned Issues," *ante*.

Michigan.—What judgment to be rendered when plaintiff elects to relinquish premises. Public Acts, 1885, sec. 52 (p. 171).

Judgment conclusive. Howell's Annot. Stat. 1882, secs. 7821, 7823.

Minnesota.—See "Minnesota" under title "Pleadings," *ante*.

Mississippi.—Judgment conclusive except as to certain parties legally disabled. Rev. Code, 1880, ch. 68, sec. 2513.

Landlord defendant; judgment. Rev. Code, 1880, ch. 68, sec. 2482.

See "Mississippi" under title "Pleadings," *ante*.

In some States, two judgments are required to bar further action.¹

33. *Writ of Possession.*—A writ of possession to secure a successful plaintiff in actual possession of the land in controversy commonly follows the judgment; and, while provision is made for the payment by the defendant of such damages as may have been

Missouri.—Judgment for what and for what period. Stat. 1872, ch. 50, sec. 16; Rev. Stat. 1879, sec. 2255.

See "Missouri" under title "Joinder of Parties generally," *ante*.

Recovery when land relinquished; improvements. Rev. Stat. 1879, sec. 2262.

Nebraska.—Decree upon appraisement; sum found in favor of occupant; decree a lien; appraisement showing balance due person proving better title; amount to be deducted from amount due occupant; judgment to be what. Comp. Stats. 1886, ch. 63, sec. 6.

No eviction, except; when claimant must take real estate with improvements; when occupant may take same at its value less improvements; effect of decree. Comp. Stats. 1886, ch. 63, sec. 10.

New Hampshire.—Judgment where improvements claimed. Gen. Laws, 1878, ch. 232, secs. 6 & 7.

New Jersey.—Death of defendant after verdict; plaintiff may have his judgment and execution. Revis. of Stats. 1877, tit. "Ejectment," sec. 36.

Disclaimer; judgment. Revis. of Stats. 1877, tit. "Ejectment," sec. 22.

Judgment conclusive; except party legally disabled. Revis. of Stats. 1877, tit. "Ejectment," sec. 44.

See "New Jersey" under title "Co-tenants," *ante*.

New York.—Judgment conclusive except otherwise provided. Banks & Bros.' Rev. Stats. 1883, vol. iv.; Code Civ. Proced. sec. 1524.

See "New York" under title "When the Action may be maintained," *ante*.

North Carolina.—What the verdict shall include; improvements allowed damage for waste, etc.; limitation to three years; unless; improvements how valued; excess of improvements in value over damages; verdict for balance may be in favor of plaintiff or defendant; balance when a lien. Code Civ. Proced. secs. 474-479 of the "Code" 1883.

Oregon.—Action against tenant; judgment conclusive. Gen. Laws, 1872, ch. 4, sec. 316; Hill's Annot. Laws, 1887, sec. 319.

Judgment conclusive. Code Civ. Proced. (Gen. Laws, 1872) ch. 4, title 1, sec. 326; Hill's Annot. Laws, 1887, sec. 329.

Pennsylvania.—After what number of verdicts judgment will be conclusive.

Brightly's Purd. Dig. 1885, title "Ejectment," sec. 15.

Ejectment for purchase-money; judgment by confession; one verdict, or such judgment conclusive; failure to pay the amount at time fixed; such contract to be enforced by action upon payment of purchase-money, etc.; improvements to be allowed; failure to pay a rescission of contract; judgment. Brightly's Purdon's Dig. p. 640, § 18.

When judgment conclusive and final. Brightly's Purdon's Dig. p. 640, § 19.

See "Pennsylvania" under title "Practice," *ante*.

South Carolina.—Plaintiff limited to two actions. See "South Carolina" under title "Limitation of Actions," *ante*.

Tennessee.—Judgment conclusive; unless disability. Code 1884, sec. 3983.

Texas.—Recovery to be of title or possession, or both; writ of possession. Rev. Stats. 1879, art. 4809.

Judgment conclusive. Rev. Stats. 1879, art. 4811.

See "Texas" under title "Disability," *post*.

Vermont.—Damages, seizin, and possession. Rev. Laws, 1880, ch. 69, sec. 1251.

Judgment conclusive. Rev. Laws, 1880, ch. 69, sec. 1252.

Neglect to join landlord; judgment by collusion; landlord not to be prejudiced. See "Parties Defendant," "Vermont," *ante*.

Execution. See "Vermont" under title "Mortgagee and Mortgagor," *ante*.

See "Vermont" under title "Parties Defendant," *ante*.

Recovery to be on the merits. Rev. Laws, 1880, sec. 1250.

Virginia.—May recover part. Code 1873, ch. 131, sec. 18.

Judgment conclusive. Code 1873, ch. 131, § 35.

See "Virginia" under title "Disability," *post*.

West Virginia.—Judgment conclusive. Rev. Stats. 1879, ch. 71, sec. 35.

Wisconsin.—Judgment conclusive. Rev. Stat. 1878, § 3088.

Individual share or interest to be recovered. Rev. Stat. 1878, § 3077.

1. *Alabama.*—Rev. Code, 1867, sec. 2620; Rev. Code, 1876, sec. 2967.

Pennsylvania.—Brightly's Purd. Dig. p. 640, § 19.

assessed, the plaintiff is also required to pay for any improvements which may exceed the amount of damages.¹

34. *Disabilities.*—Various provisions relating to the effect of disabilities are cited in the notes.²

35. *New Trials.*—Matters of practice relating to new trials,³ the time within which they must be secured, the payment of costs, and several miscellaneous matters,⁴ are referred to in the notes.

1 **Writ of Possession.**—*Alabama.*—When writ of possession is barred, and no action maintainable. Rev. Code, 1867, sec. 2605; Rev. Code, 1876, sec. 2954. See also "Alabama" under title "Improvements," *ante*; also "Alabama" under title "Judgment," *ante*.

Arkansas.—See "Arkansas" under title "Improvements," *ante*.

Colorado.—Special execution in nature of writ of possession Civil Code (in Session Laws, 1887), sec. 273.

Georgia.—Writ of possession to issue. Code 1882, sec. 3637.

Writ of possession not to issue against. Code 1882, sec. 3638.

Illinois.—See "Illinois" under title "Landlord and Tenant," *ante*.

Indiana.—Recovery of land sold by administrator, sheriff, etc.; when plaintiff not to have writ of possession; unless. Rev. Stat. 1881, sec. 1084.

See "Indiana" under title "Judgment," *ante*

Maine.—Writ of possession to issue in original demandant's name. Rev. Stat. 1883, chap. 104, tit. 9, § 40.

Demandant to have writs of possession; judgment conclusive. Rev. Stat. 1883, chap. 104, tit. 9, § 18.

When writ of possession not to issue; new action not to be sustained; unless. Rev. Stat. 1883, chap. 104, tit. 9, § 31.

Maryland.—See "Maryland" under title "Jurisdiction," *ante*.

Michigan.—Writ of possession to issue. Howell's Annot. Stat. 1882, sec. 7819.

Dower to be assigned instead of writ of possession. Howell's Annot. Stats. 1882, sec. 7845.

Writ of possession; execution. Howell's Annot. Stats. 1882, sec. 7982.

Missouri.—Writ of possession upon judgment for recovery and damages. Stat. 1872, chap. 50, sec. 17; Rev. Stat. 1879, sec. 2256.

Rhode Island.—See "Rhode Island" under title "Mortgagee and Mortgagor," *ante*.

Ohio.—If claimant pay for improvements; writ of possession to issue. Rev. Stats. 1886, sec. 5794.

Pennsylvania.—See "Pennsylvania" under title "Practice," *ante*.

Tennessee.—Writ of possession to be

executed, and possession given at once. Code 1884, sec. 3977.

Texas.—See "Texas" under title "Judgment," *ante*.

Vermont.—Neglect of defendant to pay, then writ of possession to issue. Rev. Laws, 1880, sec. 1257.

2 **Disabilities.**—*Illinois.*—Death during disability. Starr & Curtis's Annot. Stats. 1885, ch. 45, sec. 39.

South Carolina.—Disabilities stated; when action to commence, or entry to be made. Code of Civ. Proced. 1882, sec. 108.

Tennessee.—Disability, judgment no bar. "If the person against whom the recovery is had is under the disability of infancy, coverture, or unsoundness of mind at the time of the recovery, the judgment is no bar to an action commenced within three years after the removal of such disability." Code 1884, sec. 3984.

Virginia.—Disability, judgment no bar. Code 1873, chap. 131, § 36.

3 **New Trial.**—*Colorado.*—New trial; when granted; possession recovered, action for rents and profits; measure of damages in action for rents and profits; lodes, mining-claims, timbering, etc., no offset in defendant's favor. Civil Code (in Session Laws, 1887), sec. 272.

Illinois.—New trial. Rev. Stat. 1887. Cothraus' Annot. Ed. p. 609, sec. 35, makes provision for a new trial within one year after judgment.

New Trial.—See "Illinois" under title "Judgment," *ante*.

Indiana.—Time within which new trial to be granted; one new trial only. Rev. Stat. 1881, sec. 1064.

Michigan.—New trial; time for granting, limited. Howell's Annot. Stat. 1882, sec. 7822.

New trial when granted. Howell's Annot. Stat. 1882, sec. 7823.

Nebraska.—New trial when granted. Code Civ. Proced. (in Comp. Laws, 1886) secs. 630, 631.

New York.—Time within which new trial to be granted. Code Civ. Proced. (Banks & Bros.' Rev. Stats. 1883) sec. 1525.

Wisconsin.—When new trial to be granted. Rev. Stats. 1878, sec. 3092.

4 **Miscellaneous.**—*Alabama.*—Statutory provisions. See Code 1857, secs.

V. Jurisdiction in the United States Courts.—In the case of *Fussell v. Gregg*,¹ it was held that the defendants could only be turned out of possession of the premises in controversy upon strength of a legal title therein vested in the plaintiff, and that a court of law was therefore the necessary forum in which to try the rights of the contestants.²

Although under the laws or system of judicial procedure of a particular State an action of ejectment may be maintained therein on an equitable title, the courts of the United States have refused to enlarge their jurisdiction for the purpose of taking cognizance of such action, and will not authorize it other than upon the principle above stated, that a paramount legal title must be shown in the plaintiff to enable him to recover, and that the remedy must be in a court of law.³

It must appear that the estate in controversy is of the requisite value to give the circuit court jurisdiction, though this may be a matter of allegation or proof.⁴ But where the action was against several defendants to recover separate tracts of land held adversely to the plaintiff, it was declared in the Supreme Court, upon a writ of error, that the case would not be dismissed upon the ground that the different parcels of land taken separately were

2610-2621. See also Tyler on Ejectment and Adverse Enjoyment, pp. 822-825, pp. 366, 367.

Arkansas.—No relief in equity after legal action and recovery. Dig. 1874, sec. 4020; Dig. 1884, sec. 4166.

Massachusetts.—Demandant may relinquish premises at valuation assessed. Pub. Stats. 1882, ch. 173, secs. 30-39.

Information for intrusion. Pub. Stat. 1883, chap. 182.

Michigan.—Other provisions for recovery of lands. Secs. 8312, 8925, Howell's Annot. Stats. 1882.

Mississippi.—Action may be discontinued.—See "Mississippi" under title "Parties generally," *ante*.

New Hampshire.—No arrest on mesne profits. Gen. Laws, 1878, ch. 225, sec. 4.

Pennsylvania.—Form of writ. Brightly's Purd. Dig. 1885, title "Ejectment," sec. 1.

See Landlord and Tenant in Pennsylvania (Jackson & Gross's Ed. 1882), secs. 384 to 448, pp. 236 to 257, for a synopsis of the acts of the Assembly.

Vermont.—No injunction after verdict; unless. Rev. Laws, 1880, sec. 748.

Virginia.—Certain writs abolished. The writ of formedon, writ of entry, and writ of right, abolished. Code 1873, ch. 131, sec. 38.

West Virginia.—Same statute as in Virginia (certain writs abolished). Rev. Stat. 1879, ch. 71, sec. 38. Generally, see Warth's Am'd Code, 1884, chaps. 90, 91.

1. 113 U. S. (1885) 550, 554. Case of an

ejectment bill brought on an equitable title affirmed in *Fussell v. Hughes*, 113 U. S. (1885) 565.

2. Citing *Hipp v. Babin*, 19 How. (U. S. 1856) 271, 277; *Lewis v. Cocks*, 23 Wall (U. S. 1874) 466; *Killain v. Ebbinghaus*, 110 U. S. (1884) 568, 572; *Galt v. Galoway*, 4 Pet. (U. S. 1830) 332, 339.

3. Lessee of *Swayze v. Burke et al.*, 12 Pet. (U. S. 1838) 11, 23. The court said in this case, "As there is no court of chancery under the laws of Pennsylvania, an action of ejectment is sustained, on an equitable title, by the courts of that State. Such is not the practice in the courts of the United States." *Fenn v. Holmes*, 21 How. (U. S. 1858) 481, 488; *Smith v. McCann*, 24 How. (U. S. 1860) 398, 404; *Claggett v. Kilbourne*, 1 Black. (U. S. 1861) 346; *Foster v. Mora*, 98 U. S. (1878) 425; *Sheirburn v. De Cordova*, 24 How. (U. S. 1860) 423; *Hooper v. Scheimer*, 23 How. (U. S. 1859) 235, 249. The court said in the last case that "It is the settled doctrine of this court that no action of ejectment will lie on such an equitable title, notwithstanding a State legislature may have provided otherwise by statute. The law is only binding on the State courts, and has no force in the circuit courts of the Union."

4. *Crawford v. Burnham*, 1 Flippin (U. S. 1871), 116. That the jurisdiction also depends on proof, and that the value may be shown, see *Eaton v. Calhoun*, 15 Fed. Rep. (U. S. 1880) 155; *Beard v. Federy*, 3 Wall. (U. S. 1865) 478, 494.

not sufficient in value to give the court jurisdiction, if all the pieces taken together were of the requisite jurisdictional value.¹

A mere colorable conveyance is not sufficient to give the court jurisdiction in an action of ejectment; and upon the discovery of the fact of such conveyance during the trial or proceedings in the case, the court will, upon motion, order the suit dismissed, as in a case where the real parties to the action were citizens of the same State: but in order to bring the case within the Circuit Court of the United States, the claimant to the premises in controversy conveyed them without any consideration to the nominal lessor of the plaintiff in the Federal Court, who was a citizen of another State. It was decided that the court would not countenance such a proceeding; that it was the proper guardian of its own jurisdiction; and that, if jurisdiction were entertained, a judgment or verdict would produce no good to the plaintiff: and the case was ordered dismissed.²

The statutory mode of proceeding adopted by a State with reference to a new trial in an action of ejectment will be the law governing in cases tried in the United States Circuit Court within that State.³

1. *Friend v. Wise*, 111 U. S. (1884) 797.

2. *Maxfield's Lessee v. Levy*, 4 Dall. (U. S. 1797) 330. The court declared, "But it is said that the system of fictions is not new. . . . It is true the courts of law in England have countenanced and supported some fictions, such, for instance, as a fine and recovery and an ejectment, and still more exceptionally fictions to give a jurisdiction which otherwise could not be maintained. It is sufficient to say of all these that they originally took place when very dark notions of law and liberty were entertained; that they are supported now solely on the authority of long usage, and that no court would now dare to set up a new one. No court in America ever yet thought, nor I hope ever will, of acquiring jurisdiction by a fiction; and the only fiction ever in general use in America (perhaps with a few exceptions as to fines and recoveries), I believe, has been that of proceeding by ejectment, which is a mere form of action, and so modified as to do no possible injury. It cannot substantially affect any man's right whatever . . . as to equity. He has none by his own acknowledgment; he paid no consideration; he only permits his name to be used for the support of a fraud on the jurisdiction of the court, a purpose which the court of equity would reject with the highest disdain; as little, in my opinion, can he support any title at law. . . . The court is the proper guardian of its own jurisdiction. It is alone responsible for it, and must therefore take care that it neither abandons a jurisdiction rightfully belonging to it, nor usurps that

which does not." See also notes 1 and 2 to above case in *Lawyer's Co-op. Pub. Co.'s* edition of U. S. Reports, book 1, p. 858. See also *Greenwalt v. Tucker*, 10 Fed. Rep. (1882) 884; s. c., 3 *McCrary* (U. S. 1882), 450. But see *Thomas v. Newton*, Pet. C. C. (U. S. 1817) 444, where, during the pendency of an action of ejectment, the premises were transferred by the defendant to one M. Afterwards the defendant confessed judgment. M. was a citizen of the same State, and the substitution of his name would have ousted the court of its jurisdiction. The judgment was set aside, and the case re-instated, the court declaring that it would "by no means permit the name of M. to be substituted for that of the defendant, which will oust the jurisdiction which had once attached. But as ejectment is a fictitious action, and can be so moulded by the court as to further the ends of justice, . . . the court will restore the action to the situation in which it was at the time the judgment was confessed."

3. *Equator Mining, etc., Co. v. Hall et al.*, 16 Otto (106 U. S. 1882), 86. "We are of the opinion that when an action of ejectment is tried in a circuit court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials, as it is by the other provisions of the State statute. There is no reason why the federal court should disregard one of the rules by which the State legislature has guarded the transfer of the possession and title to real estate within its jurisdiction." *Miles v. Caldwell*, 2 Wall. (69 U. S. 1865)

VI. Nature of the Action. — The action of ejectment has been variously declared to be a personal action, a mixed action, and a real action, which latter would seem to be more properly the character of the action at the present time, and more in accordance with its nature and objects.¹ Although the form of the action of ejectment is changed by statute, it is declared in *Wisconsin* that this does not affect the substance of the action, or the principles governing it, and on which it is based.²

So it is held in *Illinois*, that, in the absence of statutory provisions, the rules of the common law are the determining factor in actions of ejectment.³

In *Connecticut* the action of ejectment or disseizin was adopted, and has been uniformly used to recover land of which the plaintiff has been entirely dispossessed.⁴ At the common law the action of ejectment was strictly a possessory remedy;⁵ but it has now, by gradual growth, come to be the ordinary method of trying title to lands.⁶

Title must be tried in a petitory action in *Louisiana*. So where an action, technically known in that State as a possessory action,⁷ was brought, and in which the questions of title and ownership

34; *Hiller v. Shattuck*, 1 Flippin (U. S. 1872), 272; *Sears v. Eastburn*, 10 How. (U. S. 1850) 187.

1. Tyler on Ejectment and Adverse Enjoyment (ed. 1876), p. 36. "Mixed action," Robinson's Elementary Law (ed. 1875), 59. Ejectment "bore a logical resemblance to real actions," Pomeroy's Rem. & Remed. Rights (2d ed.), sec. 21. "Mixed action," Burrill's Law Dict. "Ejectment." Is a personal action, *Miles v. Caldwell*, 2 Wall. (U. S. 1864) 41. Is "a real action" in *Illinois*, *Guyer v. Wookey*, 18 Ill. (1857) 536. See title herein, "Statutory Provisions in the United States."

2. *Howland v. Needham*, 10 Wis. (1860) 495.

3. *Williams v. Brunton*, 3 Gilm. (Ill. 1846) 600, 623.

4. *Potter v. City of New Haven*, 35 Conn. (1869) 522. A right of possession from the holder of the legal title is only required in this State. *Law v. Wilson*, 2 Root (Conn. 1794), 102. As to the form of action at present in this State, see title herein, "Statutory Provisions in the United States."

5. 3 Comyns' Digest, title "Ejectment;" Tyler on Ejectment and Adverse Enjoyment (ed. 1876), 70; *Atkins v. Harde*, 1 Burr. 119; Pomeroy's Rem. & Remed. Rights (2d ed.), sec. 98; *Jackson v. Hakes*, 2 Caines (N. Y. 1805), 335; *Redfield v. W. & S. R. R. Co.*, 25 Barb. (N. Y. 1851) 54, 56; *Cincinnati v. White*, 6 Pet. (U. S. 1832) 431, 441; *Shaven et ux. v. McGraw*, 12 Wend. (N. Y. 1834) 562; *Den ex dem. Price v. Sanderson*, 18 N. J. Law (3 Harr. 1842),

Ejectment lies merely to determine the right to present possession. *Shaven et ux. v. McGraw*, 12 Wend. (N. Y. 1834) 562. In addition, see *Dickerson v. Colgrove*, 100 U. S. (1879) 578, 582; *Sunal v. Hepburn*, 1 Cal. (1850) 255, 259; *Hill v. Plunkett*, 41 Ark. (1883) 465, 467; *Doe dem. Wood v. West*, 1 Blackf. (Ind. 1821) 133, 134; *Lannay's Lessee v. Wilson et al.*, 30 Md. (1869) 536, 546. Still a possessory action in *Wisconsin*. *Pier v. Fond du Lac*, 38 Wis. (1875) 470, 482. Said in *Mississippi* to be no longer a mere possessory action, but one in which the title is tried. *Moring v. Ables*, 62 Miss. (1884) 27.

6. 2 Broom & Had. Comm. (ed. 1875, Wait's Notes) 211; *Den ex dem. Farley v. Craig*, 15 N. J. Law (3 Green, 1836), 201, citing 3 Bl. Com. 199, 206; *Den ex dem. Price v. Sanderson*, 18 N. J. Law (3 Harr. 1842), 427. "But a writ of ejectment is not an adequate means to try the title of all estates; for on those things whereon an entry cannot, in fact, be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, or other incorporeal hereditaments." 2 Jacob's Law Dict. p. 360. As to rent, see *Den v. Craig*, 15 N. J. Law (3 Green, 1836), 192. Action of ejectment is intended only to try title. *Van Alen v. Rogers*, 1 John. Cases (N. Y. 1800), 283. It is an action to recover title as well as possession (by statute) in *Illinois*. *Guyer v. Wookey*, 18 Ill. (1857) 536.

7. Defined herein. See title "Statutory Provisions in the United States," ante.

were involved, and issues arose which should more properly have been the subject of a petitory action, it was held that the parties should be relegated to the petitory action to settle their claims.¹

Writs of right were abolished under the statute in *New York*, and ejectment was substituted therefor.²

VII. When the Action may be maintained.—It is a general rule that the plaintiff in ejectment must rely for a recovery upon the strength of his own title, and not on the weakness of his adversary's.³

This rule, however, has been qualified; as in a case where the title of the plaintiff is documentary in its character, and he has

1. *Huyghe v. Brinckman*, 38 La Ann. (1886) 836. A petitory action corresponds to ejectment. *Gilmer v. Poindexter*, 10 How. (U. S. 1850) 257. In *Fairclaim v. Shamtitle*, 3 Burr. 1290, *Lord Mansfield* declares that "an ejectment is the creature of Westminster Hall introduced within the time of memory, and moulded gradually into practice by the rules of court. The authority which brought it thus far may certainly carry it to a higher degree of perfection, as experience points out either inconveniences or defects." This case came up as early as the year 1762.

2. *Cole v. Irvine*, 6 Hill (N. Y. 1844), 636; 2 Rev. Stat. 343, sec. 24; 2 Rev. Stat. 303, secs. 1, 2, 3; 2 Rev. Stat. 293, secs. 5 to 8.

See, however, the title "Statutory Provisions in the United States," *ante*.

In *Pennsylvania*, the action exists as ejectment at common law and equitable ejectment. *Jackson & Gross, Landlord and Tenant in Pennsylvania*, sec. 381, p. 235.

Ejectment at common law and under the code is an action *ex delicto*, and is not changed in this respect, nor made an action *ex contractu*. *Howland v. Needham*, 10 Wis. (1860) 495.

In *Alabama*, the old action of trespass to try title was the same as the later "writ in the nature of the action of ejectment." *Aiken's Digest*, 1833, p. 265; *Rev. Code* 1867, sec. 2610.

The commencement of the action of ejectment dates from the service of the declaration. *Baron v. Abeel*, 3 John. (N. Y. 1808) 483.

3. *Watts v. Lindsey*, 7 Wheat. (U. S. 1822) 158; *Doe v. Barber*, 2 Term Rep. (1788) 749; *Roe v. Harvey*, 4 Burr. (1769) 2487; *Smith v. Lorillard*, 10 John. (N. Y. 1813), 339; *Butler v. Davis*, 5 Neb. (1877) 521; *Boylan v. Meeker*, 28 N. J. Law (1860), 274; *Wallace v. Swinton*, 64 N. Y. (1876) 188; *Richardson v. Pulver*, 63 Barb. (N. Y. 1872) 67, 70; *Graham v. Peat*, 1 East (1801), 244; *Foster v. Evans*, 51 Mo. (1872) 39; *Love v. Hill*, 3 Harr. (Del.

1843) 530; *Covert v. Irwin*, 3 Serg. & Rawle (Penn. 1817), 283, 288; *Cunningham v. Dean*, 33 Miss. (1857) 46; *Armstrong v. Pierson*, 4 Greene (Iowa, 1853), 45; *Goulding v. Clark*, 34 N. H. (1856) 148, 156; *Sullivan v. Dimmitt*, 34 Tex. (1870) 112; *Hill v. Draper*, 10 Barb. (N. Y. 1851) 454, 458; *Colston v. McVay*, 1 A. K. Marsh. (Ky. 1817) 251; *Schauber v. Jackson*, 2 Wend. (N. Y. 1828) 13; *Tyler on Ejectment and Adverse Possession* (ed. 1876), 72; *Tracy v. Norwich, etc.*, R. R. Co., 39 Conn. (1872) 394; *Adams on Eject.* (Am. ed. 1821) 29; *Williams v. Ingell*, 21 Pick. (Mass. 1839) 288; *Stehman v. Crull*, 26 Ind. (1866) 436; *Stanford v. Mangin*, 30 Ga. (1860) 355; *Winnard v. Robbins*, 3 Humph. (Tenn. 1842) 614; *Den ex dem. Clarke v. Diggs*, 6 Ired. (N. C. 1845) 159; *Garrett v. Lyle*, 27 Ala. N. S. (1855) 586; *Millandon v. Ranny*, 18 La Ann. (1866 case under a statute) 196; *Talcott v. Goodwin*, 3 Day (Conn. 1808), 267; *Watts v. Lindsey*, 7 Wheat. (U. S. 1822) 158, 161; *Hague v. Porter*, 45 Ill. (1867) 318; *Marshall v. Barr*, 35 Ill. (1864) 106; *Webster v. Hill*, 38 Me. (1854) 78; *Stuart v. Dutton*, 39 Ill. (1866) 91, 96; *Gardiner v. Tisdale*, 2 Wis. (1853) 153, 182; *Vallette v. Bennett*, 69 Ill. (1873) 632; *Walker v. Fox*, 85 Tenn. (1886) 154, 160; *Stehman v. Crull*, 26 Ind. (1866) 436; *Eldon v. Wynn*, 6 Blackf. (Ind. 1842) 341, 344; *Connelly v. Skelly*, 8 Blackf. (Ind. 1846) 320; *Galbreth v. Zook*, 8 Blackf. (Ind. 1847) 366; *Huntington v. Jewett*, 25 Iowa (1868), 249; *Agnew v. Perry*, 120 Ill. (1887) 655, 657; *Graham v. Eastman*, 75 Ga. (1885) 889; *Elwood et ux. v. Lannon's Lessee*, 27 Md. (1867) 200, 208; *Randolph v. Laysard*, 36 La. Ann. (1884) 406; *Lothrop v. American Emigrant Co.*, 41 Iowa (1875), 547; *Daniel et al. v. Lefevre*, 19 Ark. (1857) 202; citing *Huddleston v. Garrett*, 3 Humph. (Tenn. 1842) 629; *Wynn v. Cole*, Walker (Miss. 1822), 119. See also *Mitchell v. Lines*, 36 Kas. (1887) 378; *Kelly v. McKeon*, 67 Wis. (1887) 561, 563; *Brown v. Caldwell*, 23 W. Va. (1883) 187, 194; *Nelson v. Triplets*, 81 Va. (1885) 236.

had a prior peaceable possession, he may be allowed to recover on this title against a defendant who is a mere trespasser.¹

Or where one is the first possessor of the premises, although not the actual or true owner, he will, as against the other party, be entitled to his recovery.²

Ejectment may be maintained against a trespasser or wrongdoer upon the strength of a prior possession, however short.³

In the United States courts it is held that an action may be maintained only on the legal title.⁴

A similar requirement exists in most of the States.⁵

1. *Turner v. Aldridge*, McAll (U. S. 1857), 229; *Winans v. Christy*, 4 Cal. (1854) 70, 78; *Christy v. Scott*, 14 How. (U. S. 1852) 282, 292; *Den v. Sinnickson*, 9 N. J. Law (4 Hals. 1827), 150.

2. *Hubbard v. Barry*, 21 Cal. (1863) 321. Other cases where the rule has been modified. *Shultz v. Arnott*, 33 Mo. (1862) 172. In this last case, one of the parties was entitled under statute of limitations; question was, which. *Shumway v. Phillips*, 22 Penn. St. (1853) 151; *Turner v. Reynolds*, 23 Penn. St. (1854) 199, 205; *Tapscott v. Cobbs*, 11 Gratt. Va. (1854) 172.

"Where no title appears on either side, a prior possession, though short of the statutory bar, will prevail over a subsequent possession, which has not ripened into a title, provided the prior possession be under a claim of right, and not voluntarily abandoned. In such cases it must appear that the defendant is a mere trespasser, and that he, or those under whom he claims, or from whom he obtained possession, entered upon the actual or constructive possession of the plaintiff." *Bledsoe v. Simms*, 53 Mo. (1873) 305, 309; citing *Crockett v. Morrison*, 11 Mo. (1847) 3, 6, which established the doctrine as above stated.

"A prior possession short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. It is, however, to be understood in cases to which the rule of evidence applies, that the prior possession had not been voluntarily relinquished without the *animus revertendi* (as is frequently the case with possession taken by *squatters*), and that the subsequent possession of the defendant was acquired by mere entry, without any lawful right." *Smith v. Lorillard*, 10 Johns. (N. Y. 1813) 338, 356.

Possession that is prior and peaceable, and which is not barred by the statute of limitations, will be sufficient to warrant a recovery against one who is a mere intruder. *Doe dem. Wood v. West*, 1 Blackf. (Ind. 1821) 133.

"Prior possession is *prima facie* evidence of title." One in "actual, peaceable, and exclusive possession of [public] premises claimed by him . . . is entitled to the exclusive enjoyment of the same as against every other claimant, except the general government." Such a person may maintain ejectment against one holding adversely. *Feirbaugh v. Masterson*, 1 Idaho (1867), 135, 138; citing *Plume v. Seward*, 4 Cal. (1854) 94.

3. *Doe dem. Hughes v. Dyeball*, 1 Moody & Malkins (1829), 346; s. c., 3 Carrington & Payne (1829), 610.

Prior possession, accompanied by a claim of the fee, is sufficient against one having only a naked possession. *Dale v. Faivre*, 43 Mo. (1869) 556.

Where there is no paper title, and the plaintiff relies solely upon prior possession, a defendant who is a mere trespasser cannot defend by showing title in another. *Foot v. Murphy*, 72 Cal. (1887) 104, 106, approving *Bird v. Lisbros*, 9 Cal. (1858) 3, 5, where it is held that "a mere trespasser cannot show title in a third party."

A prior possession will prevail against a trespasser by force without title. *Davison v. Gent*, 1 Hurlst & Norm. (1857) 744; s. c., 3 Jur. N. S. 342.

4. *Sheirburn v. Cordova*, 24 How. (U. S. 1860) 423, and cases cited under title "Jurisdiction," *ante*.

5. Plaintiff must have the legal title and immediate right to possession. *Lannay's Lessee v. Wilson et al.*, 30 Md. (1869) 536, 545; *Leonard's Lessee v. Diamond*, 31 Md. (1869) 536, 541.

Must recover, if at all, upon a paramount title. *The State of Kansas v. Stringfellow*, 2 Kas. (1864) 263, 316.

Right of possession only required to maintain action. *Bryan v. Wear*, 4 Mo. (1835) 106, 112.

Legal interest and possessory title requisite in plaintiff. *Beal v. Harmon*, 38 Mo. (1866) 435.

Must show paramount title. Title must be in himself. *Robbins v. Eckler*, 36 Mo. (1865) 194.

In an action of ejectment against one

The question in issue is the legal right to the possession as between the parties, and not the question of abstract title; and a recovery lies where such legal right of possession is established.¹

An actual entry is not required to sustain the action of ejectment, it is only necessary that the right to enter exists; and where there is a provision providing for re-entry in case of condition broken, here it is held that an actual entry is not a prerequisite to bringing an action of ejectment.²

Inasmuch as the claim seems to be founded on the right of possession, the party seeking a recovery must show himself entitled to such right generally at the time of the commencement of the suit and of the trial, or at the time of the demise laid in the declaration.³

showing no title in himself, possession is title. *Sherin v. Brackett*, 36 Minn. (1886) 153.

"A petitory action can only be maintained by one in whom the legal title is vested, or by his legal representative." *Caze v. Robertson*, 14 La Ann. (1859) 232; *Kelly v. Wiseman*, 14 La Ann. (1859) 661.

Plaintiff must recover on the strength of his legal title where he bases his action on the right of possession. *Kitteringham v. Blair Town Lot, etc., Co.*, 66 Iowa (1885), 280.

An action of ejectment will not be supported by a title acquired subsequent to the time the action was commenced. *Perciful et ux. v. Platt*, 36 Ark. (1880) 456, 465.

Ejectment may be maintained upon a title acquired by adverse possession for the period required by statute. *Joy v. Stump*, 14 Oregon (1887), 361.

In certain cases a bare possession without title will warrant a recovery, as where a tenant has been actually ousted, or one is a trespasser without color of title. *Fowke v. Darnall*, 5 Lit. (Ky. 1824) 316, 319.

Ejectment lies under the statute in all cases where the plaintiff has the legal right to the possession of the premises. *Garther et al. v. Lawson*, 31 Ark. (1876) 279, 283; *Cloyes et al. v. Beebe et al.*, 14 Ark. (1854) 489, 494.

The plaintiff must have a present right of possession in order to sustain the action of ejectment. *Heffner v. Betz*, 32 Pa. St. (1859) 376; *Atkins v. Harde*, 1 Burr. (1757) 60, 119.

Need have only the "present right of entry and possession;" the fee may reside in another. *White v. St. Guirons*, 1 Ala. (Minor, 1824) 331, 334.

Legal estate and right of entry required. *Daniel et al. v. Lefevre*, 19 Ark. (1857) 202.

Legal title and right of possession required "under it at the time of the demise laid in the declaration." *Nelson v. Triplets*, 81 Va. (1885) 236.

1. *Doe dem. Wood v. West*, 1 Blackf. (Ind. 1821) 133.

The legal title must prevail. — *Allen v. Smith*, 6 Blackf. (Ind. 1843) 527; *Doe v. Wharton*, 8 T. R. (1798) 2; *Doe v. Staple*, 2 T. R. (1788) 684, 696; *Doe dem. Shewen v. Wroot*, 5 East (1804), 138 and note; *Franklin v. Palmer*, 50 Ill. (1869) 202, 205; *Chiniquy v. Catholic Bishop*, 41 Ill. (1866) 148, 156, — and must also be paramount to defendant's legal or equitable title. *Rowe v. Beckett*, 30 Ind. (1868) 154, 161.

May recover only by virtue of a good and sufficient title in himself. *Shutt v. Travis*, Sneed (Ky. 1804), 307.

The plaintiff's lessor must have the right of entry at the date of the demise, or there can be no recovery. *Marshall v. Depey*, 4 J. J. Marsh. (Ky. 1830) 388.

2. *Cornelius v. Ivins*, 26 N. J. Law (2 Dutch. 1857), 376, 386, citing *Hylton's Lessee v. Brown*, 1 Wash. C. C. (U. S. 1804) 204; *Den v. McShane*, 1 Green (N. J. 1831), 35, 37; *Sigler v. Van Riper*, 10 Wend. (N. Y.) 414; *Lessee of Ruge v. Ellis*, 1 Bay, 107, 111 (S. C. 1790); *Adams on Eject.* 10 (Am. ed. N. Y. 1821); *Little v. Heaton*, 1 Salk. 259; s. c., 2 Ld. Ray. 750 (1702); *Oates v. Brydon*, 3 Burr. 1897 (1766); *Jackson v. Cryslar*, 1 John. Cas. (N. Y. 1800) 125; *Goodright v. Cator*, Douglass (K. B.), 475, 485; *Anon. Ventris* (1673), 248.

But it was said in *Chalker v. Chalker* (referred to in the 26 N. J. Law, 386), 1 Conn. (1814) 75, 92, that "In all cases where the right or title of the plaintiff accrues upon his entry or re-entry on lands, an actual entry is necessary in order to revest the estate."

3. At the time of the demise (by common law and by statute), *Wood v. Morton*, 11 Ill. (1850) 547. Generally, see *Alden v. Grove*, 18 Penn. St. (1852) 377, 385; *Kile v. Tubbs*, 32 Cal. (1867) 332, 339; *Boylan Ads. v. Meeker*, 28 N. J. Law (1860), 274, 297; *Heffner v. Boetz*, 32 Penn. St. (1859)

The fictitious proceedings in the action of ejectment are based upon the principle, that, as against the one entitled to possession, the actual occupier or tenant in possession of the premises is a wrong-doer; and this must exist as a fact at the time of the commencement of the action, or no recovery can be had.¹

It is held in *New York* that in ejectment the legal estate shall prevail over the equitable title, and that a *cestui que trust* in possession cannot set up his equitable title against the legal estate, especially if the equitable interest is not clear and precise.²

The rule generally obtains, that a person who has a mere equitable estate cannot maintain an action of ejectment.³

376; *Owen v. Fowler*, 24 Cal. (1864) 192; *Sisson v. McLaws*, 12 Ga. (1852) 166, 169; *Daniel v. Lefevre*, 19 Ark. (1857) 201, 202; *Williams v. Hartshorn*, 30 Ala. (1857) 211; *Doe v. Jackson*, 2 Dowl. & Ry. (1823) 514, 523; *Fenne v. Holme*, 21 How. (U. S. 1858) 481; *Carroll v. Norwood's Heirs*, 5 Harr. & J. (Md. 1820) 164, 173.

But see *Elgerton v. Clarke*, 20 Vt. (1848) 264, where it was held to be sufficient if the plaintiff have the right of possession at the beginning of the suit, and the time of trial. It was declared also to be immaterial, that in the period between he had no such right. *McCook v. Smith*, 1 Blacks. (U. S. 1861) 459, 470.

Plaintiff must show title at the commencement of the suit, — *Collins v. Brannin*, 1 Mo. (1825) 540; *Daniel et al. v. Lefevre*, 19 Ark. (1857) 202, — “and before the ouster laid in the declaration.” *Buxton v. Carter*, 11 Mo. (1848) 481.

1. *Lannay's Lessee v. Wilson et al.*, 30 Md. (1869) 536, 546.

2. *Jackson v. Sisson*, 2 John. Cas. (N. Y. 1801) 321, 324.

The following cases are distinguished and reviewed by Kent, J.: *Lade v. Holford Bull*, N. P. 110; 2 Term Rep. 696; 8 Term Rep. 122; *Armstrong ex dem. Tinker v. Price*, 3 Burr. 1901; *Goodtitle ex dem. Estwick v. Way*, 1 Term Rep. 737; *Doe ex dem. Bristow v. Pegge*, 1 Term R. 758 note.

See, to same effect as the text, *Jackson v. Chase*, 2 John. (N. Y. 1806) 84, 86; *Jackson v. Pierce*, 2 John. (N. Y. 1807) 221; *Jackson v. Deyo*, 3 John. (N. Y. 1808) 422.

“A *cestui que trust* having the legal title may maintain ejectment after the trust is satisfied.” *Moore v. Burnet*, 11 Ohio (1842), 334, 341, citing *Hopkins v. Ward*, 6 Munf. (Va. 1817) 38.

An action of ejectment cannot be maintained by the *cestui que trust* of a resulting trust. *Moore v. Spellman*, 5 Denio (N. Y. 1848), 225.

He in whom the legal title rests must prevail. *Doe dem. Da Costa v. Wharton*,

8 Term Rep. (1798) 2; *Goodtitle dem. Jones v. Jones*, 7 Term Rep. (1796) 43, 47; *Roe dem. Eberall v. Lowe*, 1 H. Black. (1796) 447, 461.

And this is so although the action be against a *cestui que trust* by his trustee. *Roe dem. Reade v. Reade*, 8 Term Rep. (1799) 118, 122; *Weakly dem. Yea v. Rogers*, 5 East (29 Geo. III.), 138 n; *Doe dem. Shewen v. Wroot*, 5 East (1804), 132, 138.

That the action of ejectment will lie in favor of the trustee, against the *cestui que trust*, see *Reade v. Reade*, 8 Term R. (1799) 118, 121, 123; *Reed v. Murray*, 11 Penn. St. (1849) 335; *Beach v. Beach*, 14 Vt. (1842) 28; *Reed v. Murray*, 11 Penn. St. (1849) 334.

“A *cestui que trust* cannot set up his equitable estate as a bar to an action of ejectment brought by his trustee, especially where the equity is doubtful; and the only way in which he can be assisted is by permitting the jury in certain cases to presume a conveyance of the legal estate.” Note a to *Jackson v. Deyo*, 3 John. (N. Y. 1808) 423, citing *Jackson v. Sisson*, 2 John. Cases (N. Y. 1801), 321; *Jackson v. Van Slyck*, 8 John. (N. Y. 1811) 487; *Doe v. Wroot*, 5 East (1804), 132, 137; *Roe v. Reade*, 8 Term R. (1799) 118, 122; *Goodtitle v. Way*, 1 Term R. (1787) 735, 737; *Doe v. Lowe*, 1 H. Black. (1790) 447, 461.

A *cestui que trust*, where the trust is not prescribed by statute, has been held in *New York* to have such a title as to enable him to maintain ejectment. *Van Deusen v. Trustees of Pres. Congregation*, 42 N. Y. (3 Keyes, 1867) 550, 556. See, however, *Clark v. Crego*, 47 Barb. (N. Y. 1867) 599.

For a discussion of the question whether an action of ejectment can be maintained by a trustee against his *cestui que trust*, or by the owner of the equitable title merely, see *Pomeroy's Rem. & Remed. Rights* (2d ed.) secs. 99-103.

3. *Doe dem. North v. Webber*, 3 Bing. N. C. (1837) 922, 926; *Gilpin v. Davis*, 2 Bibb. (Ky. 1811) 417; *Fenn v. Holme*, 21 How. (U. S. 1858) 481, 483; *Smith v. Mc-*

The fact that the statute requires that the action be brought in the name of the real party in ejectment, does not affect the character of title requisite to support the action: it merely does away with the old fictions of the English common law relative to ejectment, so that an action cannot be sustained on an equitable title merely; there must be a legal right to possession.¹

It is declared, however, in *Missouri*, that a plaintiff may proceed in ejectment where he has established his title through a court of equity.²

And an equitable title is, in some States, sufficient to maintain ejectment.³

An action of ejectment has in many cases been declared in *Pennsylvania* to be a mere substitute for a bill in equity.⁴

Cann, 24 How. (U. S. 1860) 398, 403; Carson v. Boudinot, 2 Wash. (U. S. C. C. 1807) 33; Thompson v. Lyon, 33 Mo. (1862) 219, 230; Swaze v. Burke, 12 Pet. (U. S. 1838) 11, 23; Moody v. Farr, 33 Miss. (1857) 192, 210; Leonard v. Diamond, 31 Md. (1869) 536; Doe dem. Hodson v. Staple, 2 Durn. & East (1788), 684; Rountree v. Little, 54 Ill. (1870) 323; Deitzler v. Mishler, 37 Penn. St. (1860) 82, 86. Ejectment on an equitable title is in substance a bill for specific performance, and is governed by equitable principles. The legal title must prevail over an equitable one. Fleming v. Carter, 70 Ill. (1873) 286; Hammond's Lessee v. Inlors, 4 Md. (1853) 138, 173; Jackson v. Chase, 2 John. (N. Y. 1806) 86; Jay v. Berdell, 25 Ill. (1861) 537, 542; Jackson v. Demont, 9 John. (N. Y. 1812) 55, 60; Johnson v. Watson, 87 Ill. (1877) 535, 540; Gillett v. Treganza, 13 Wis. (1861) 472, 476; Longford v. Love, 3 Sneed (Tenn. 1855), 308; Eaton v. Smith, 19 Wis. (1865) 537; Pendergast v. Burlington & M. R. R. Co., 53 Iowa (1880), 326; Williams v. Carpenter, 35 Mo. (1864) 52, 70.

A vendee who occupies land under a bond conditioned to convey has only an equitable title, and cannot maintain an action of ejectment. Trumbull v. Simmons, 17 Ala. (1850) 411; Elmore v. Willis et al., 13 Ala. (1848) 360, 365.

1. Percifull et ux. v. Platt, 36 Ark. (1880) 456, 462.

A bill in equity wherein the principal object of the recovery is the possession of premises to which the plaintiff's title rests upon a purely legal right, may not be sustained, nor is it aided by the fact that it prays for other relief which is properly within the jurisdiction of a court of equity. Moore v. Kempston, 4 Irish R. Equity Series (1870), 306.

2. Peyton v. Rose, 41 Mo. (1867) 257, 263; Wynn v. Cory, 43 Mo. (1869) 301, 304.

3. "The owner of the equitable title may support ejectment." Schuykill Nav. Co.

v. Farr, 4 Watts & Serg. (Pa. 1842) 362, 374.

So in *Kansas* by statute. Kansas Pacific R. R. Co. v. McBratney, 12 Kas. 9.

The rule is the same in *Texas* as established by a course of decisions. Miller v. Alexander, 8 Tex. (1852) 36, 42; Walker v. Howard, 34 Tex. (1870) 478, 508. See title "Defences," *post*.

It is said in *Maryland*, "But when one holding the equitable title of an estate has such a beneficial occupation of it as to give reason to suppose that the legal title has been conveyed to him, a jury may be advised to presume such a conveyance." Colvin v. Warford, 20 Md. (1863) 357, 396.

Ejectment lies in chancery where fraudulent possession exists. Chatham v. Hoare, 22 L. T. N. S. (1870) 57.

"Where the beneficial occupation of an estate by the possessor has given reason to suppose that there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate." Reade v. Reade, 8 Term R. (1799) 118, 122.

4. "In this State, where we have no court of chancery to compel the execution of a trust, or the performance of a contract, from necessity our courts of common law have assumed chancery powers, and the ejectment is substituted for the bill in chancery. It is an equitable action; and wherever chancery would execute a trust, or decree a conveyance, the courts of this State by the instrumentality of a jury would direct a recovery in an ejectment. They, in the exercise of this power, would be governed by same rules as a court of chancery." "This equitable action of ejectment is here in the nature of a bill in equity to compel an execution of a trust." Peebles v. Reading, 8 Serg. & Rawle (Pa. 1822), 484, 491, 497; Pennock v. Freeman, 1 Watts (Pa. 1833), 401, 409; Hauberger v. Root, 5 Penn. St. (1847) 108, 112; Deitzler v. Mishler, 37

Although the sheriff effecting a sale under a *fi. fa.* can deliver the legal possession, yet, if the premises are not vacant, it is necessary for the purchaser to bring an action of ejectment to obtain actual possession.¹

It is held in *Louisiana* that a party never having been in possession of land, but claiming the same, should seek his remedy by a petitory or possessory action.²

The provision that the party sued in a petitory action must be in the "actual possession of the immovable," does not mean necessarily that the party was in the natural or corporeal possession at the time of the suit. The word "actual" may, perhaps, apply "to the civil as well as to the natural possession, provided the defendant in a petitory action, contradictorily with whom the question of title is to be settled, be really pretending to possess the property as owner." It seems necessary, however, that the defendant shall at some previous time have been in the *natural* possession of the property.³

In an action of ejectment for non-payment of rent, where the premises were entirely unoccupied, and there were no buildings thereon, and the assignee of the lessee could not be found, nor his place of residence be ascertained, it was held that the remedy must be either under the common law or the statute relating to summary proceedings.⁴

Ejection or trespass at the option of the plaintiff may be brought against the owner of a building, which, through inadver-

Penn. St. (1860) 82, 86; *Martin v. Willink*, 7 Serg. & Rawle (Pa. 1821), 297; *Schuykill Nav. Co. v. Farr*, 4 Watts & Serg. (Pa. 1842) 362, 374; *Willing v. Brown*, 7 Serg. & Rawle (Pa. 1822), 467, 469. So in case of a vendee in articles of agreement after tender of purchase-money. *Martin v. Willink*, 7 Serg. & Rawle (Pa. 1821), 297, 299; *Hawn v. Norris*, 4 Binney (Pa. 1811), 77; *Minsher v. Morrison*, 2 Yeates (Pa. 1798), 344; *Griffith v. Cochran*, 5 Binn. (Pa. 1812) 87, 105.

Where the legal title passed out of the grantor upon a contract, which was the consideration of the deed, or, rather, a covenant to pay such consideration, it was held that ejectment would not lie to enforce the performance of the contract, it being a consideration, and not a condition, the two being essentially different. *Krebs v. Stroub*, 116 Pa. St. (1887) 405.

Greatly more than half of the actions of ejectment brought in *Pennsylvania* are on equitable titles. *Seitzinger v. Ridgway*, 9 Watts (Pa. 1840), 496, 507.

"The equitable action of ejectment forms in this State an important branch of the law. Through the liberality and ingenuity of the courts it has become the most important and universal mode of enforcing

the equity of a plaintiff relating to land. It is a remedy which has been substituted for the bill in equity, though it is subject to all those considerations by which a claim to have the land itself may be defeated. The rule is, that, wherever equity will presume a trust to have arisen, and will compel its execution, or will enforce articles of agreement, our courts will, through the application of this remedy, administer the same relief." *Troubat & Haly's Pract.* (5th ed. by Brightly) sec. 36.

1. *People v. Nelson*, 13 John. (N. Y. 1816) 340. See *McDougall v. Sitcher*, 1 John. (N. Y. 1806) 42.

2. *McElroy v. Dean*, 11 La. Ann. (1856) 612.

3. *Barnes v. Gaines*, 5 Rob. (La. 1843) 314, 318, 319.

4. *Stratton v. Lord*, 22 Wend. (N. Y. 1840) 611, relying upon the statutes, 2 Rev. Stat. 303, sec. 1; 2 Rev. Stat. 512, secs. 24, 5, 6, 7, declaring that "The provisions of these sections were evidently intended to come in place of the former, — 1 R. L. 441, sec. 23 *et seq.*, — the mode of service which was adopted by *Evans v. Moran*, 12 Wend. (N. Y. 1834) 180. In deciding the latter case the provisions of 2 R. S. 512 seem to have been overlooked," and overruling that case.

tence of the owner, overhangs the plaintiff's land; but if the defendant offers to remove the projecting part, and is prevented by the plaintiff, ejectment will probably not lie.¹

Where a lease was conditioned for re-entry in case of a breach of its conditions, it was held, upon such breach by the lessee or his assigns, that an action of ejectment might be maintained.²

Where the plaintiff relies for his recovery upon a patent, he cannot maintain his action where it appears that the defendant holds under a patent of the same date.³ And if the defendant's patent is outstanding and older, or the defendant can show such outstanding and older patent in a stranger, he may defeat the plaintiff's recovery.⁴

It is not necessary that a grantee of the commonwealth should make an actual entry before bringing ejectment.⁵

VIII. For what Ejectment lies.—If possession can be delivered by the sheriff of any thing attached to the soil, ejectment may be had therefor.⁶

Ejectment will lie to obtain possession of an interest in lands, provided it is tangible that the possession is capable of delivery, and that the right of entry exists.⁷ But it may not be maintained for a mere trespass to lands,⁸ nor for an incorporeal hereditament,⁹ nor for a mere *right of way*,¹⁰ nor an easement.¹¹

1. *McCourt v. Eckstein*, 22 Wis. (1867) 153.

"But whether an occupancy by mistake and through misapprehension of the dividing line amounts to a disseizin, is a point not perfectly agreed. . . . In Maine and Tennessee it has been *held* no disseizin. . . . In Connecticut and Pennsylvania it is *held* otherwise." 1 Greenl. Cruise on Real Prop. p. 52, note 2, where the cases on both sides are reviewed.

2. *Jackson v. Bronson*, 7 John. (N. Y. 1810) 227.

3. *Talbott v. Calloway*, Hardin (Ky. 1805), 35; *Coleman v. Talbott*, 2 Bibb. (Ky. 1810) 129.

4. *Colston v. McVay*, 1 A. K. Marsh. (Ky. 1818) 251; *Chiles v. Calk*, 1 A. K. Marsh. (Ky. 1819) 583.

A life estate is a good title for either plaintiff or defendant. *Bryan v. Wear*, 4 Mo. (1835) 106, 112; *Beal v. Harmon*, 38 Mo. (1866) 435, 439.

5. *Innes v. Crawford*, 2 Bibb. (Ky. 1811) 413.

Where a lease contained a provision for re-entry for non-payment of rent, *held* that ejectment might be maintained without any actual entry. *Goodright dem. Hare v. Cator*, 2 Dougl. (1780) 477, 485.

Where land is conveyed with a reservation of an easement for a special purpose, the fee of the land is vested in the grantee, who may bring ejectment against the grantor in case the property is used by him for

a purpose different from that set out by the reservation. *Reformed Church v. Schoolcraft*, 65 N. Y. (1875) 134, 150.

Where the lessor has released all his interest to the defendant, a recovery cannot be had upon a demise from such lessor, the plaintiff being estopped from claiming title. *Jackson v. Foster*, 12 John. (N. Y. 1815) 488.

6. *Jackson v. May*, 16 John. (N. Y. 1819) 185; *Carpenter v. O. & S. R. R. Co.*, 24 N. Y. (1861) 655, 657; *Child v. Chappell*, 9 N. Y. (1853) 246, 252.

7. *Jackson v. Buel*, 9 Johns. (N. Y. 1812) 298; *Nichols v. Lewis*, 15 Conn. (1842) 144.

8. *Potter v. City of New Haven*, 35 Conn. (1869) 522.

9. *Black v. Hepburn*, 2 Yeates (Pa. 1798), 331; *Taylor v. Gladwin*, 40 Mich. (1879) 232; *Harlow v. Lake Superior Iron Co.*, 36 Mich. (1877) 105.

10. *Northern Turnpike Co. v. Smith*, 15 Barb. (N. Y. 1852) 355; *Judd v. Leonard*, 1 Chip. (Vt. 1814) 204.

11. *Clement et al. v. Youngman et al.*, 40 Pa. St. (1861) 341; *Caldwell v. Fulton*, 31 Pa. St. (1858) 483; *Judd v. Leonard*, 1 Chip. (Vt. 1814) 204; *Child v. Chappell*, 9 N. Y. (1853) 246, 251.

"If the plaintiff [who is the owner of a mere easement] can, in this case, maintain his action of ejectment, although entitled to an easement only, a right of way over the land demanded, yet he will recover the soil itself. For such with us is the conse-

Where land situate below high-water mark was filled up, and made solid, dry land, it was held that an action of ejectment would be sustained, and that such lands might be recovered by the people of the State by virtue of the right of sovereignty, and that it was not necessary to prove their title to the same under the parties reclaiming such lands;¹ so it has been held that recovery may be had in this action in case of a private individual where tide-water flats have been filled in, and a wharf built under a claim of a right to do so by reason of being a riparian owner; nor can such right be overcome by a claim that the freehold was in the State.²

Where property was left in fee to a son, subject to certain conditions, for the benefit of the daughters of the testator, it was held, that, upon a breach of the conditions, an action of ejectment might be sustained in behalf of the daughters as heirs at law to obtain possession of their interest or share in the real estate of the testator.³ At the common law, dower could not be recovered in ejectment before it was assigned, since it could not be known before assignment what part was dower. This was changed in *New York* by statute, so that an action of ejectment for dower may be brought before assignment.⁴

A public corporation entitled only to the use of a highway cannot maintain ejectment for the possession or title thereof.⁵ Though where one is the owner in fee of land used as a highway by the public, he may maintain ejectment against one who claims to hold possession in exclusion of the owner or the public.⁶

quence of a recovery in this action, in which the land itself, not merely the easement, is demanded; and a recovery in this case will give the plaintiff, not the easement only, which he has a right to claim, but the fee of the land. The remedy, at common law, in such a case, was by assize." *Judd v. Leonard*, 1 Chp. (Vt. 1814) 204.

"The general rule is, that ejectment will lie only for things whereof possession may be delivered by the sheriff." "Ejectment will not lie for a fishery, or the diversion of a water-course." So it was held that one to whom a certain lot of land was conveyed, together with 'the free use and privilege' of certain alleys and a certain landing-place, could not maintain ejectment for such alleys and landing-place. *Lessee of Black v. Hepburne*, 2 Yeates (Pa. 1798), 331.

Ejectment does not lie for a messuage or tenement, or a messuage and tenement, in such words, although the words "and tenement" may be stricken out by leave of the court. *Goodright dem. Welch v. Flood*, 3 Wils. (1769) 23; *Doe dem. Bradshaw v. Plowman*, 1 East (1801), 441. *Contra*, see *Doe dem. Stewart v. Denton*, 1 Term Rep. (1785) 11.

Will not lie for a water-course or rivulet as such. *Woolrych on Waters, Rights of Sea*, etc. (2d ed.) 276.

1. *People v. Mauran*, 5 Den. (N. Y. 1848) 389.

2. *Nichols v. Lewis*, 15 Conn. (1842) 143.

3. *Hogeboom v. Hall*, 24 Wend. (N. Y. 1840) 146.

4. *Sigler v. Van Riper*, 10 Wend. (N. Y. 1833) 421, citing *Co. Litt.* 37 b, 34 b; *Jackson v. O'Donaghy*, 7 John. (N. Y. 1810) 247, 248; *Jackson v. Vanderheyden*, 17 John. (N. Y. 1819) 167; 2 Rev. Stat. 303, 343; 2 Rev. Stat. 311, 12, sec. 55. At the common law, dower must be assigned before ejectment lies for its recovery. *Jackson v. Vanderheyden*, 17 Johns. (N. Y. 1819) 167.

Under the statute of *Iowa* an action for the recovery of real property may be brought for dower without its being first assigned or admeasured, or without resorting to an equitable action. *Rice v. Nelson*, 27 Iowa (1869), 148, 155.

Where dower has not been assigned, ejectment will not lie therefor. *Doe dem. Nutt v. Nutt*, 2 Car. & Payne (1826), 430. See also *Chapman v. Sharpe*, 2 Show (33 Car. 2), 184.

5. *West Covington v. Freking*, 8 Bush (Ky. 1871), 121, 128.

6. *Gardiner v. Tisdale*, 2 Wis. (1853) 153, 198; *Weisbrod v. C. & N. R. Co.*, 21 Wis. (1867) 602, 610; *Strong v. City of*

The mere grant of a privilege in general to use land for the purpose of erecting a building and machinery thereon, without designing what portion or how much of the land is to be used therefor, does not, in the absence of an actual entry and location, enable the holder of such privilege to bring an action of ejectment therefor.¹

The consent rule is declared in *Sharp et al. v. Ingraham*² to have been abolished in *New York* by the Revised Statutes.³

IX. Presumptions.—The law assumes that a man holds by virtue of the right under which he ought to hold, and this rule obtains where one in possession of the premises has several capacities.⁴

Where possession had been held for a number of years by virtue of a deed wherein a beneficial interest was set forth, and also a covenant that the legal estate would be conveyed, it was declared that such possession would not warrant a presumption that there had been such a conveyance, nor could ejectment be maintained by the possessors.⁵

In the absence of any thing to the contrary, the presumption obtains that the possession is subordinate to the legal title.⁶

So, in the absence of proof of title by either party, the presumption stands in favor of the title of the first actual occupier or possessor.⁷

Brooklyn, 68 N. Y. (1876) 1; *Goodtitle dem. Chester v. Alker*, 1 Burr. (1757) 133; s. c., 1 Ld. Ken. 427.

Even "against those who are setting up an adverse claim, although he has parted with the right of way over it." *West Covington v. Freking*, 8 Bush (Ky. 1871), 121, 126.

Where a piece of land described in a deed as bounded "by H Street on the east" is granted by one who owns the fee of the land used as "H Street," and of the land on both sides thereof, the grantor acquires no right to the fee of the street; and in case the street, though designated as a plat of the city, is not used as a street, it reverts to the grantor, who may recover the same from the grantee, — if he claim adversely, — in an action of ejectment. *B. & O. R. R. v. Gould*, 67 Md. (1887) 60.

1. *Jackson v. May*, 16 John. (N. Y. 1819) 184.

An undivided portion may be recovered where the demise is laid for the whole. *Doe dem. Bryant v. Whipple*, 1 Esp. (1757) 360; *Denn dem. Burgiss v. Purvis*, 1 Burr. (1795) 326.

2. 4 Hill (N. Y. 1843), 116.

3. "It is now provided that it shall not be necessary on the trial for the defendant to confess, nor for the plaintiff to prove, lease, entry, and ouster, except where the action is brought by one or more tenants in common or joint tenants against their co-ten-

ants; in which case the plaintiff, in addition to other necessary proof, is required to show an actual ouster or some other act amounting to a total denial of his right as such co-tenant (2 Rev. Stat. 306, secs. 26, 27; *Siglar v. Van Riper*, 10 Wend. N. Y. 1833, 414)." Cases reviewed are *Langendyck v. Burhaus*, 11 John. (N. Y. 1814) 462; *Jackson v. Lyons*, 18 John. (N. Y. 1820) 398; *Wigfall v. Brydon*, 3 Burr. 1897; *Doe v. Roe*, 2 Taunt. 397.

4. *Carson et al., Admins. of Carson et al., v. Phelps, Trustee, et al.*, 40 Md. (1873) 73, 98.

"Possession is presumptive evidence of seizin in fee until the contrary is shown." *Jones et al. v. Bland et al.*, 116 Pa. St. (1887) 194.

That one acquired possession as tenant of the plaintiff warrants a presumption of title in the latter. *Jones et al. v. Bland et al.*, 116 Pa. St. (1887) 194.

5. *Goodright v. Swymmer*, 1 Ld. Ken. (1756) 385.

6. *Winn v. Wilhite*, 5 J. J. Marsh. (Ky. 1831) 521, 523.

7. *Fowke v. Darnell*, 5 Lit. (Ky. 1824) 316, 320. And the presumption will obtain against a servant in visible occupation that he is a tenant in possession, though such presumption may be rebutted. *Doe dem. James v. Staunton*, 1 Chit. (1819) 119; s. c., 2 Barn. & Ald. 371; *Gulliver v. Swift*, 2 Ld. Ken. (1759) 511.

For other cases under this head, see

X. The Statute of Limitations. — Adverse Possession. — The action of ejectment could formerly be brought only where the lessor or plaintiff might enter; and to sustain this right, it became necessary therefore to show a possession in the plaintiff's lessor within twenty years.¹

Under the new procedure, it is said that, in an action to recover real property, the defence of the statute of limitations is a matter which in some States is available by way of evidence under a general denial, upon the ground that every legal or equitable defence is available under such answer.²

An adverse holding of the premises in question for the prescribed period constitutes a bar to the action of ejectment.³

But mere lapse of time, where there is no adverse possession, and no title in defendant, will not prevent a recovery by the plaintiff.⁴

sub-title herein, "Equitable Title," *ante*; and the title "Statute of Limitations. — Adverse Possession," herein, *post*. Also the title herein, "Landlord and Tenant," *post*. See also title "Improvements" herein, *post*.

1. Comyns' Digest, vol. 3, title "Ejectment;" *Den v. Morris*, 7 N. J. Law (2 Hals. 1822), 6.

But "it has been repeatedly decided that the oldest possession, even for less than twenty years, carries with it a presumption of title that is sufficient to put the defendant upon his defence, and will overcome the later possession of a mere trespasser." *Den v. Sinnickson*, 9 N. J. Law (4 Hals. 1827), 150.

Suit must be brought within twenty years after the right of entry accrued; and adverse possession in the defendant for that period of time is evidence of the possessor's title to the premises, and constitutes a good defence. *Hogan v. Kurz*, 94 U. S. (1877) 773, citing 1 Chitt. Pl. (16th Am. ed.) 213; *Jackson v. Brink*, 5 Cow. (N. Y. 1826) 483; *Briggs v. Prosser*, 14 Wend. (N. Y. 1835) 227; *Jackson v. Harder*, 4 John. (N. Y. 1809) 202, and other cases.

See, generally, Tyler on Ejectment and Adverse Possession (ed. 1876), 88. See also title herein, "Statutory Provisions in the United States," sub-titles "Limitation of Actions" and "Adverse Possession," *ante*.

2. *Bledsoe v. Simms*, 53 Mo. (1873) 305, 307; *Vanduyne v. Hepner*, 45 Ind. (1874) 589, 591; *Lane v. Shepardson*, 23 Wis. (1868) 224, 228.

The doctrine is said to be well settled in *Missouri*, that the statute of limitations need not be specially pleaded in actions of ejectment. *Fairbanks v. Long*, 91 Mo. (1886) 628.

In *Texas* the statute of limitations must be specially pleaded. *Custard v. Musgrove*, 47 Tex. (1877) 217.

See also, as to what admissions are made by a plea of adverse possession, the title "Pleadings" herein, *post*.

3. See title herein, "Statutory Provisions in the United States," sub-titles "Limitation of Actions" and "Adverse Possession," *ante*. *Hogan v. Kurz*, 94 U. S. (1877) 773; *Leffingwell v. Warren*, 2 Black (U. S. 1862), 599, 605; *Hill v. McKinnon*, 16 Upper Can. (21 Vict.) 216; *Moore v. Luce*, 29 Pa. St. (1857) 260; *Taylor v. Bate*, 4 Dana (Ky. 1836), 198, 200.

Twenty years' adverse possession is a good defence, and in such case no written evidence of title is required. *Herndon v. Wood*, 2 A. K. Mar. (Ky. 1819) 44; *Innes v. Crawford*, 2 Bibb (Ky. 1811), 413; *Smith's Heirs v. Frost*, 2 J. J. Marsh. (Ky. 1829) 424, 427.

The effect of a successful interposition of the statute of limitations is to vest the title in the party pleading it in bar, and to extinguish the right opposed. *Leffingwell v. Warren*, 2 Black (U. S. 1862), 599, 605.

"Where the plaintiff in ejectment shows an adverse possession for twenty years, so that the entry is barred, he is entitled to recover even against a defendant, whose possession for a less period is lawful." *Riverside Co. v. Townshend*, 120 Ill. (1886) 9, 20.

Where land is occupied adversely for a shorter period than twenty years, the person so occupying obtains a right in the premises which is good against everybody except the actual fee-owner; and he or his devisee may maintain ejectment therefor against a person claiming by virtue of an adverse possession subsequently acquired, and which is less than twenty years. *Asher v. Whitlock*, 1 L. R. Q. B. Cases (1865), 1; s. c., 11 Jur. N. S. 925.

4. *Norton v. Sanders*, 1 Dana (Ky. 1833), 14.

The fact that possession was fraudulently obtained or continued, or that the tenant knew it to be so, does not constitute a valid excuse on the part of the owner for negligence in not bringing the action within the time stated in the statute as a limitation; nor does the fact that the owner was ignorant of the injury, even though it was fraudulently concealed by the person committing the wrongful act, excuse him from not bringing his action before the statute interposes its limitation.¹

In general, the possession of one tenant in common cannot be adverse to his co-tenant. But it is held in *North Carolina*, that where the possession is continuous for a period of twenty years without any claim from the co-tenant, the law presumes that it is rightful, and will bar the co-tenant from asserting his right.²

Where there is a privity between several successive holders, adverse possession may be made out to have continued the requisite period by adding together the continuous periods of their occupancy.³

If a part of the plaintiffs in an action of ejectment are *feme covert*s or infants against whom the statute of limitations has not operated as a bar, recovery may be had by them of their proportionate share or value of the lands and damages, although some of the other plaintiffs are barred a recovery by the statute.⁴

In order to constitute the adverse possession requisite to defeat the plaintiff's claim, it must possess all the elements of an adverse holding; that is, it must be positive and to the exclusion of any other title, since, if it be in subordination to, or an admission of, the existence of a better or superior title, it will not be deemed to be held adversely to that title; nor in such case does it matter how long the possession may have been held, as it cannot constitute a bar.⁵

It must also have been hostile in its inception, visible, notorious, actual, adverse, exclusive, and continuous, as owners, and under circumstances warranting the presumption that the owner must

"Extreme forbearance, long continued, shown by the plaintiffs to those who for . . . many years occupied, cultivated, and reaped the fruits of their land," will not deprive parties of their ownership. *Davis et al. v. Young*, 36 La. Ann. (1884) 375.

1. *Humbert et al. v. Trinity Church*, 24 Wend. (N. Y. 1846) 587.

2. *Page v. Branch*, 97 N. C. (1887) 97. So in Kentucky. *Russell v. Menks*, 3 Met. (Ky. 1860) 37, 45.

3. *Sherin v. Brackett*, 36 Minn. (1886) 153.

4. *Wheeler et al. v. Ladd et al.*, 40 Ark. (1882) 108, 113.

Dower.—In case of dower, the right must be denied before the statute of limitations will be deemed to have commenced to run against it. *Rice v. Nelson*, 27 Iowa (1869), 148, 153.

5. *Dean et al. v. Brown*, 23 Md. (1865) 11, 16. "If a party in possession of land offers to purchase it from the true owner, and the offer is made not merely to buy an outstanding or adverse claim in order to quiet possession or protect himself from litigation, the offer is a recognition of the owner's title, and will stop the running of the statute."

The court in *Davis et al. v. Young*, 36 La. Ann. (1884) 375, citing Sedgwick & Wait on Trial of Title to Land, p. 530; *Lovell v. Frost*, 44 Cal. (1872) 471; *Bowen v. Guild*, 130 Mass. (1881) 121; Civ. Code (Louisiana), 3490, 3500.

"To be an adverse possession, it must be an occupancy under a claim of ownership, though it need not be under color of title." *Swift v. Mulkey*, 14 Oregon (1886), 59, 64.

have had notice of the adverse claim, and must be accompanied by an intention to claim adversely.¹

XI. Landlord and Tenant.—Where there is no privity between the plaintiff's lessors and the defendant, it is said that the relation of landlord and tenant does not exist.²

If a tenant acquires title, and holds under the landlord, the relation of landlord and tenant is presumed to continue; and the tenant's right against his landlord, so far as enabling him to defend upon a claim of title in an action of ejectment is concerned, is not bettered by the neglect of the latter to demand payment of the rent.³

Ejectment will not lie to bar the right of an absconding lessee in behalf of a landlord already in possession.⁴

For the purpose of defending in ejectment, any person will be deemed a landlord by the court when his title is consistent with the possession of the occupier, and is connected therewith;⁵ but if his title is hostile to the tenant, he will not be considered as landlord.⁶

In a case decided in 1822 under a statute in *New York*,⁷ it is declared that the right of the tenant can be barred only by the action in ejectment, and that the title in equity cannot be defeated merely by a re-entry at common law; but, if legal re-entry is made,

1. *Beatty et al., Lessors, v. Mason et al.*, 30 Md. (1868) 409, 414; *Jackson v. Parker*, 3 Johns. Cases (N. Y. 1802), 124; *Baker v. Lessee of Swan et al.*, 32 Md. (1869) 355; *Randolph v. Laysard*, 36 La Ann. (1884) 405; *Morrison & Kildow v. Hammond's Lessee*, 27 Md. (1867) 604, 618; *Newman et al. v. Young's Lessee*, 30 Md. (1868) 417, 420; *Sherin v. Brackett*, 36 Minn. (1886) 154; *Davis v. Young*, 36 La Ann. (1884) 375; *Hogan v. Kurz*, 94 U. S. (1876) 773, citing *Bradstreet v. Huntington*, 5 Pet. (U. S. 1831) 402, 438; *Ang. Lim.* (6th ed.) 386; 2 *Greenl. Ev.* (12th ed.) sec. 430; *Hawk v. Genseman*, 6 G. & R. 21. Strict proof of the facts relied on is required. *Gay v. Moffitt*, 2 Bibb (Ky. 1812), 507.

Notorious possession of land in a thickly settled country for a period of ninety years is sufficient to raise a presumption of a grant of the land by the commonwealth, or at least of a pre-emption, and is therefore sufficient to sustain an action of ejectment. "There is no absolute time prescribed by law in which to found this kind of a presumption. Circumstances may require in different cases a different length of time." *Mather v. Ministers of Trinity Church*, 8 Serg. & Rawle (Pa. 1817), 509, 510.

"An open, notorious, exclusive, uninterrupted, and adverse possession, continued for the period of twenty years, is effectual to confer a complete title on the person so occupying, and it is not essential that such possession should have been under color

of title. . . . A title so acquired is equally available, whether it is used as a shield for the purposes of defence, or to recover a possession lost after such title has fully matured." *Roots v. Beck*, 109 Ind. (1886) 472.

Where an equitable title to the land in controversy is set up as a defence to the action, and no affirmative relief of any kind was asked, *held* that the matters so pleaded did not in any sense constitute a cause of action so as to be excluded by the statute of limitations. The court declared that the "office and purpose of the statute by its very terms is to bar 'actions,' and not to suppress or exclude mere matters of defence. . . . It is perhaps necessary to say that it has been frequently *held*, and is the settled law in this State, that an equitable title well plead is a good defence to an action of ejectment based on the legal or paper title," citing numerous cases. *Seebree v. Patterson*, 92 Mo. (1887) 458.

2. *Jackson v. Chase*, 2 John. (N. Y. 1806) 87.

3. *Campbell v. Shipley*, 41 Md. (1874) 81, 96.

4. *Jackson v. Hakes*, 2 Caines (N. Y. 1805), 335.

5. *Stiles v. Jackson*, 1 Wend. (N. Y. 1828) 316, citing *Adams on Eject.* 230; *Burr.* 1290.

6. *Jackson v. Flint*, 2 Cow. (N. Y. 1824) 594.

7. 1 *Rev. L.* 440, 441.

it is said that the presumption would prevail, that it was made under the statute rather than under the common law.¹

XII. Notice to Quit.—The general rule seems to be, that, to entitle a defendant to notice to quit, there must exist the relation of landlord and tenant.²

1. *Jackson v. Ellsworth*, 20 John. (N. Y. 1822) 181. Though it was said in this case, "that if a re-entry had been made under the statute, the evidence of it exists as a matter of record, and might have been produced. The non-production of it raises a presumption that there is no such evidence, at least until search has been made, and some fact established on which the presumption can rest. . . . 'After fourteen years' possession we will presume a regular re-entry at common law; re-entry is matter *in pais*, and not of record," citing from *Jackson v. Demarest*, 2 Caines (N. Y. 1805), 382; *Jackson v. Walsh*, 3 John. (N. Y. 1808) 226.

"If reliance is placed on the breach of the condition, an ejectment must be brought for the forfeiture; for the lease in this case is only voidable, and cannot be determined until the lessor re-enters in this manner." *Jackson v. Ellsworth*, 20 John. (N. Y. 1822) 181.

Where there was a provision for re-entry upon the non-payment of a half-year's rent, it was held that a formal demand or possession was necessary. *Doe dem. Darke v. Bowditch*, 8 Ad. & Ell. Q. B. (1846) 973, 978. Case was brought under the stat. 4 Geo. II. c. 28, § 2.

As to what was necessary to be done at common law to obtain possession upon non-payment of rent, see note to *Jackson v. Collins*, 11 John. (N. Y. 1814) 5, where the following cases are cited: *Cro. Eliz.* 209; *Co. Litt.* 202 *a* & Hargrave's note (3); *Plow.* 70, *a*, *b*; *Kedwelly v. Brand*, *Cro. Eliz.* 48, 73; *Crapp v. Hambledon*, 4 Leon, 180; *Wood v. Chivers' Case*, 1 Leon, 142; *Smith & Bustard's Case*, 2 Lutw. 1139; *Co. Litt.* 201, *b*; 7 Rep. 28; *Scot v. Scot*, 4 Leon, 180; *Wood & Chivers' Case*, 7 Term Rep. 117; 1 Ven. 248; 2 Ld. Raymond, 750; 1 Salk. 259; 3 Burr. 1896, 1897. But these niceties are now obviated by stat. 4 Geo. II. c. 28, sec. 2.

For a case where the landlord was held not bound by a judgment against the tenant, see *Smith v. Pretty*, 22 Wis. (1868) 655.

Where a suit was brought to recover land in the hands of the tenant of another, and damages for its detention, it was held that the defendant could not be dismissed on his disclaimer of title until he had called in his landlord to defend, and that, if the defendant was within the jurisdiction of the court, the landlord could not plead to

the jurisdiction on the ground that he himself was without the jurisdiction. *Fusilier v. Hennen*, 5 Mart. U. S. (La. 1826) 71.

There is an old statute in vol. 1 of *Laws of New York*, 440, 441, which provided for the action of ejectment in case of non-payment of rent, and which is important to know, so as to understand the reason of certain decisions arising thereafter. The statute is as follows: "In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath a right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, *serve a declaration in ejectment for the recovery of the demised premises*," etc., providing for the manner of service, and also that such "service or affixing such declaration in ejectment shall stand in place and stead of a demand and re-entry." See, generally, on Landlord and Tenant the titles "Notice to Quit," and "Parties Defendant," herein, *post*.

2. *Jackson v. Deyo*, 3 John. (N. Y. 1808) 417; *Jackson v. Aldrich*, 13 John. (N. Y. 1816) 106.

So that a privity of contract or estate between them is an important factor in determining whether or not a notice to quit should be given. *Jackson v. Hopkins*, 18 John. (N. Y. 1821) 488.

A notice to quit is not necessary to be proven as against a mere trespasser, since this defence may only be availed of in case of landlord and tenant. *Meeker v. Doe dem. Place*, 7 Blackf. (Ind. 1844) 169.

No notice to quit is required where the tenant claims to hold adversely. *Harrison v. Middleton*, 11 Gratt. (1854) 527, 548.

"A notice to quit is only requisite where a tenancy is admitted on both sides; and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence." *Doe dem. Calvert v. Frowd*, 4 Bing. (1828) 557, approved in *Vivian v. Moat*, L. R. 16 Ch. D. (1880) 730, 734.

Where the interest was determined by an agreement whereby the party in possession transferred all his interest to another, it was held that an action of ejectment could be brought at once, and that a notice to quit was not necessary. See opinion of the court in *Allen v. Jaquish*, 21 Wend. (N. Y. 1839) 628.

In a case where the defendant had been in possession for ten or twelve years, having entered without permission of the plaintiff's lessors, but during said time one of the lessors — who was the owner of a portion of the land — told him that he would sell him the premises, and that he might continue thereon and work upon it the same as if it were his own, though it did not appear that there was any assent on the part of the defendant to the proposition, or that he had acknowledged the lessor's right in the premises, it was held that no relation of landlord and tenant was created; although the defendant disclaimed holding adversely, that the first entry was adverse; it was also decided that no notice to quit was required.¹

A notice to quit is required in case of a tenancy from year to year;² and it was so held in a case where the facts constituted a tenancy from year to year.³

The fact that the tenant from year to year holds over, does not, in the absence of statutory provision, change the character of his tenancy: such holding is presumed to have been with the landlord's consent, and the tenant is entitled to a notice to quit.⁴

If one during his tenancy takes a deed in fee from a stranger, he is not entitled to a notice to quit, since such disclaimer is inconsistent with a claim of tenancy.⁵

A tenant at sufferance is not entitled to notice to quit under the *New York* decisions.⁶

1. *Jackson v. Tyler*, 2 John. (N. Y. 1807) 444, distinguishing this case from *Jackson v. Bryan*, 1 John. (N. Y. 1806) 322; and *Jackson v. Loughhead*, 2 John. (N. Y. 1806) 75.

The reversioner of an estate may bring ejectment against the tenant, of the holder of the particular estate immediately on the termination of the particular estate, and no notice to quit is necessary. *Doe dem. Calvert v. Frowd*, 4 Bing. (1828) 557, 560.

2. *Den v. McIntosh*, 4 Ired. Law (N. C. 1844), 291, 294.

3. *Jackson v. Wilsey*, 9 John. (N. Y. 1812) 267, 269.

In this case the lessee in possession paid rent for the premises occupied, and he was declared to be a tenant from year to year, although a portion of the premises was land to which he was not entitled under his lease, and it was said that a notice to quit was a prerequisite to an action of ejectment for the land not covered by the lease.

One who obtains possession under the owner's permission to enter and make improvements, although no rent is reserved, and continues therein for eighteen years, is a tenant from year to year, and is entitled to a notice to quit. *Johnson v. Bryan*, 1 John. (N. Y. 1806) 322; *Jackson v. Wheeler*, 6 John. (N. Y. 1810) 272.

It is said in note *b* to *Jackson v. Wheeler*,

6 John. (N. Y. 1810) 274, "that the decision in the text (*Jackson v. Wheeler*), and in the case of *Jackson v. Bryan*, 1 John. (N. Y. 1806), 322, are directly at variance with the principle of the English decisions on the subject of notice to quit," citing *Adams on Eject.* 108, 109; *Right et al. v. Beard*, 13 East, 210; *Hegan v. Johnson*, 2 Taunt. 149; *Doe v. Quigley*, 2 Campb. 505; *Doe v. Stennett*, Esp. 717; *Doe v. Sayer*, 3 Campb. 8; *Jackson & Phillips v. Aldrich*, 13 John. (N. Y. 1816) 106, opinion of Thompson, Ch. J.

4. *Classen v. Carrol*, 18 La. Ann. (1866) 267; *Jackson v. Salmon*, 4 Wend. (N. Y. 1830) 327. But *contra*, see *Harrison v. Marshall*, 4 Bibbs (Ky. 1817), 525.

5. *Sharpe v. Kelley*, 5 Denio (N. Y. 1848), 433.

A letter from a tenant to the landlord disputing the landlord's right to raise the rent of the premises, is a repudiation of the relation of landlord and tenant, and no notice to quit is necessary in order to maintain ejectment. *Vivian v. Moat*, L. R. 16 Ch. D. (1881) 730, 734.

Receipt of rent when unqualified after notice to quit has expired, constitutes a waiver of whatever rights have accrued thereby. *Prindle v. Anderson*, 19 Wend. (N. Y. 1838) 391.

6. *Jackson v. Parkhurst et al.*, 5 John.

No notice to quit is required in case of a tenant at will.¹

Where an action is brought under the provisions of the statute to recover the possession of premises held by two co-tenants as tenants at will of the plaintiff, it is sufficient if a notice to quit be served upon one of them only.²

Where one holds under a parol gift of lands, he is a mere tenant at will; and the fact that the lessee of the donee is permitted to occupy the premises, will not prevent the devisee of the donor from sustaining an action of ejectment; nor is a previous notice to quit required.³

It is a well settled rule in *New York*, that the mortgagor is considered as a tenant at will by implication, and, in an action between him and the mortgagee, is entitled to a notice to quit.⁴

After foreclosure of the mortgagor, a notice to quit is not necessary to sustain ejectment, especially after an advertisement of sale.⁵

Where the owner in fee of land conveyed the same to another, and secured himself by a mortgage back for the purchase-money, and the mortgagor let a third party into possession of the premises under himself, and thereafter the parties to the original deed

(*N. Y.* 1809) 128; *Jackson v. McLeod*, 12 *John.* (*N. Y.* 1815) 182.

1. *Jackson v. Bradt*, 2 *Caines* (*N. Y.* 1804), 169; *Jackson v. Rogers*, 1 *John Cas.* (*N. Y.* 1799) 33; *Jackson v. Sample*, 1 *John. Cas.* (*N. Y.* 1800) 231.

But it is held in *Alabama* that notice to quit is required in tenancies at will: this was a case, however, of assumption for rent. *Cook v. Cook*, 28 *Ala.* (1856) 660, 669.

Demand of possession six months before the year expires is said to be sufficient in *Kentucky* in case of a tenant at will, although no notice is required if there be a disclaimer. *Ross v. Garrison*, 1 *Dana* (*Ky.* 1833), 36.

"It may be remarked that this rule as to notice to quit seems highly just and reasonable, as it respects the rights of tenants without essentially prejudicing the interest of landlords, and that the English courts have latterly been more liberal in the application of it, extending it even to tenants at will (13 *East*, 210)." *Jackson v. Wilsey*, 19 *John.* (*N. Y.* 1812) 269. See note *a* to *Jackson v. Fuller*, 4 *John.* (*N. Y.* 1809) 216.

2. *Grundy v. Martin*, 143 *Mass.* (1887) 279.

3. *Jackson v. Rogers*, 2 *Caines' Cases* (*N. Y.* 1805), 314.

4. *Dickinson v. Jackson*, 6 *Cow.* (*N. Y.* 1826) 149, citing *Jackson v. Hopkins*, 18 *John.* (*N. Y.* 1821) 488; *Jackson v. Loughhead*, 2 *John.* (*N. Y.* 1806) 75; *Jackson v. Green*, 4 *John.* (*N. Y.* 1809) 186.

The fact that the mortgage was paid constitutes no waiver of the right of a

mortgagor to a notice to quit. *Jackson v. Hopkins*, 18 *John.* (*N. Y.* 1821) 488.

The mortgagee may sue in ejectment the tenant of the mortgagor who is let in without the privity of the mortgagee upon a lease granted after the execution and delivery of the mortgage, and a notice to quit is not necessary. *Keech dem. Warne v. Hall*, 1 *Dougl.* (1778) 21; *Rogers v. Humphreys*, 4 *Ad. & Ell.* (1835) 299.

5. *Jackson v. Colden*, 4 *Cow.* (*N. Y.* 1825) 266.

In *Vermont* a mortgagee may maintain suit against the mortgagor or his assignee after condition broken, without notice to quit to either. *Mason v. Gray*, 36 *Vt.* (1863) 311, 312.

It was said by the court in this case that "the mortgagor is a mere tenant at sufferance, and is not entitled to notice to quit before an ejectment can be maintained against him; and in this State it has been fully decided that the mortgagee may bring ejectment without notice to quit."

One in possession under a parol contract to purchase from the mortgagor is not entitled to notice to quit. *Jackson v. Stackhouse*, 1 *Cow.* (*N. Y.* 1823) 122.

A purchaser of the premises from the mortgagor when sold absolutely is not entitled to notice to quit. *Jackson v. Hopkins*, 18 *John.* (*N. Y.* 1821) 488; *Jackson v. Chase*, 2 *John.* (*N. Y.* 1806) 84.

And no notice seems to be required in the case of a tenant of the mortgaged premises between whom and the mortgagee no privity exists. *Jackson v. Fuller*, 4 *John.* (*N. Y.* 1809) 216.

and mortgage agreed to and did cancel their respective deeds, upon ejectment brought by the plaintiffs who held under the original owner and grantor, it was decided that the legal title was in such owner, and that the plaintiffs could recover, and that the party in possession under the mortgagor could not be considered either as a tenant or mortgagor, and was not, therefore, entitled to notice to quit.¹

XIII. Parties Plaintiff. — 1. *In General.* — The real parties to the fictitious proceedings in ejectment are the plaintiff's lessor and the tenant.²

The owner of land taken by a railroad corporation without due proceedings of condemnation may maintain ejectment.³

The holder of the fee of a public highway may maintain ejectment against one using it for private purposes, to the exclusion of the public.⁴

2. *Grantor and Grantee.* — Although, in case of adverse possession existing at the time of grant, only the grantor, or those under him, can sustain a claim in ejectment, if the adverse claimant continue to hold possession, yet the recovery must enure to the grantee's benefit.⁵

3. *Vendor and Vendee.* — It is held in *Pennsylvania* that the vendor of land cannot maintain ejectment for land for a failure on the part of the vendee to pay the consideration agreed upon.⁶

1. *Jackson v. Chase*, 2 John. (N. Y. 1806) 84.

As to notice to quit, see further cases under title "Parties Plaintiff," sub-title "Mortgagee," herein, *post*.

2. *Baron v. Abeel*, 3 John. (N. Y. 1808) 475, citing *Aslin v. Parker*, 2 Burr. 665; *Van Allen v. Rogers*, 1 John. Cases (N. Y. 1800), 281; *Goodtitle v. Tombs*, 3 Wils. 118.

Held in *Indiana*, that any one in whom the right to enter and make a lease exists, may bring ejectment. *Duchane v. Goodtitle*, 1 Blackf. (Ind. 1821) 117.

3. *Smith v. C. A. & S. L. R. R.*, 67 Ill. (1873) 191; *C. & A. R. R. v. Smith*, 78 Ill. (1875) 96.

4. *Carpenter v. O. & S. R. R.*, 24 N. Y. (1861) 655; *Redfield v. U. & S. R. R.*, 25 Barb. (1851) 54, 58.

So the one in whom the fee rests may bring ejectment against one having or claiming a right of way by prescription or deed. *Bolling v. The Mayor, etc.*, of Petersburg, 3 Rand. (Va. 1825) 563; *Morgan v. Moore*, 3 Gray (Mass. 1855), 319; *Cowper v. Smith*, 9 Serg. & Rawle (Pa. 1822), 26.

Party in Possession. — It is said that, "as against one showing no title in himself, possession is title." Hence, one in possession of land may maintain ejectment against a mere trespasser, even though he

have no title. *Sherin v. Brackett*, 36 Minn. (1886) 152, approving *Rau v. Minn. Val. R. R. Co.*, 13 Minn. (1868) 442, 445.

When Claimant is estopped. — Where a party has actual knowledge of what is doing by a railroad in locating and constructing its road, and it expends large amounts of money thereon, if he does not interfere, he may not maintain ejectment. *New Orleans & Selma R. R. Co. v. Jones*, 68 Ala. (1880) 48.

See also titles "Plaintiff's Evidence" and "Defences," *post*.

5. *Livingston v. Proseus*, 2 Hills (N. Y. 1842), 526.

An action of ejectment may be maintained by the grantee in a case where the deed has been executed by the grantor for the purpose of defrauding creditors. *Bush v. Rogan*, 65 Ga. (1880) 320.

Trustee. — The legal estate being in the trustee, he may maintain ejectment. *Mordecai v. Parker*, 3 Dev. (N. C. 1832) 425; *Beach v. Beach*, 14 Vt. (1842) 28.

See, as to trustees, the title.

The grantee of a deed of land held adversely when the grant was made, may himself bring ejectment if the adverse holder abandons the premises, and a stranger enter thereon. *Livingstone v. Proseus*, 2 Hills (N. Y. 1842), 526.

6. *Cook v. Thrimble*, 9 Watts (Pa. 1839), 15. But it was said in this case that a

Where the purchaser of the legal title was in possession by forcible entry, although he had the right to have entered peaceably, it was held that an action of ejectment would not lie against him in behalf of the vendee of the land, who had neglected to fulfil a contract of purchase.¹

4. *Corporations and Public Officers.* — In a case where land was dedicated, and the fee conveyed to a public corporation for a specific purpose, it was held that ejectment might be brought by the corporation to obtain the possession against any person using the land for a purpose other than that contemplated in the dedication.²

A railway corporation in whom is vested, under the act of Congress of July 1, 1862, an exclusive right to use the land for two hundred feet on each side of its track, may maintain ejectment to recover the same against an occupant thereof holding it to the exclusion of the company.³

5. *Dower.* — A widow may bring ejectment for her dower after it is assigned.⁴

6. *Reversioner.* — That waste has been committed, and the particular estate forfeited, constitutes no sufficient ground for a reversioner to maintain an action.⁵

7. *Devisee.* — Where the testator, during his lifetime, granted

condition in a deed might be enforced in ejectment.

But *contra*, it is said that, where premises are sold under an agreement of purchase, and entry is made by the vendee, but he neglects or fails to keep the terms of the contract, or to pay the purchase-money, ejectment lies in behalf of the vendor for their recovery. *Fears v. Merrill*, 9 Ark. (1849) 559; *Baker v. Gittings*, 16 Ohio (1847), 485.

The vendee may, in *Pennsylvania*, have an action of ejectment for the specific performance of an agreement for the sale of lands. *Henderson v. Hayes*, 2 Watts (Pa. 1834), 150.

1. *Moring v. Ables*, 62 Miss. (1884) 263, 270.

2. *Weeping Water v. Reed*, 21 Neb. (1887) 261, 270.

The board of supervisors of a county are precluded by the statute (sec. 741 of the Code 1880 construed) from bringing ejectment for land for school purposes. *Rabb v. Supervisors of Washington Co.*, 62 Miss. (1885) 593.

"A corporation may avail itself of any legal or equitable remedy which would be available, under similar circumstances," to a private person. *Morawetz on Private Corporations* (ed. 1882), sec. 184.

3. *The Central Pacific R. R. Co. v. Benity*, 15 Amer. Rail. Rep. (Ladd, 1877) 363.

Receiver cannot bring ejectment. *Wynn v. Newborough*, 3 Bro. C. C. (1790) 88.

Nor can a receiver be proceeded against in ejectment, if in possession, except by leave of the court. *Angel v. Smith*, 9 Ves. (1804) 335.

4. *Pringle v. Gaw*, 5 Serg. & Rawle (Pa. 1820), 536; *Doe v. Mitt*, 2 Carr & Payne (1826), 430; *Bralton v. Mitchell*, 7 Watts (Pa. 1838), 113, 115. But see *Stokes v. McAllister*, 2 Mo. (1829) 163.

In *New Hampshire* an action of ejectment lies for dower in a limited time after demand for assignment. *Robie v. Flanders*, 33 N. H. (1856) 524.

It would seem that, in *Missouri*, under the statute, a widow may bring action for her husband's messuage before dower assigned. *Miller v. Talley*, 48 Mo. (1871) 503.

So in *Indiana*, by statute. *Galbreath v. Gray*, 20 Ind. (1883) 290.

See also title "Where the Action may be maintained," sub-title "Dower," herein, *ante*.

5. *Patrick v. Sherwood*, 4 Blatchf. (U. S. 1857) 112.

A reversioner may enter after a determination of a tenancy by curtesy. *French v. Rollins*, 21 Me. (1842) 372.

A Remainder man may not maintain ejectment against a railroad owning a life estate in an undivided moiety, there being no such ouster as is requisite to support the action. *Austin v. Rutland R. R. Co.*, 2 Amer. Rail. Rep. (Vt. 1873) 46.

lands, reserving an annual rent, with provision made for forfeiture and re-entry for non-payment of the same, it was held that a devisee could not maintain ejectment for non-payment of rent during the testator's life, but only for rent unpaid after his interest vested under the will.¹

8. *Tenant for Years*. — A tenant for years may sue in ejectment.²

9. *Tenant at Sufferance*. — It is held that an action of ejectment will not lie in behalf of a tenant at sufferance who has been dispossessed by his landlord, without a prior demand for possession.³

10. *Tenant at Will*. — And in *Indiana*, ejectment may be maintained by a tenant at will.⁴

11. *Guardian*. — An action of ejectment for the lands of the ward may be sustained by the guardian in *socage*.⁵

12. *Ward*. — A ward may bring ejectment against one holding the ward's lands, under a claim of purchase, at a void guardian's sale.⁶

13. *Committee of Imbecile*. — The committee of the estate and person of an imbecile may not bring an action of ejectment.⁷

14. *Agent*. — Where an agent of the owner of real estate sued in his own name, it was determined that the action could not be sustained.⁸

15. *Administrator*. — In *Arkansas*, the administrator may maintain ejectment by reason of being entitled to the real estate; and the action will lie in his behalf against any person except the widow, or her tenant, in occupation of the dwelling-house, etc., before dower assigned.⁹

1. Van Rensselaer *et al.* v. Hayes, 5 Denio (N. Y. 1848), 477, 480.

This case apparently rests upon the construction of the statutes, 1 R. S. 747, sec. 23; 2 R. S. 505, sec. 30.

Devisee may bring ejectment. Young v. Holmes, 1 Strange (4 Geo. I.), 70.

The owner in fee of land devised the same in fee to his son's issue in remainder after the life estate of the son. Upon the son's decease, the executors named in a will left by him received rent from a party who had been in possession of the land in question during the lifetime of the deviser: the devisees were infants. It was held that ejectment might be maintained by them, notwithstanding the acts of the executors in receiving the rent, such acts not being binding upon the devisees. Doe *dem.* Thomas v. Roberts, 16 Mees. & Wes. (1847) 779.

That devisee, although an executor, may bring ejectment, see Doe v. McFarland, 9 Cranch (1815), 151.

2. Olendorf v. Cook, 1 Lans. (1869) 37.

3. Doe *dem.* Harrison v. Murrell, 8 Carr. & P. (1837) 134.

4. Buntin v. Doe, 1 Blackf. (Ind. 1818) 27.

5. Holmes v. Seeley, 17 Wend. (N. Y. 1837) 75, citing 3 Bac. tit. "Guardian," 403. 414 g; note c, 5 John. (N. Y. 1809) 67, and cases therein. See also Wade v. Cole, Ld. Raym. (8 Will. III.) 130; More v. Deyoe, 22 Hun (N. Y. 1880), 208.

A mother may enforce her children's rights as guardian in socage, and may bring ejectment. Cagger v. Lansing, 64 N. Y. (1876) 417.

6. Wilkinson v. Felby, 24 Wis. (1869) 441.

7. Petrie v. Shoemaker, 24 Wend. (N. Y. 1840) 85.

An insane person may sue in his own name in ejectment. Allen v. Ransom *et al.*, 44 Mo. (1869) 263.

8. McHenry v. Painter, 58 Iowa (1882), 365.

9. Carnall v. Wilson, 21 Ark. (1860) 62. See also Meeks v. Hahn, 20 Cal. (1862) 621, case under the statute; Russell v. Erwin's Adm'r, 41 Ala. (1867) 292.

Ejectment lies in behalf of the personal representative of a termor upon a lease for years; and this is so whether the ouster is prior or subsequent to death. Moreton's Case, 1 Vent. (21 Carl. 2), 30; Russell v.

An action of ejectment will not lie, however, in behalf of an administrator against one who holds possession as tenant of lands of the intestate.¹

16. *Executor.* — Where a suit was brought in ejectment by the executor, who qualified in *Virginia*, for lands in *Kentucky*, the will being admitted to record according to the laws of the former State, while the latter was a part of it, it was held that the action might be maintained.²

And in *Pennsylvania*, in certain cases, the executor may maintain ejectment.³

So it is held in *New York*, that where the lease is of a species of property (as in case of a term for years) in which, being a chattel real, the executor has an interest, that ejectment by him could be sustained.⁴

But where land has been granted in fee, reserving rent payable annually, with certain provisions as to forfeiture and re-entry for condition broken, the executor of the grantor cannot maintain an action for ejectment in case the rent is not paid, the estate being of a character which gives the executor no interest therein.⁵

17. *Heir.* — An action of ejectment may be brought by the heir of one who died possessed or seized of the estate claimed.⁶

18. *Joint Tenants, Tenants in Common, and Coparceners.* — As to joint tenants, tenants in common, and coparceners, the common-law rule permitting a suit by them in ejectment required that they should join in the action.⁷ But where several persons hold

Prat, cited 1 and (1664) 243; Slade's Case, 4 Co. part 4, 95 a (44 Eliz.).

So the administrator may bring the action for land obtained under a foreclosure. *Kunzie v. Wixom*, 39 Mich. (1878) 384.

1. *Morrill et al. v. Meniffee*, Adm'r, 5 Ark. (1844) 629.

Ejectment may be brought by the administrator of a tenant from year to year. *Doe dem. Porter v. Shore*, 3 T. R. (1789) 13.

That suit lies for a term of years by the administrator, see *Mosier v. Yost*, 33 Barb. (N. Y. 1861) 277.

For cases governed by statutory provisions in respect to suits in ejectment by administrator for a term of years, see *Russell v. Erwin's Adm'r*, 41 Ala. (1867) 302; *Kline v. Moulton*, 11 Mich. (1863) 370, and cases *ante* herein.

2. *Doe v. McFarland*, 9 Cranch (1815), 151.

3. *Kirk v. Carr*, 54 Pa. St. (1867) 285. So in Georgia, *Carruthers v. Bailey*, 3 Ga. (1847) 105.

4. *Van Rensselaer et al. v. Hayes*, 5 Denio (N. Y. 1848), 477, 480.

5. *Van Rensselaer et al. v. Hayes*, 5 Denio (N. Y. 1848), 477, 480.

Where an executor is a devisee of lands, he may bring ejectment notwithstanding he

is executor. Indirectly decided, however. *Doe v. McFarland*, 9 Cranch (U. S. 1815), 151.

6. *Carruthers v. Bailey*, 3 Ga. (1847) 105; *Tappscot v. Cobbs*, 11 Gratt. (Va. 1854) 172. See also *Webster v. Webster*, 53 Pa. St. (1866) 161. But not against the widow. So held in *Pennsylvania*. *Gourley v. Kinley*, 66 Pa. St. (1870) 270.

In *Michigan* the heir may bring ejectment unless possession be demanded by the administrator. *Campeau et al. v. Campeau et al.*, 19 Mich. (1869) 116; *Marvin v. Schilling*, 12 Mich. (1864) 360.

Where premises are granted unconditionally, to be used for a certain purpose, the whole estate and title passes from the grantor; and his heirs cannot maintain ejectment, even though the premises cease to be used for the purposes stated in the grant. *Brown v. Caldwell*, 23 W. Va. (1883) 187, 194.

7. *Webster v. Vanderverter*, 6 Gray (Mass. 1856), 428. (This case was brought under a statute.)

And joint tenants of devised lands held equally may join in an action of ejectment. *Hicks v. Rogers*, 4 Cranch (U. S. Vt. 1807), 165; *Poole v. Fleeger*, 11 Pet. (U. S. Tenn. 1837) 185.

Joint tenants may join or sue separately

as tenants in common under title derived from their ancestor, it seems that a part may maintain ejectment under an after-acquired title from the owner, provided such parties shall first surrender possession to the other heirs.¹ And a separate action of ejectment may be maintained by a tenant in common against his co-tenant to recover his undivided interest in the estate: so trespass for mesne profits will also lie.² So an action of ejectment lies in behalf of two tenants in common, and recovery may be had of the whole estate to which they are entitled in such capacity.³

One co-tenant cannot maintain ejectment against his co-tenant, except in case of actual ouster; such ouster need not be an actual physical dispossession, but may be evidenced by acts and declarations amounting to ouster.⁴

One tenant cannot maintain an action of ejectment against his co-tenant after partition had, when it appears that such co-tenant had, prior to such partition, entered and been permitted to make improvements on the land, unless there be a tender of the value of such improvements, both before and after such partition, less the amount due for use and occupancy.⁵

19. *Mortgagee*. — A mortgagee, or his assignee, may maintain ejectment against a mortgagor in possession where the deed contains a provision for re-entry and sale on non-fulfilment of the conditions, and non-payment of the money, as stipulated.⁶

for share of each. *Hasbrouck et al. v. Bunce*, 62 N. Y. (1875) 475.

1. *Phelan et ux. v. Kelley*, 25 Wend. (N. Y. 1841) 389.

2. *Chesround v. Cunningham*, 3 Blackf. (Ind. 1832) 82, citing *Adams on Ejectment*, 1821, p. 330.

Ejectment may be maintained by one tenant in common alone. *Robinson v. Roberts*, 31 Conn. (1862) 145.

One tenant in common may alone maintain ejectment against all persons except his co-tenants and those claiming under them. He can probably, however, recover only his own proportionate share of the mesne profits. *Brown v. Warren*, 16 Nevada (1881), 228, 241.

A joint tenant may maintain ejectment for his share of the premises, where he holds equally by descent with other children, from the tenant last seized. *Roe dem. Roper v. Lonsdale*, 12 East (1810), 39.

One owning an undivided interest in land may bring an action for its recovery. *Hughes v. Holliday*, 3 G. Gr. (Iowa, 1851) 36.

3. *Elliss v. Elliss*, El. Bl. & El. (1858) 81; 27 L. J. Q. B. 316. Decided under Common Law Proc. Act, 1852.

It is decided in *Weese et al. v. Barker et al.*, 7 Col. (1883) 178, that a tenant in common may have a recovery in ejectment for the entire premises, unless the action

be against a co-tenant. The case of *Yancy v. Greenlee*, 90 N. C. (1884) 317, is to the same effect. But it is said in *Wilson v. Chandler*, 60 Ga. (1878) 129, that, where a part of a number of tenants in common sue, they can only have a recovery for their respective shares.

Ejectment may be brought by one of two coparceners for his separate portion of the estate. *Jackson et al. v. Sample*, 1 John. Cas. (N. Y. 1800) 231.

4. *Hammond et al. v. Morrison's Lessee*, 33 Md. (1870) 95; *Avery v. Hall*, 50 Vt. (1877) 11; *Barnitz v. Casey*, 7 Cranch (U. S. 1813), 456; *Vance v. Schroyer*, 77 Ind. (1881) 501.

Co-tenant may maintain action against his co-tenant, upon the latter's refusal to permit him to enter and occupy; which refusal amounts to an ouster. *Norris v. Sullivan*, 47 Conn. (1880) 474; *Chiles v. Conley*, 9 Dana (Ky. 1840), 385, 388; *Ricard v. Williams*, 7 Wheat. (U. S. 1822) 59, 120.

5. *Jackson v. Creal et al.*, 13 Johns. (N. Y. 1816) 116.

6. *Pierce v. Brown*, 24 Vt. (1852) 165; *Oldham v. Pfeiffer*, 84 Ill. (1876) 102; *Thunder v. Belcher*, 3 East (1803), 449; *Walcop v. McKinney*, 10 Mo. (1846) 229; *Blaney v. Bearce*, 2 Me. (1822) 132; *Wilson v. Hooper*, 13 Vt. (1839) 653; *Doe dem. Fisher v. Giles*, 5 Bing. (1829) 421; *Sutton*

Where a mortgage deed contained a condition for re-entry and right to distrain, in case of the non-payment of interest, and there had been an entry by the mortgagee, and he had distrained for accrued and unpaid interest, although at a time subsequent to the demise laid in the declaration, it was held that there was nothing in the provision in the deed, or in the act of the mortgagee in having entered and distrained, which could be construed as a recognition of a tenancy in the mortgagor, or that would prevent a recovery in ejectment by the mortgagee.¹

Upon a sheriff's deed, the purchasers of an equity of redemption may maintain ejectment against the mortgagor.²

20. *Mortgagor*. — Where a mortgagee comes legally into possession of the premises after condition broken, neither the mortgagor

v. Mason, 38 Mo. (1866) 120; *Carroll v. Ballance*, 26 Ill. (1861) 9; *Jackson v. Warren*, 32 Ill. (1863) 331; *Doe dem. Snell v. Tom*, 4 Ad. & El. Q. B. (1843) 615; *Fuller v. Wadsworth*, 2 Ired. (N. C. 1842) 263; *Den v. Stockton*, 7 Halst. (N. J. 1831) 322; *Reddick v. Gressman*, 49 Mo. (1872) 389; *Ahern v. White*, 39 Md. (1873) 409; *Fitchburg v. Melven*, 15 Mass. (1818) 270; *Ely v. McGuire*, 2 Ham (Ohio, 1826), 223; *Rockwell v. Bradley*, 2 Conn. (1816) 1. *Contra*, *Murray v. Walker*, 31 N. Y. (1865) 399; *Carpenter v. Carpenter*, 6 R. I. (1860) 542, under a statute. Nor need a foreclosure or sale be first had. *Allen v. Ransom*, 44 Mo. (1869) 263. So the action lies where the debt is payable in instalments upon non-payment. *Smith v. Shuler*, 12 Serg. & Rawle (Pa. 1824), 240.

In *Michigan*, held that the mortgagee might bring an action where it appeared that the mortgage was executed prior to 1843. *Todd v. Davis*, 32 Mich. (1875) 160.

A second mortgagee may bring ejectment, even if there is an outstanding prior mortgage, and although it was expressly excepted in the covenants of the second mortgage, — *Savage v. Dooley*, 28 Conn. (1859) 411. See also *Batcheller v. Pratt*, 10 Cush. (Mass. 1852) 185, — but not against a tenant of a prior mortgagee.

1. *Doe dem. Wilkinson v. Goodier*, 10 Ad. & Ell. (U. S.) Q. B. (1847) 957. See also *Doe dem. Garrod v. Olley*, 12 Ad. & Ell. (1840) 481.

The heirs of a mortgagee, after condition forfeited, may bring ejectment. *Brown v. Mace*, 7 Blackf. (Ind. 1843) 2.

It is said in *New York* that an action of ejectment cannot be sustained by a mortgagee. *Swart et al. v. Service*, 21 Wend. (N. Y. 1839) 36; 2 Rev. Stat. 237, sec. 37, 2d ed.; 2 R. S. 312, sec. 57.

The statute provided in *New York* that no action of ejectment shall be maintained by a mortgagee, or his assigns or representatives, to recover possession of the

mortgaged premises, — *Stewart v. Hutchins*, 13 Wend. (N. Y. 1835) 486; aff'd, 6 Hill, (N. Y. 1843) 143, — and held to apply to mortgages executed prior to the passage of the act. Said by the court that "the Revised Statutes declare that no action of ejectment shall (hereafter) be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises." Citing statutes above referred to.

A mortgagee in possession is protected under the mortgage against an action of ejectment, as well before as since the passage of the statute regarding actions of ejectment by a mortgagee. *Phyfe v. Riley*, 15 Wend. (N. Y. 1836) 253, citing *Jackson v. Minkler et al.*, 10 John. (N. Y. 1813) 480; *Jackson v. Bowen*, 13 Wend. (N. Y. 1827) 13. There seems to be some question, however, as to this doctrine. *Fort v. Burch*, 6 Barb. (N. Y. 1849) 60, 76.

2. *Martin v. Shelton*, 2 B. Mon. (Ky. 1841) 63, approving *Dougherty v. Linthicum*, 8 Dana (Ky. 1839), 194, 198.

The purchaser of an equity of redemption may maintain ejectment against a mortgagor (by statute). *Black v. Justice*, 86 N. C. (1882) 504. But see *Jackson v. Elliot*, 26 N. H. (1852) 67, 73. And the action may be maintained in favor of a mortgagee against a mortgagor who is in possession by a tenant from whom he receives rents and profits under a lease made after the mortgage. *Middletown Savings Bank v. Bates*, 11 Conn. (1836) 519.

In *Keech v. Hall*, 1 Doug. (1778) 21, it is held that a mortgagee can maintain ejectment against the tenant of the mortgagor claiming under a lease made without the privity of the mortgagee.

It has been held in *New York* that the legal estate passed to the assignee of a mortgage, or the mortgagee's grantee, and that he might maintain ejectment thereon. *Jackson v. Chase*, 2 John. (N. Y. 1806) 87, citing *Weaver v. Belcher*, 3 East, 449.

nor his grantee may maintain the action of ejectment as against such mortgagee.¹

An action of ejectment cannot be sustained by the mortgagor against the assignee of the mortgage, and those claiming under him, notwithstanding the fact that the consideration on which the assignment is based was usurious.² Nor may the mortgagor bring ejectment against the tenant of the mortgagee.³ But the mortgagor may maintain an action of ejectment against the mortgagee's grantee, who was not an assignee of the debt.⁴

21. *Other Cases.* — The court will not permit one who has no subsisting title, and no claim or pretension to an interest in the premises, to be made a lessor in an action of ejectment, in order to enable the plaintiff to support his title.⁵

1. *Jackson v. Elliot*, 26 N. H. (1852) 67; *Connor v. Whitmore*, 52 Me. (1863) 185; *Phyfe v. Riley*, 15 Wend. (N. Y. 1836) 248; *Tallman v. Ely*, 6 Wis. (1859) 244, 256; *Parsons v. Wells*, 17 Mass. (1821) 419; *Gillett v. Eaton*, 6 Wis. (1859) 30; *Johnson v. Huston*, 47 Mo. (1871) 227. *Held* so prior to the statute, and not changed by it. *Gillett v. Eaton*, 6 Wis. (1859) 30; *Tallman v. Ely*, 6 Wis. (1859) 244.

2. *Jackson v. Bowen*, 7 Cow. (N. Y. 1827) 13, 20.

3. *Hennessy v. Farrell*, 20 Wis. (1865) 42.

4. *Jackson v. Bronson*, 19 John. (N. Y. 1822) 326. See also under the title "Statutory Provisions in the United States," the sub-title "Mortgagee" and "Mortgagor," herein, *ante*.

5. *Jackson ex dem. Starr et ux. v. Richmond*, 4 John. (N. Y. 1809) 482, cited in *Jackson ex dem. Livingston et al. v. Schloer*, 10 John. (N. Y. 1813) 368.

Where the title is out of the plaintiff, he may not sustain the action of ejectment against a wrong-doer upon the strength of a mere possession only. *Nagle v. Shea*, 8 Ir. Rep. C. L. (1874) 224.

One who has granted an estate in fee with ground-rent reserved, has no estate, legal or equitable, on which to found an action of ejectment on non-payment of rent. *Kenege v. Elliott*, 9 Watts (Pa. 1840), 258.

Tax Sale. — The owner of real estate, in case of an illegal or irregular sale of the same under a tax-deed, may bring ejectment. *Knox v. Cleveland*, 13 Wis. (1860) 245. But a tender is required; *Rand v. Robinson*, 11 Cush. (Mass. 1853) 289, case under the statute.

One already in possession may not maintain ejectment. *Jackson v. Hakes*, 2 Caines (N. Y. 1805), 335.

Surviving Partner. — An action of ejectment lies by a surviving partner for the recovery of partnership land. *Robinson v. Roberts*, 31 Conn. (1862) 145.

The State. — It has been *held* that eject-

ment may be maintained by the State. *James Riv., etc., Co. v. Thompson*, 3 Gratt. (Va. 1846) 270. But it is said that "a State cannot maintain an action of trespass to try the title to land, or an action of ejectment, because a State cannot be dis-seized. The remedy against a trespasser in such case in favor of the State is by information for intrusion." 3 Wash. on Real Prop. (4th ed.) p. 191, citing *State v. Arledge*, 1 Bail. (S. C. 1830) 551; *Jackson v. Winslow*, 2 Johns. (N. Y. 1806) 80.

Action was brought by the people in *Wendell v. Jackson*, 8 Wend. (N. Y. 1831) 183, and in *People v. Snyder*, 51 Barb. (N. Y. 1868) 589.

A State may not maintain directly the action of ejectment, since it cannot be dis-seized: the suit must be brought in the name of the attorney-general. *State v. Pinckney*, 22 So. Car. (1884) 503.

"Where the State comes into her own courts to assert a right of property, she is, of course, bound by all the rules established for the administration of justice between individuals." Case of action for the recovery of real property or ejectment. *State v. Pacific Guano Co.*, 22 So. Car. (1884) 74.

Though "direct suits will not lie against" the property of a State, yet "it is well settled that where the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles which govern individuals. Where the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself on an equality with other litigants." Although this case was not an action of ejectment, yet the similarity of the language used with that used in the South Carolina case (which was an action of ejectment), would by analogy seem to imply its applicability to ejectment suits). *United States v. Beebe*, 17 Fed. Rep. (U. S. 1883) 41.

XIV. Parties Defendant. — 1. *In General.* — The rule at present in regard to parties defendant requires the plaintiff in the action of ejectment to make all those parties who have or claim an interest, ownership, title, or right of possession, in or to the demanded premises, to be made parties to bind them upon the question of title; and as against such persons as are not made parties, and who ought properly to have been joined, no title is established against them by the judgment.¹

Where a party merely moves hay-scales upon land, and leaves them there without afterwards occupying or using them, the land being that of another, there is no such possession in the person removing them as to enable an action of ejectment to be had against him.²

There must be a privity between the tenant and one seeking to be made a defendant in action of ejectment. A party will not be permitted to come in and defend, simply because he claims title, and has a good and substantial defence;³ so that a mere stranger to the possession, one whose title is not connected to, or is inconsistent with, the occupier's possession, cannot be permitted to come in and defend.⁴

Where a proceeding in ejectment was instituted for a vacant possession, and a regular judgment was obtained by default, it was held that such judgment should be opened, and that one who claimed ownership in the lands might, upon proper showing, be admitted to defend on the merits.⁵

2. *Actual Occupant, or One claiming Title, etc.* — As a rule, the action should be brought against the party in actual posses-

A State need not prove her title. *State v. Pinckney*, 22 So. Car. (1884) 484, 503.

1. *Moore v. Deyo*, 22 Hun (N. Y. 1880), 208, code; *Crane v. Seitz*, 30 Mich. (1874) 457, by statute; *Walsh v. Vartney*, 38 Mich. (1878) 73; *Lyttle v. Burgin*, 82 N. C. (1880) 301, by code.

"The word 'landlord' is extended to all persons claiming title consistent with the possession of the occupier. . . . All such persons have a right to defend as landlords, and no other." *Rollins v. Rollins*, 76 N. C. (1877) 264.

2. *Jackson v. Pike*, 9 Cow. (N. Y. 1828) 69.

In a case where one was actually made a party, but the action was discontinued as to him before service and appearance, *held* that he might not come in and defend after judgment rendered. *Hathaway v. Fullerton*, 11 Wis. (1860) 287.

Judgment without the possession having been obtained is not sufficient to enable a party to come in as defendant under the act of 1852. *Thompson v. Tomkinson*, 11 Exch. (1856) 442.

Ejectment may be brought against one falsely claiming a deed of the property and the right to lease it and retain the

rents. *Darkee v. Felton*, *imp.* 54 Wis. (1882) 405, 411.

3. *Jackson v. McEvoy*, 1 Caines (N. Y. 1803), 151, and note, p. 152, upon the right of a landlord to defend, citing *Fenwick's case*, 1 Salk. 257; Bull. N. P. 95; *Lovelock v. Doncaster*, 3 D. & E. 783; *Norris v. Doncaster*, 4 D. & E. 122; *Doe v. Cooper*, 8 D. & E. 645; *Fairclaim v. Shamtitle*, 3 Burr. 1290; *Jackson ex dem. Cantine et al. v. Stiles*, 4 John. (N. Y. 1809) 493.

And a party cannot be permitted to defend, either with the tenant or the tenant's landlord, where he claims in opposition to the tenant. *Jackson v. Flint*, 2 Cow. (N. Y. 1824) 594.

4. *Buford v. Gaines*, 6 J. J. Marsh. (Ky. 1831) 34, 40.

5. *Wood v. Wood*, 9 John. (N. Y. 1812) 257.

In *Louisiana* the real party defendant is the warrantor of the occupier or party in possession. *Gaines v. New Orleans*, 17 Fed. Rep. (U. S. 1883) 16.

A petitory action can only be brought against a defendant "in the actual possession of the immovable." *Deloquy v. Dixon*, 5 La. (1833) 356.

sion of the premises claimed;¹ or in case there is no one in actual occupancy, or there is a tenant in possession, it may be brought against such tenant, or the one exercising acts of ownership or claiming title in the premises.²

So it is held in *New York*, in a case under the statute, that the action of ejectment might be brought against one claiming title to the land, although he were not in actual occupancy of the same, and that the fact that a claim of title was seriously made by such person was sufficient foundation for such action, but that the claim must, however, be something more than a mere idle declaration of ownership.³

3. *Adverse Claimants*. — All parties may, under the codes, if not previously, be defendants who claim to hold the premises adversely to the plaintiff or owner, or claim an interest therein.⁴

4. *Vendor and Vendee*. — It is held in *Alabama* that a vendee holding lands under a bond to convey cannot defend against an action of ejectment brought by his vendor, in whom the legal title resides; and the rule is the same, even if the whole purchase-money has been paid, nor can a purchaser from the vendee so defend.⁵

Though it is decided in *Kentucky*, that if one enters legally into the possession of premises, as in case of a *bona fide* occupant who holds under an executory agreement to purchase, and continues therein without any wrongful act affecting the possession, ejectment may not be maintained against him. The action may be brought against one who is an actual or *quasi* trespasser.⁶

1. *Klink v. Cohen*, 13 Cal. (1859) 623; *Lockwood v. Drake*, 1 Mich. (1847) 14, case under the statute; *Taylor v. Crane*, 15 How. Pr. (N. Y. 1858) 358, 361; *Schuyler v. Marsh*, 37 Barb. (N. Y. 1862) 350.

2. *Finnegan v. Canaleer*, 47 N. Y. (1872) 493; *Hyde v. Folger*, 4 McLean (U. S. Mich. 1847), 255, so by statute; *Chilson v. Buttolph*, 12 Vt. (1840) 231; *Hill v. Kricke*, 11 Wis. (1860) 442.

3. *Banyer et al. v. Empie*, 5 Hill (N. Y. 1843), 48.

The court said with reference to this statute, that, "It cannot be doubted that the legislature intended to change the old rule, and allow ejectment to be brought for the recovery of unoccupied lands. This was done for the purpose of enabling the plaintiff while his witnesses were alive and at command to settle the right between himself and another claimant without the necessity of taking possession, and then waiting for an action to be commenced by the other party. A recovery in ejectment is now made conclusive of the right as between the parties to the action and persons claiming under them by title accruing after the commencement of the suit."

4. *Carter v. Hunt*, 40 Barb. (N. Y. 1863)

89, 93; *McCowan v. Hannah*, 3 Oregon (1871), 302; *Patch et ux. v. Keller et al.*, 28 Vt. (1856) 332; *Abeel v. Van Gelder*, 36 N. Y. (1867) 513.

5. *Collins v. Doe ex dem. Robinson*, 33 Ala. (1858) 91.

That ejectment lies by the vendor against a vendee in possession who neglects or refuses to fulfil the contract of purchase, see *Moyer v. Garrett*, 96 Pa. St. (1880) 376; *Hicks v. Lovell*, 64 Cal. (1883) 14.

But not when the vendor has parted with the legal title, and has neither possession nor right of possession, and the contract is a specific agreement to convey in fee. *Wheeling, etc., R. R. Co. v. Gowles*, 99 Pa. St. (1881) 171.

6. *Harle v. McCoy*, 7 J. J. Marsh. (Ky. 1832) 318, 320.

Corporation. — Ejectment may be maintained against a corporation. *Lucas v. Johnson*, 8 Barb. (1850) 244.

Where a railway corporation conforms to the presented statutory provisions in taking possession of land, ejectment will not lie against them. *Doe dem. Armistead v. North Staffordshire R. Co.*, 16 Q. B. 526; s. c., 4 Eng. L. & E. (1851) 216.

Ejectment lies against a railroad corpora-

5. *Dower*. — The tenant of the freehold is properly the party defendant in ejectment for dower.¹

6. *Remainderman*. — While the particular estate continues, ejectment will not lie against the remainderman.²

7. *Tenant at Will*. — A writ of entry may be maintained against a tenant at will if he denies the right of the landlord.³

8. *Infant*. — And against an infant.⁴

9. *Servant*. — Although, ordinarily, the action of ejectment should be brought against the party who is actually in possession of the land, yet if one claim possession, and a servant of his be found upon the land and cultivating it, the action must be brought against such servant, although his labors are intended to be for the sole benefit of his master, and the servant has no interest in the result of his labors.⁵

10. *Coparceners*. — Coparceners with the tenant may not defend in a suit against their coparcener.⁶

11. *Husband and Wife*. — Where the wife has the title to the lands in controversy vested in her, and is in possession with her husband, it is said in New York that she should necessarily be made a party.⁷

12. *Mortgagee*. — A mortgagee may properly be let in as defendant if he be in possession.⁸

tion in favor of the owner of the fee where the corporation is permanently occupying same for its railway. *Weisbrod v. Chicago & North-western R. R. Co.*, 21 Wis. (1867) 602.

Receiver. — A receiver who holds possession of the property cannot be subjected to this action, unless, perhaps, it may be brought upon an order of the court. *Angel v. Smith*, 9 Ves. (1804) 335.

1. This was not positively decided, but it was only intimated that such would be the law were the question necessary to be determined. *Shaver et ux. v. McGraw*, 12 Wend. (N. Y. 1834) 558, citing *Hurd v. Grant*, 3 Wend. (N. Y. 1829) 340, and relying upon the statute 2 R. S. 304, sec. 10.

Any party holding under the tenant should be made a party defendant. *Marvin v. Dennison*, 20 Vt. (1846) 662.

2. *Shaver et ux. v. McGraw*, 12 Wend. (N. Y. 1834) 562.

3. *Wheelwright v. Freeman*, 12 Metc. (Mass. 1846) 154; *Dolly v. Miller*, 2 Gray (Mass. 1854), 135.

4. *Marshall v. Wing*, 50 Me. (1862) 62; *McCoon v. Smith*, 3 Hill (N. Y. 1842), 147. See *Spitts v. Wells*, 18 Mo. (1853) 468.

Heirs. — **Death of Defendant**. — The heirs and terre-tenants are said to be properly the ones to be made parties upon the decease of the defendant in ejectment, and revivor of the judgment by *scire facias* is the proper remedy. *Walden v. Craig*, 14 Pet. (U. S. 1840) 147.

5. *Shaver v. McGraw*, 12 Wend. (N. Y. 1834) 558. Upon stat. 2 R. S. 304, sec. 14, which declares, "that, if the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the declaration. If they are not so occupied, the action may be brought against some person exercising acts of ownership on the premises claimed, as claiming title thereto or some interest therein at the commencement of the suit.

In an action of ejectment, it has been held that a recovery may be had against the servant of another, the servant being in possession. *Doe dem. Cuff v. Stradling*, 2 Stark. (1817) 187.

6. *Minke's Lessee v. McNamee et al.*, 30 Md. (1868) 294.

7. *Stewart v. Patrick et al.*, 68 N. Y. (1877) 450.

But it is declared in Missouri that the husband of a wife in whom the fee is vested is properly and of right the defendant. *Bledsoe v. Simms*, 53 Mo. (1873) 305.

8. *Jackson v. Stiles*, 11 Johns. (N. Y. 1814) 407. See also *Doe dem. Tilyard v. Cooper*, 8 T. R. (1800) 645.

So an assignee of a mortgagee may defend upon neglect or refusal of the tenant. *Jackson ex dem. Clark v. Babcock*, 17 John. (N. Y. 1819) 112. And upon such neglect of the tenant he may be let in to defend, although out of possession. *Wisner et al.*

13. *Holder of Tax Title.*—The action will not lie against the holder of a tax-certificate.¹

14. *Landlord may be Defendant.*—Where the relation of landlord and tenant exists, the landlord may defend,² and he will be permitted to defend when the lessor's claim in ejectment is inconsistent with the title of the landlord.³ It is held that the landlord may come in as a party defendant after a judgment against the tenant upon his neglect or refusal to defend, and, if an alien, that he may have his cause removed upon petition to the United States Court, and that proceedings shall be stayed after such removal until the court shall make some further order thereon.⁴ But where the rights of third parties have, without collusion or fraud, accrued, as in a case of a sale and transfer of part of the premises after judgment, and possession granted, the court will not permit the landlord to come in and defend, although he had received no notice, nor had knowledge of the ejectment proceedings.⁵ Married women who are trustees of the creditors and stockholders of a corporation, for the purpose of winding up its affairs cannot be let in, in an action of ejectment to defend as landlords unless their husbands are joined.⁶ The landlord may not be let in to defend in ejectment if the interest claimed by the plaintiff's lessor is no greater than, or not inconsistent with, the interest of the tenant.⁷

v. Wilcocks et al., Coleman's Cases (N. Y. 1798), 62.

A mortgagee who has no interest in the determination of the suit may not defend as a landlord. *Doe dem. Pearson v. Roe*, 6 Bing. (1830) 612.

One holding title under a foreclosure is not liable in ejectment. *Stark v. Brown*, 12 Wis. (1860) 572.

1. *Eldridge v. Kuehl*, 27 Iowa (1869), 160, 174.

2. *McClellan v. Doe*, 3 Bibb (Ky. 1814), 266; *Wisner et al. v. Wilcox et al., Coleman & Caines' Cases* (N. Y. 1798), 62.

But only those who have an actual interest, have the right to appear as defendants. *Minke's Lessee v. McNamee et al.*, 30 Md. (1868) 294, 298.

In *England* the landlord may defend under the act of 1852 as a matter of right. *Butler v. Meredith*, 11 Exch. (1855) 85.

In *Oregon* the landlord can be defendant only after an allegation by tenant in his answer, setting out the fact of holding under the landlord, and designating him by name and residence. *Fitch v. Cornell*, 1 Saw. (U. S. Oregon, 1870) 156; so by a code provision.

3. *Stiles v. Jackson*, 1 Wend. (N. Y. 1828) 316.

Under the *Iowa* code the landlord is not a necessary, but only a permissive, party. *State v. Orwig*, 34 Iowa (1871), 112.

The affidavit required by the act of 1852 (15 & 16 Vict.) need only make out a *prima facie* case, showing that the applicant is in possession of the land either by himself or tenant. *Croft v. Lumley*, 4 Ellis & Black (1855), 608.

4. *Jackson ex dem. Cantine et al. v. Stiles*, 4 John. (N. Y. 1809) 493.

Even after a writ of *habere facias possessionem* executed, a landlord has been permitted to come in and defend, in a case of collusion. *Doe dem. Grocers' Co. v. Roe*, 5 Taunt. (1813) 205.

5. *Goodtitle v. Badtitle*, 4 Taunt. (1813) 820. See also *Doe dem. Martin v. Roe*, 1 Hodges (1835), 223.

6. *People v. Webster*, 10 Wend. (N. Y. 1833) 555. Construction given in this case to statute 2 R. S. 341, sec. 17, that "landlord" used therein "means the legal landlord or the person who in judgment of law is connected by privity of estate or interest with the tenant, a person capable of being a defendant in a suit."

7. *Stiles v. Jackson*, 1 Wend. (N. Y. 1828) 103; note to *Jackson v. Stiles*, 4 John. (N. Y. 1809) 496.

"No other than the landlord, or at least a person between whom and the tenant there is a privity of interest, can be admitted to defend." *Jackson v. Stiles*, 10 Johns. (N. Y. 1813) 67; *Jackson v. McEvoy*, 1 Caines (N. Y. 1803), 151; *Wisner*

XV. Service.—The matter of service of writs or complaints in ejectment or actions for the recovery of real property is to a great extent dependent upon the statutes or local practice in the several States,¹ so that only a few decisions under the English practice will be noted. In a case where the tenant was in possession, a declaration was held to have been properly served when made upon the wife of the tenant, if left with her upon the premises or at her husband's house in another place.²

XVI. Pleadings.—It is only necessary in *Iowa*, in bringing the action for the recovery of real property, to set forth generally the plaintiff's claim, the extent of his interest, and facts upon which it is relied to sustain the same: matters of evidence need not, however, be averred.³ The requisites of the petition in the action of ejectment being fully presented by statute in *Kansas*, it is not necessary that the declaration set out any thing in addition when the object of the action is the mere recovery of the land.⁴ It is declared in *New York*, that proceedings in ejectment for unsettled

et al. v. Wilcox et al., Coleman's Cases (N. Y. 1798), 62; *Doe v. Roe*, 3 Taunt. 50; *Roe v. Doe*, Bull. N. P. 95; *Lovelock v. Doncaster*, 3 Term Rep. 783; s. c., 4 Term Rep. 122; *Doe v. Cooper*, 8 John. 645; *Fairclaim et al. v. Shamtitle*, 3 Burr. 1290.

"The right of the landlord to be admitted to defend existed at common law previous to the statute." *Fairclaim et al. v. Shamtitle*, 3 Burr. 1290; *Fenwick's Case*, 1 Salk. 257. But see *Goodright v. Hart et ux.*, 2 Str. 830.

One who has no interest cannot be permitted to come in as landlord, and defend. *Jackson v. Stiles*, 10 John. (N. Y. 1813) 67. A case of ejectment brought under sec. 23 of act (Sess. 11, c. 36) *de* distresses and recovery of rents.

The landlord may not defend alone until after neglect or refusal of the tenant to come in as defendant. *Jackson v. Stiles*, 1 Cow. (N. Y. 1823), citing 1 Rev. Laws, 443, s. 30.

Where it appeared that the occupying tenant had entered by virtue of an agreement with the plaintiff's lessor to whom he had paid rent, but that the agreement had terminated, it was held that another party could not come in and defend as landlord. *Doe dem. Knight v. Smythe*, 4 Maule & Selwyn (1815), 347.

1. See title "Statutory Provisions in the United States" herein, *ante*.

2. *Doe dem. Moreland v. Bayliss*, 6 T. R. (1796) 765; *Doe dem. Royle v. Roe*, 4 Com. Bench (1847), 258.

But service upon the tenant's mother in possession is not good. *Doe v. Roe*, 1 Dowl. P. C. (1832) 614.

Though it was held good where made upon a person who stated that she was the tenant's wife. *Doe v. Roe*, 4 Moore &

Payne (1830), 11; *Doe v. Roe*, 8 Dowl. P. C. (1839) 135.

Service on an agent of a non-resident tenant is good, the agent residing on the premises. *Doe dem. Treat v. Roe*, 4 Dowl. P. C. (1835) 278; *Doe v. Roe*, 4 Scott, N. R. (1842) 706.

Service on the keeper of a house is sufficient where the lodgers therein are not accessible. *Doe v. Roe*, 1 Dowl. N. S. (1841) 261.

Where several tenants are in possession, service on one is good as to both. *Doe dem. Bailey v. Roe*, 1 Bos. & P. (1799) 369.

In case of the death of the lessee, service may be made upon the widow, if she be sole administratrix, and if the whole interest of the lease pass to her. If she be not in possession, service should also be made upon the person in possession. *Doe dem. Pamphilon v. Roe*, 1 Dowl. P. C. (N. S.) (1841) 186.

Upon judgment by default, it appearing that no proper service had ever been made, an order of restitution may be had. *Geister v. Hilbert*, 38 Wis. (1875) 609; *Doe v. Roe*, 2 Cr. & Jer. (1832) 682.

3. *Phillips v. Blair*, 38 Iowa (1874), 649, 657; *Larum v. Wilmer*, 35 Iowa (1872), 244.

4. *Shelton v. Dunn*, 6 Kas. (1870) 128, 133.

It is said in *Louisiana*, that the character of the action, whether petitory or possessory, is to be determined by the petition, and that the mere setting up a title cannot change a possessory action to a petitory one. *Kemper v. Hulick*, 16 La. (1840) 44; *Hood v. Segrest*, 1 Rob. (1841) 109; *Peck v. Bemiss*, 10 La Ann. (1855) 160; *Carraby v. Le Breton*, 1 Rob. (1842) 242.

lands in this country cannot, without great inconvenience and manifest hardship, be based upon the principles existing in regard to ejectment for vacant possession in *England*.¹ A late case in *Louisiana* determines, that, in order to make an action petitory, there must be an allegation not only of possession of the property as owner, but it must appear that the possession claimed was as owner, or in some capacity which would entitle the plaintiff to possession. The prayer alone for the restoration of possession would fix the action as possessory.²

1. *Joinder*. — In *Ely et al. v. Ballantine*,³ it was declared that, although the names of any other than the real plaintiffs might not be used, yet the grantor and grantee might be joined where it was anticipated that an objection would be raised of adverse possession against the grantor when the grant was made.⁴

2. *Description of the Land*. — The general rule seems to be, that great accuracy is not required in describing the premises. It is sufficient if they are generally described.⁵ Where the description of land set out in the pleadings in ejectment was defective in part, but the defendant's plea admitted possession to all, except a part to which he denied plaintiff's title, it appeared that the excepted

1. *Saltonstall v. White*, 1 John. Cas. (N. Y. 1799) 221.

2. *Huyghe v. Brinckman*, 37 La Ann. (1885) 240.

Where the petition in a petitory action alleged a joint possession by the defendants of the premises in controversy, it was held not to be objectionable because it did not set up what particular portion was in the separate possession of any of the several defendants. *Louis et al. v. Giroir et al.*, 38 La Ann. (1886) 723.

The rule requiring that proceedings by a landlord against the tenant for the recovery of the possession of the leased property shall be summary, held applicable to proceedings in the appellate as well as in the original court, and ruled that all defences must be made at once in such actions; that "pleadings are taken for what they really are, and not for what their authors designate them," based upon Rev. Stats. secs. 2155, 2156. *State ex rel. Matt v. Judge*, 37 La Ann. (1885) 843.

3. 7 Wend. (N. Y. 1831) 470.

4. Need not join those having a reversionary interest. *Allen v. Rawson*, 44 Mo. (1869) 263.

Where several parcels of land are covered by one title, they may be joined, and plaintiff may also add to this his claim for damages or for rents and profits. *Beard v. Federy*, 3 Wall. (U. S. 1865) 478, 494; suit brought in U. S. Court for the California circuit.

5. *Munson v. Munson*, 30 Conn. (1862) 425; *Barclay v. Howell*, 6 Pet. (U. S. 1832)

498; *Huson v. Norris*, 4 Binn. (Pa. 1811) 77; *Fenwick v. Floyd*, 1 Harr. & Gill (Md. 1827), 172.

It was said in an early case in *Louisiana*, that the premises should be legally and definitely described. *McManus v. Stevens*, 10 La Ann. (1855) 177.

But in a later case, in a petitory action where the description of the lands in question was "sections 93 and 94 in township 10 south range, 5 east, south-western district of Louisiana, situated in the parish of Lafayette," it was held sufficient since "by consulting the United States surveys, the lands may be accurately located, and a greater precision is not required in a petitory action. That is certain which can be rendered certain." *Louis et al. v. Giroir et al.*, 38 La Ann. (1886) 723.

Where the description of the land claimed is so imperfect that it may not be definitely ascertained, judgment cannot be given therefor, nor writ of possession issue. *Orton v. Noonan*, 18 Wis. (1864) 447.

The estate sought to be conveyed must be accurately set out in the complaint, as the recovery must be in accordance with the allegations. *Allie v. Smith*, 17 Wis. (1863) 169; *Bressee v. Stiles*, 22 Wis. (1867) 120, 127; *Riehl v. Bugenheimer*, 28 Wis. (1871) 84; sec. 3077, Rev. Stat. 1878.

A description of the land as being in a certain county named in the declaration is good. *Doe dem. Edwards v. Gunning*, 2 Nev. & Perry (1837), 260; s. c., 7 Adolph & Ellis, 240, 253.

part to which he denied the plaintiff's right and title accurately described so much of the land claimed by the plaintiff as was defectively described in the declaration, so that, upon the plaintiff's showing a deed, corresponding in description to the land declared upon, it was held that he was entitled to recover, being aided as to description by the defendant's plea.¹

3. *The Demise.* — The rule is not disputed that the demise must be laid in the declaration subsequent to the accruing of the lessor's title and right of entry.² So where the demise was laid as of a time prior to the date when the plaintiff's right of entry accrued, it was held that the plaintiff must fail in his suit.³ A demise set out in the declaration in the name of a dead man is ground for a non-suit in an action of ejectment; the rule being, that the lessor must have the right to make a demise on the day when the suit was commenced, as it is alleged to have been made.⁴ It has been decided that in case the grantor of premises had given his deed when out of possession, the land being held adversely by another, and the plaintiff in ejectment alleged a demise from both the grantor and grantee, the recovery could only rest on the demise from the grantor.⁵ A plaintiff may allege in his declaration and obtain a recovery upon separate demises from several lessors of different parts of the premises, upon showing title thereto in them.⁶

Tenants in common may make a joint demise.⁷

1. *Campe v. Renandine*, 64 Miss. (1886) 441.

2. *Dickenson v. Jackson*, 6 Cow. (N. Y. 1826) 149; *Den v. McShane*, 1 Green (N. J. 1831), 35; *Doe v. Shawcross*, 3 Barn. & Cress. (1825) 752; *Doe dem. Compere v. Hicks*, 7 Term Rep. (1797) 433 (1798), 727; *Coxe v. Joiner*, 3 Bibbs (Ky. 1814), 297.

It is said, however, in *Van Alen v. Rogers*, 1 John. Cases (N. Y. 1800), 283, that the demise must be laid at or subsequent to the time of the accruing of the plaintiff's right or title, and that, if laid before, ejectment could not be sustained.

3. *Boyd v. Barkley*, 4 Dana (Ky. 1836), 227; *Coxe v. Joiner*, 3 Bibb (Ky. 1814), 297; *Rogers v. Barnett*, 4 Bibb (Ky. 1817), 480; *Anderson v. Turner*, 3 Mar. (Ky. 1820) 131, 134.

4. *Doe v. Butler*, 3 Wend. (N. Y. 1829) 149, 154.

The court said, "Although the demise is a fiction, still the fiction must be such as might by possibility have been true."

If the demise is laid as of a man deceased before the service of the declaration and notice, no recovery may be had. *Elliott v. Bohannon*, 5 Mon. (Ky. 1827) 123; *Fry v. Smith*, 2 Dana (Ky. 1834), 39; *Gilleland v. Martin*, 3 McLean (U. S. 1844), 490; *Baylor v. Neff*, 3 McLean (U. S. 1844), 302.

5. *Williams v. Jackson*, 5 John. (N. Y. 1809) 489.

A demise laid on the day of the ancestor's decease where the action was brought by the heir, was formerly good after verdict. This was prior, however, to the Procedure Act of 1852 (*ante*, title "Statutory Provisions in England"). *Roe dem. Wrangham v. Hersey*, 3 Wils. (1771) 274.

Demise in action by administrator may be laid before administration granted, and on day after death of intestate. *Selw. N.P.* (6th ed.) 717.

6. *Jackson v. Sidney*, 12 John. (N. Y. 1815) 185.

7. *Jackson v. Bradt*, 2 Caines' Cases (N. Y. 1804), 169; *Poole v. Fleegeer*, 11 Pet. (U. S. Tennessee, 1837) 185.

"By the practice of this court before the revised statutes took effect, a demise was laid in the declaration from the owner to a nominal person, in whose name the action was brought. Then the day was so far material, that the demise must be subsequent to the accruing of the title of the claimant. Now it is sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question; describing them, and being so possessed thereof the defendant afterwards, on some

4. *Ouster*. — The day of the ouster need not be alleged.¹

In actions between co-tenants, where the title is not in dispute, the defendant may confess ouster specially, although it would seem that he will not be compelled to do so at all.²

5. *Abatement*. — At common law, an action of ejectment abates on the death of the sole defendant, and cannot be revived against the heir or personal representative; and this is still so under the statute of *Wisconsin*.³

The death of the plaintiff's lessor after commencement of the action does not abate the suit,⁴ but *contra* where he dies before commencement of the action.⁵

6. *Amendment*. — Where there is a subsisting legal interest or title in a lessor, new demises may be added, changed, or otherwise altered by amendment, it being a matter of discretion with the court.⁶ The court is liberal in allowing amendments, and a party may in some States amend the same as in other cases.⁷

7. *Admissions*. — A denial of the plaintiff's right is an admission of actual possession in the defendant.⁸

day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof (2 Rev. Stat. 304, sec. 7). This seems to be in accordance with the former practice so far as it may be applicable. The averment of title must be laid subsequent to the title actually accruing, and an ouster must be stated on some day afterwards." *Sigler v. Van Riper*, 10 Wend. (N. Y. 1833) 417.

1. *Woodward v. Brown*, 13 Pet. (U. S. 1839) 1.

2. *Davis v. Whitesides*, 1 Bibb (Ky. 1809), 511.

Seizin. — That there was a seizin within the prescribed time limited for instituting the suit, must appear from the allegations. *Bockee v. Crosby*, 2 Paine (U. S. 1828), 432.

3. *Farrall v. Shea*, 66 Wis. (1886) 561, 564.

4. *Doe v. Butler*, 3 Wend. (N. Y. 1829) 153, citing *Frier v. Jackson*, 8 John. (N. Y. 1811) 495; *Adams on Ejectment*, 288, 306; *Wilkes v. Lion*, 2 Cow. (N. Y. 1823) 355; *Austen v. Jackson*, 1 Wend. (N. Y. 1828) 27, citing *Frier v. Jackson*, 8 John. (N. Y. 1811) 495. The court in the latter case declares, "That the death of a lessor does not abate a suit in ejectment, has long been the settled doctrine. The action is considered as a legal fiction devised to subserve the purposes of justice, and to be modelled as those purposes require; and so far has this doctrine been carried in advancement of justice, that, even where the lessor was a tenant for life, his death was not permitted to abate the suit which it was held might still be prosecuted for the damages and costs." 2 Str.

1056; *Jenk.* 293, pl. 38; 1 Bac. Abr. 13; *Vin. Eject.* (T.) pl. 4."

5. *Doe v. Butler*, 3 Wend. (N. Y. 1829) 153, citing *Jackson ex dem. Low v. Reynolds*, 1 Caines (N. Y. 1803), 20; *Jackson et al. v. Ditz*, 1 Johns. Cas. (N. Y. 1800) 392; *Jackson v. Bankcroft*, 3 John. (N. Y. 1808) 259.

Under the statute in *New York* in force in 1833, the death of the plaintiff after issue joined and before judgment or verdict in actions of ejectment does not abate the suit, but those who succeed to the deceased plaintiff's title may be substituted in his place. *James v. Bennett*, 10 Wend. (N. Y. 1833) 540, based upon 2 Rev. Stat. 308, sec. 32.

6. *Jackson v. Travis*, 3 Cow. (N. Y. 1824) 356; *Riddle v. Lessee of Findlay*, 6 Serg. & Rawle (Pa. 1820), 227; *Blackwell v. Patton*, 7 Cranch (U. S. 1813), 478; *Jackson v. Kough*, 1 Caines (N. Y. 1803), 251; *Wood v. Grundy*, 3 Harr. & J. (1810) 13; *Smith v. Vaughan*, 10 Pet. (U. S. 1836) 367; *Pickett's Heirs v. Longwood*, 7 Pet. (U. S. 1833) 144; *Kendall v. Slaughter*, 1 Mar. (Ky. 1818) 375; *Lessee of Woods v. Galbraith*, 2 Yeates (Pa.) (1800), 536; *Lion v. Burtis*, 18 John. (N. Y. 1821) 510; *Jackson v. Murray*, 1 Cow. (N. Y. 1823) 156, case where not allowed.

7. *Walden v. Craig*, 9 Wheat. (U. S. 1824) 576; *Brown v. Leigh*, 49 N. Y. (1872) 78; *Northern Cent. R. R. Co. v. Canton Co.*, etc., Lessee, 24 Md. (1866) 492. The description was not permitted to be amended on trial in *Doe dem. Manning v. Hay*, 1 Mood. & Rob. (1833) 243.

8. *Kerr v. Leighton*, 2 G. Gr. (Iowa, 1849) 196.

8. *Estoppel*. — *In Bar*. — If one is not in personal occupation of land, but has granted it to his son, and is sued in ejectment for its recovery under a claim of *title*, he will be estopped from pleading the grant if he has made statements subsequent to the grant that the land was still his.¹

Where two adjoining land-owners agree to fix the boundary-line between them, the agreement is not within the statute of frauds, and need not be specially pleaded in defence.²

9. *General Prayer for Relief*. — Rents and profits are necessarily a part of the damages, and may be recovered under the general prayer for relief.³

10. *The Interest claimed*. — In a declaration in ejectment, if the claim be for the whole of the premises, a part may be recovered; and so, if the claim be for an undivided portion of a specified number of acres; though if one claim an undivided half, he cannot recover any other undivided fractional part, nor the whole; nor under a claim of the whole can an undivided fractional part be recovered. This decision was based upon a statute.⁴

XVII. The Plaintiff's Evidence. — The plaintiff must, in order to entitle him to recover, show (1) a legal estate in the premises existing in him at the time the suit was commenced; (2) a right of entry in himself; (3) that, at the commencement of the suit, the defendant, or those claiming under him, was in possession of the premises.⁵

1. *Title*. — The burden of proof is upon the plaintiff to clearly

Adverse Title. — If the defendant pleads *adverse title* under deed from another, the plea admits the title of that other. *Du Pont v. Davis*, 30 Wis. (1872) 170, 176.

"The assertion by the defendant in his plea of title in himself, grounded upon adverse and exclusive possession, amounts to a denial of the title of the plaintiffs, and dispenses with the necessity of further proof of ouster." *Waterman v. Andrews*, 14 R. I. (1884) 589, 600, and cases cited.

"A *disclaimer* admits the title of the plaintiff to the land, which, nothing further appearing, would entitle the plaintiff to a judgment for it, and the defendant to a judgment for costs. A plaintiff, however, may assert that the defendant was in possession of or claiming the land when the action was brought; and, if this be found in his favor, the defendant will not be entitled to his costs." *Wootters v. Hall*, 67 Tex. (1887) 513.

1. *McMahon v. McGraw*, 26 Wis. (1870) 614, 620.

"If, pending a real action for the recovery of land, the title to the land, and the right of possession, pass from the plaintiff, and become vested in the defendant," the defendant may plead this fact in bar. *Leavitt v. School Dist.*, 78 Me. (1887), 574.

2. *Jacobs v. Mosely*, 91 Mo. (1886) 457.

3. *Cunningham et al. v. Ashley et al.*, 16 Ark. (1855) 181.

Claim for possession and damages may be united under the code. *Vandevort v. Gould*, 36 N. Y. (1867) 639. See on the last point the title "Damages and Mesne Profits" herein, *post*.

4. *Holmes v. Seeley*, 17 Wend. (N. Y. 1837) 78; 2 R. S. 304, secs. 9, 10; sec. 30 subd. 4, 5, 6, 7.

Under plea of general issue, only the plaintiff may have a recovery where it is proven that any part of the premises claimed are in defendant's possession. *Greer v. Mezes*, 24 How. (U. S. 1860) 268, 277.

As to recovery of a portion greater or less than that claimed, see title.

As to pleadings generally, see title "Statute of Limitations and Adverse Possession" herein, *ante*. See also the title "Landlord and Tenant" herein, *ante*.

5. *Daniel et al. v. Lefevre*, 19 Ark. (1857) 202, citing 2 Greenlf. Ev. sec. 304; *Adams on Eject.* by Tillinghast, p. 247. See also *Fleming v. Johnson et al.*, 26 Ark. (1871) 421, 423.

and satisfactorily establish his title, and the order of proof is not important.¹

A certificate of entry or sheriff's deed is no evidence of title when it shows only an entry of an entirely different tract of land than that described in the declaration, and is inadmissible in evidence for that purpose.²

It is not necessary, in giving proof of title in an action of ejectment, to conform precisely to the averment of title. It is sufficient to prove its existence prior to the day alleged in the declaration.³

In an action where the plaintiff claimed to have acquired his title to the land in question by virtue of an ordinary contract of sale from the State of *Louisiana*, it was held that he must not only show his deed from the State and the registry thereof, but must also prove that the State itself had acquired a valid title to the land.⁴

1. *Langley's Lessee v. Jones et al.*, 26 Md. (1866) 462; *Murray v. Bossier*, 10 Mart. (La. 1821) 293, 301; *Hipp v. Forester*, 7 Jones, Law (N. C. 1860), 599-601; *Heuken v. Brittain*, 12 Rob. (La. 1845) 46.

The burden of proof under an answer denying title is upon the plaintiff. *Bancroft v. Chambers*, 10 Kas. (1872) 364.

2. *Hutchinson et al. v. Kelly*, 10 Ark. (1849) 180.

Evidence of title in the plaintiff back of the person named by the defendant's answer as the grantor under whom he claims by adverse possession, is not required. *Du Pont v. Davis*, 30 Wis. (1872) 170.

Reputed Ownership.—In an action of ejectment, a witness may not be permitted to testify that a party was generally reputed in the vicinity of the land to be its owner. *Canfield v. Hard*, 58 Vt. (1885) 217, 228.

3. *Sigler v. Van Riper*, 10 Wend. (N. Y. 1833) 420.

Joint Demise.—Where the demise is laid as joint, it must be so proven; proof of title as to some of the lessors is not sufficient. *Doe v. Butler*, 3 Wend. (N. Y. 1829) 154; *Smith v. Mahan*, 7 Mon. (Ky. 1828) 230.

If a declaration in ejectment allege a joint title in several persons, the action cannot be sustained upon proof only of title in some of them. *Gillett et al. v. Stanley*, 1 Hill (N. Y. 1841), 121, 128, citing *Doe v. Butler*, 3 Wend. (N. Y. 1829) 149.

Devisee must show his own seizin. *Wells v. Prince*, 4 Mass. (1808) 64.

If one "claims as devisee, he must . . . prove the will and seizin of his devisor." *Jones et al. v. Bland et al.*, 116 Pa. St. (1887) 194.

Declarations.—For the purpose of show-

ing the seizin of a deceased occupant of the same land possessed by the tenant, his declarations are admissible. *Peaceable dem. Uncle v. Watson*, 4 Taunt. (1811) 16.

4. *Gatlin v. Hutchinson et al.*, 36 La. Ann. (1884) 350.

The court said, "The title on which the plaintiff relies is not one to property purchased at a sale of it for taxes due by it, but is a title derived directly from the State by ordinary contract, such as is daily entered into in conventional sales. In a case like the present one, it cannot be claimed that a tender is necessary as a condition precedent; for although the defendant in a petitory action is not bound to attack the title of the plaintiff, still he may do so when he specially alleges ownership in himself, and has an interest in having the title opposed to him annulled and so declared. It was incumbent on plaintiff to have proved not only the title of the State to him and its registry, but also that the State had acquired a valid title to the property."

Tax Title.—Title derived by virtue of a sale for taxes must be strictly proven, both as to the authority under which the sale was made, the validity of the proceedings, and, in some cases, the conformity with statutory requirements. *Gaines v. Stiles*, 14 Pet. (1840) 322; *Syer v. Bundy*, 9 La. Ann. (1854) 540; *Conway v. Cable*, 37 Ill. (1865) 88; *Beekman v. Bingham*, 5 N. Y. (1851) 366. See title "Defendant's Evidence," *post*.

Older Title.—Where both parties claim title to land by virtue of deeds from the governor, the oldest deed will prevail. *Bacon's Adm'r v. Tate*, 22 Ark. (1861) 531.

Vendee.—An agreement of purchase under which entry was made, but which was never fulfilled, is, in the absence of

2. *Right of Entry*. — The plaintiff can have no recovery, unless he shows a right of entry in himself.¹

3. *Possession*. — It must be proven, as against the defendant named in the action of ejectment, that he was actually in possession when the suit was commenced, unless he be one admitted to defend in place of another.²

Where a party is, upon her motion, made a co-defendant, the better to enable her to try the question of title, it is only requisite for the plaintiff to prove that the party originally made defendant was in possession at the time the suit was brought.³

Proof is not necessary to be given on the part of the plaintiff of the receipt of any profits from the demanded premises, nor that there has been an actual entry under title. Evidence is only required of a right of possession in the plaintiff when the suit commenced, and that there is an occupancy by the defendant, whereby the plaintiff is kept out of possession.⁴

4. *Ouster*. — Proof of ouster is only necessary to be given where the defendant shows himself, or the one under whom he claims, to be co-tenant with him.⁵

The statute in *New York*⁶ is declared not to have altered the former practice relating to the action of ejectment by a co-tenant against his co-tenant, in so far that, under the statute in such action, it is necessary to prove an ouster; not one where manual force is exerted, but a demand and refusal only; or some act equivalent to a total denial of the co-tenant's right, as a refusal to pay his share of the proceeds; or a denial of the co-tenant's title under a claim of the whole; or a continued possession to the exclusion of the other tenant in common.⁷

evidence of title in the vendee, such an admission of title in the vendor as to warrant a recovery by him in ejectment. *Doe dem. Bord v. Burton*, 16 Ad. & Ell. N. S. Q. B. (1851) 807.

See title "When the Action may be maintained," herein, *ante*.

1. *Botts v. Shield's Heirs*, 3 Lit. (Ky. 1823) 32, 35; *Cooper v. Galbraith*, 3 Wash. (U. S. 1819) 546.

A recovery cannot be had against a defendant who shows a right of entry in a third person. *Smith v. Nowells*, 2 Lit. (Ky. 1822) 160.

See title "When the Action may be maintained," herein, *ante*.

2. *Garnett v. Garnett*, 7 Mon. (Ky. 1828) 546; *Ozark Land Co. v. Leonard*, 20 Fed. Rep. (U. S. Ark. 1884) 881; *Pope v. Pendergast*, 1 Mar. (Ky. 1817) 122.

It must appear, either from the pleadings or evidence, that the defendant is in possession. *Delogny v. Dixon*, 5 La. (1833) 356; *Cooper v. Smith*, 9 Serg. & Rawle (Pa. 1822), 26.

The plaintiff need not show possession

in himself. *Syer v. Bundy*, 9 La. Ann. (1854) 540.

3. *Warren v. Carter*, 92 Mo. (1887) 288.

4. *Sigler v. Van Riper*, 10 Wend. (N. Y. 1833) 419; 2 Rev. Stat. 306, sec. 25.

See titles "Pleading," "When the Action may be maintained," *ante*, and the sub-title *post*, "Defendant's Evidence."

5. *Sharp v. Ingraham*, 4 Hill (N. Y. 1834), 118; relying upon 2 Rev. Stat. 306, secs. 26, 27.

Actual ouster need not be proved where the defendant enters into the common rule. *Davis v. Whitesides*, 1 Bibb (Ky. 1809), 511.

6. 2 Rev. Stat. 306, 7, sec. 27.

7. *Sigler v. Van Riper*, 10 Wend. (N. Y. 1833) 419, citing *Adams on Eject.* 56, *Cowp.* 217.

In ejectment by one joint tenant against his co-tenant, actual ouster must be proven. *Doe dem. White v. Cuff*, 1 Camp. (1808) 173; *Lodge v. Patterson*, 3 Watts (1834), 74, 77; *Frederick v. Gray*, 10 Serg. & Rawle (1823), 182, 188.

Such ouster may, however, be of acts

5. *Title from a Common Source.*—Where both plaintiff and defendant in ejectment claim title from a common source, the plaintiff is only required to prove such source of title as neither party will be permitted to dispute such title.¹

6. *Declaration as Heir.*—*Recovery as Devisee, etc.*—Parties declaring as heirs are not confined in proof to the character in which they sue; but upon trial they may prove that they sustain some other character, as devisees, purchasers, etc.²

7. *Admissions.*—*Dower.*—Admissions made by the mortgagor, while in possession of the premises, are proper evidence in an action of ejectment for dower.³

8. *Tenant by Curtesy.*—It is held in *Wisconsin* that a plaintiff claiming as tenant by curtesy must prove the death of his wife, and the legitimacy and death of his son.⁴

9. *Claim for the Whole.*—*Proof of Part.*—When the claim is of the whole tract, the plaintiff may introduce in evidence a deed of an undivided interest therein in support of his title.⁵

XVIII. Defendant's Evidence.—1. *Outstanding Title.*—The defendant may show that either the legal title or right to possession is in a third party, and defeat the action.⁶

amounting thereto as a denial of the plaintiff's right, or a claim of right to the whole by the co-tenant. *Clarke v. Vaughan*, 3 Conn. (1819) 191; *Doe v. Prosser*, 1 Cowp. (1774) 218; *Bigelow v. Jones*, 10 Pick. (Mass. 1830) 161; *Clason v. Rankin*, 1 Duer (N. Y. 1852), 337; *Doe v. Bird*, 11 East (1809), 49, *Hargrave v. Powell*, 2 Dev. & Batt. (N. C. 1836) 97.

But it is said to be "perfectly well settled that a tenant in common is not bound to prove lease entry and ouster if the consent rule confesses it; and in all cases but that of an ejectment brought to avoid a fine, the confession of lease entry and ouster is sufficient to bar a non-suit for want of proof of ouster." *Langendyck v. Burhaus*, 11 John. (N. Y. 1814) 462.

For cases where the evidence claimed as amounting to an ouster of the co-tenant was held insufficient, see *Jordon v. Sylvester*, 7 Greenlf. (Me. 1831) 335, 337; *Butler v. Phelps*, 17 Wend. (N. Y. 1836) 642. See titles "History," "Statutory Provisions in the United States," herein, *ante*.

1. *Izler v. Hailey*, 24 S. C. (1885) 382.

Where title is from a common source, and is so admitted by the answer, proof only is required of such source of title, nor does such proof admit any other of defendant's allegations in his answer. *Orton v. Noonan*, 19 Wis. (1865) 350, 355.

Title from a common grantor or common source cannot be denied. *Wissehunt v. Jones*, 78 N. C. (1878) 361; *Merchants' Bank v. Harrison*, 39 Mo. (1867) 433; *Roosevelt v. Hungate*, 110 Ill. (1884) 595;

Miller v. Hardin, 64 Mo. (1877) 545. See sub-title "Defences," *post*.

2. *Birney v. Haim*, 2 Lit. (Ky. 1822) 262, 269.

Heir.—"If plaintiff claims by descent, it is sufficient for him, in the first instance, to prove his heirship, and that the ancestor from whom he derived title was the person last seized of the premises." *Jones et al. v. Bland et al.*, 116 Pa. St. (1887) 194.

3. *Van Duyne v. Thayre*, 14 Wend. (N. Y. 1835) 235, citing *Jackson v. Bard*, 4 John. (N. Y. 1809) 230; *Jackson v. Myers*, 11 Wend. (N. Y. 1834) 536. In the last case, the declarations were held admissible against the tenant claiming under the person making them.

4. *Hayward v. Ormsbee*, 7 Wis. (1859) 111, 122.

5. *Lewis v. McFarland*, 9 Cranch (U. S. 1815), 151; *Dickerson's Heirs v. Talbot's Exors.*, 14 B. Mon. (Ky. 1853) 49.

Railroad Corporation.—Silence.—Estoppel.—Mere silence and inaction does not constitute an estoppel as against the owner of the soil where a railroad corporation has constructed its track over land owned by him in fee. *Walker v. Chicago, Rock Island & Pacific R. R. Co.*, 57 Mo. (1874) 275.

See further on this point, the title "Parties Plaintiff," *ante*, also title "Defendant's Evidence," *post*.

6. *Lannay's Lessee v. Wilson et al.*, 30 Md. (1869) 536, 545, 546; *Gunno v. Jarvis*, 6 Mo. (1840) 330.

Where a *prima facie* good title is shown by the plaintiff, it is incumbent upon a defendant setting up an outstanding title for the purpose of defeating the action, to positively and clearly establish such title, and show it to be an actual subsisting and better title than the plaintiff's, and such a title as would enable the third party to have himself maintained ejectment upon it against both the plaintiff and defendant.¹

In an action of ejectment decided in *New York* in 1839, it appeared that the plaintiffs, being heirs of S., claimed title by virtue of a lease and release of the premises in controversy made by one C. to S. C. had held possession until a few years prior to his death. The defendant was in possession of the premises at the commencement of the action. For the purpose of divesting the plaintiffs of their title under S., and so defeating the plaintiffs' right to sue in ejectment, the defendant offered to prove that the lease and release was in fact executed, delivered, and held as a mortgage from C. to S., and that C. had long before his death paid the debt which the mortgage was given to secure. The defendant did not attempt to connect himself with C. It was held, upon objection by the plaintiff, that such fact might be shown.²

It is held in *Wisconsin* that the defendant is not confined in his evidence upon the issue under a general denial to such defects of title as he has set up in his answer made in addition to such plea, but that he may show any defect in the plaintiff's title which may defeat the same.³ So the plaintiff's deed set up as evidence of title may be impeached as being based upon a fraudulent consideration.⁴

2. *Ancestor's Seizin disputed.* — Upon an issue that whatever right the plaintiff might have had by virtue of the seizin of his

1. *Lannay's Lessee v. Wilson et al.*, 30 Md. (1869) 536; *Griffith v. Bradshaw*, 4 Wash. (U. S. 1821) 171; *McDonald v. Schneider*, 27 Mo. (1858) 405.

Where it appeared that the defendant was a mere trespasser who had neither entered nor held under the plaintiffs, it was held that he might, without connecting himself with the title of the plaintiffs, show such title to be out of them, and in some third person, and thus defeat the action. *Gillet et al. v. Stanley*, 1 Hill (N. Y. 1841), 121, 128.

2. *Swart et al. v. Service*, 21 Wend. (N. Y. 1839) 36.

3. *Lain v. Shepardson*, 23 Wis. (1868) 224, 228.

4. *Hayden v. Dunlap*, 3 Bibb (Ky. 1813), 218.

Where the deed against which the plaintiff's lessor claims, expresses a consideration, this fact cannot be controverted, although it may be shown to be vicious, or different from that expressed; but it may then be proven by evidence other than that of

record, that the deed was based upon a legal or valid consideration, notwithstanding it is different from that stated. *Chiles v. Coleman*, 2 A. K. Marsh. (Ky. 1820) 299.

Sheriff's Deed. — Where the land is claimed under a deed, obtained by virtue of a sheriff's sale on execution, it may be shown by parol that the tract of land in controversy was not included at the sale. *Bartlett v. Judd*, 21 N. Y. (1860) 200.

Where one's official existence as a justice of the peace was admitted, held that a judgment rendered by him could not be collaterally attacked for the purpose of affecting the title in question in an ejectment suit, such title resting upon a sheriff's deed of sale under the judgment. *Karnes v. Alexander*, 92 Mo. (1887) 660.

Trustee's Sale. — The fact of purchase at a trustee's sale may be disputed by the defendant by parol evidence, although the land is described in the trustee's deed to the plaintiff, since, in the absence of such sale, no title would exist. *Washburne v. White*, 62 Miss. (1885) 545.

ancestor, had been conveyed away by the latter, the burden is upon the defendant to prove such fact of conveyance.¹

3. *Forced Issue. — Tenant in Common.* — A defendant may not, without showing connection with the title claimed by the plaintiff, set up a tenancy in common with him for the purpose of compelling the latter to prove an actual ouster. In order to compel proof of such ouster, the defendant must first show that he is a tenant in common with the plaintiff, or that he holds possession under some person who sustains such relation to the plaintiff.²

4. *Co-tenant. — Title of Common Ancestor. — Estoppel.* — The defendant in ejectment, being co-heir and tenant in common with one claiming under his co-heir, cannot be permitted to dispute the title of the common ancestor, and show that he is not a tenant in common, but holds in his own right.³

5. *Landlord's Title. — Estoppel.* — Where one enters into possession of land upon an executory contract, or where a tenant acquires possession from his landlord, he is estopped from disputing the title of the party under whom he entered.⁴

6. *Tenancy is a Question of Fact.* — The question of tenancy is a matter for the jury, and it may be disproved by parol evidence.⁵

In a case where the defendant, who had been holding possession for a long period of time, applied, under a mistake, to B. for the privilege of purchasing, and to be also let in as a tenant, it was held that this did not prevent A. from showing such mistake, and in whom the title actually existed, but that he might set up an adverse possession of twenty years in himself to disprove plaintiff's title. It was also held that no tenancy was created, and therefore no notice to quit was required.⁶

1. *Shirey et al. v. Cumberhouse*, 41 Ark. (1883) 97.

2. *Gillett et al. v. Stanley*, 1 Hill (N. Y. 1841), 121, 127, 128.

3. *Jackson v. Streeter*, 5 Cow. (N. Y. 1826) 529. This case is cited, and the doctrine affirmed, in *Phelan et ux. v. Kelly*, 25 Wend. (N. Y. 1841) 393, citing *The Proprietors of Braintree v. Battles*, 6 Verm. (1834) 395; *Jackson v. Hinman*, 10 John. (N. Y. 1813) 292. And the court also said in that case, that "The rule of law, that a person coming into possession of lands under the agreement or license of another cannot be permitted to deny the title of the latter when called upon to surrender, is of almost universal application. Even if he had a valid title at the time, he is deemed to have waived it, and, as between the parties, to have admitted title in the person under whom he entered;" citing *Jackson v. Walker*, 7 Cow. (N. Y. 1827) 637; 3 Ad. & El. 188; 2 id. 17.

4. *Woodruff v. Detheridge*, 6 J. J. Marsh. (Ky. 1831) 368, 369; *Sharpe v. Kelly*, 5 Denio (N. Y. 1848), 431.

It may be shown that the landlord has conveyed away all his interest after lease made. *Jackson v. Stiles*, 5 Cow. (N. Y. 1826) 447. And that the landlord's title has expired after the lease was made. *England v. Slade*, 4 Term. R. (1792) 682; *Fenner v. Duplock*, 2 Bing. (1824) 10.

5. *Jackson v. Vosburgh*, 7 John. (N. Y. 1810) 186.

6. *Jackson v. Cuerdon*, 2 John. Cases (N. Y. 1801), 353.

Adverse Possession. — "Whenever, in an action of ejectment, a claim of right by adverse possession of twenty years or more is set up by the defendant against the claim of right set up on behalf of the plaintiff by a clear and undisputed legal title, . . . the duty and burden of establishing the defence of adverse possession against the legal title in such a case, to the satisfaction of the jury, always devolves and rests upon the defendant." *Doe dem. Barrett v. Jefferson*, 5 Hous. (Del. 1878) 477, 488.

Disclaimer. — Upon a disclaimer being filed by the defendant of any title or interest, etc., in the premises, the plaintiff is

7. *Judgment as Evidence.*—A judgment against the plaintiff's lessor in ejectment is proper evidence for the jury in a second action of ejectment, in which the same lessor of the plaintiff is named, and which is against the same defendant.¹

XIX. Defences.—It is said that defendant's title must in general equal a freehold, unless there be an actual ouster, or an action will not lie against him.²

1. *Equitable Defence.*—In some States the defendant is permitted, either under the code, or by virtue of precedents, or on account of the peculiar system of judicature existing therein, to set up a defence in equity as an equitable title in himself.³

entitled to a judgment. Kas. P. R. R. Co. v. McBratney, 10 Kas. (1872) 415.

Occupancy.—**Notice.**—Occupancy by a railroad corporation is constructive notice of the company's right. Detroit & Mil. R. R. Co. v. Brown, 37 Mich. (1877) 533. See also titles "Plaintiff's Evidence," and "Parties Plaintiff," *ante*.

Defence as to Part.—The actual part claimed by the defendant out of the whole tract demanded, when he does not defend as to all, must be shown by him. Cresus, etc., Co. v. Colorado Land, etc., Co., 19 Fed. Rep. (U. S. 1884) 78.

Right to begin and reply.—Where defendant is the devisee, and the plaintiff is an heir, the admission by the defendant of the seizin and pedigree of the plaintiff entitles the defendant to begin and reply. Revett v. Braham, 4 T. R. (1792) 497. As to the right to begin and reply, see Wood's Pract. Ev. (ed. 1886) secs. 203, 204, pp. 663, 664, where the following cases are reviewed: Mercer v. Whall, 5 Ad. & Ell. N. S. Q. B. (1845) 464; Smith v. Smart, 1 Mood. & Rob. (1835) 476; Wollaston v. Barnes, 1 Mood. & Rob. (1834) 386; Tucker v. Tucker, Mood. & Mal. (1830) 536; Warren v. Bray, Mood & Mal. (1828) 166; Bradford v. Freeman, 5 Exch. (1850) 734; Bather v. Brayne, 5 C. B. (1848) 655.

1. Wright v. Tatham, 1 Ad. & Ell. (1834) 3, 19; Strode v. Seaton, 2 Crompt. Mees. & Ros. (1835) 728; 1 Gale, 303. See *contra*, Camp v. Forrest, 13 Ala. (1848) 114, 117, opinion of the court.

Is evidence between the same parties and their privies; by statute. Ryerss v. Rippey, 25 Wend. (N. Y. 1841) 432.

Is proper evidence, and *prima facie* establishes the title involved. Chirac v. Reinecker, 2 Pet. (U. S. 1829) 622.

The record of a judgment in trespass where the action was between A. and the *cestui que trust* of B. is admissible in evidence in a suit in ejectment between A. and B. Calhoun's Lessee v. Dunning, 4 Dall. (U. S. Pa. 1792) 120.

But it was held in *Kentucky* in 1810, that the record of a former suit in ejectment

is inadmissible evidence for the jury, and that so also is the record of an action in equity. Rice's Heirs v. Lowan, 2 Bibb (Ky. 1810), 150.

A judgment is evidence in action for mesne profits against any one in possession. Jackson v. Hills, 8 Cow. (N. Y. 1828) 290; Doe v. Huddart, 2 C. M. & R. (1835) 316.

For other cases concerning evidence, see title "Statute of Limitations and Adverse Possession," *ante*. See also titles "Pleadings," *ante*, and "Defences," *post*.

2. Wyman v. Brown, 50 Me. (1863) 139, 143, 150. See Rev. Stat. 1883, chap. 104, secs. 6 and 7, title 9, p. 817.

3. "A perfect equity united with the possession is equivalent in our system for all purposes of defence to a legal estate." Morrison v. Wilson, 13 Cal. (1859), 494, 497; Cadiz v. Majors, 33 Cal. (1867) 288. See also Tibeau v. Tibeau, 19 Mo. (1853) 78; Traphagen v. Traphagen, 40 Barb. (N. Y. 1863) 537; Crary v. Goodman, 12 N. Y. (1855) 266; Hayden v. Stewart, 27 Mo. (1858) 286.

"While it is conceded, that, under the system of code pleading, an equitable defence may be set up in an action of ejectment, it is also well settled that such defence must contain all the essentials of a bill in equity; and the issue thus made is triable by the court without a jury, as an equitable issue." Kahn v. Old Telegraph Mining Co., 2 Utah (1878), 174, 195.

"A defendant in an action for the recovery of real property, under the general denial, may show any legal or equitable defence he may have. . . . The plaintiff [where the complaint is on the legal title] can only recover on a legal title to the possession paramount to the legal or equitable title of the defendant." Rowe v. Beckett, 30 Ind. (1868) 154, 161.

The plaintiff may show, by way of an equitable defence, that he entered into possession and made improvements by virtue of a contract of sale made by the grantor of the plaintiff, of which fact the plaintiff had notice when the purchase was

Though it is decided in *Missouri*, that if the defendant, in an action of ejectment, sets up an equitable defence, and recovery is had by the plaintiff, the defendant is barred from thereafter availing himself of the matters so relied on, as in a case where he attempts to recover in another proceeding by establishing such equitable title.¹

There are, however, a large number of decisions given under statutes, or otherwise, which determine that a mere equity does not constitute a defence in ejectment.²

2. *Outstanding Title*.—It is held to be a sufficient defence to this action to show that a third party has a better title than the plaintiff.³

If the tenant, during the continuance of his term, purchase a title adverse to his lessor, he cannot set it up in bar of the latter's title in an action of ejectment.⁴

made, and that the defendant has always been willing to carry out the same. *Warren v. Crew*, 22 Iowa (1867), 315. See also *Baldwin v. Lowe*, 22 Iowa (1867), 367, in which it was held that an equitable defence was available of a contract of purchase with the grantor of the plaintiff, and of notice to the plaintiff prior to acquiring the title.

Where no equitable defence is pleaded, the legal title must prevail. *Goepinger v. Ringland*, 62 Iowa (1883), 76.

But an equitable title was formerly no defence in Iowa. *Page v. Cole*, 6 Iowa (1858), 153. And see *Farley v. Goocher*, 11 Iowa (1861), 570.

1. *Preston v. Ricketts*, 91 Mo. (1886) 320.

An outstanding equity is no defence in a suit of trespass to try title unless defendant's connection with such outstanding equity be proven. *Shields v. Hunt*, 46 Tex. (1876) 424.

In an equitable defence it may be claimed that the deed from the plaintiff should be reformed. *Hoppough v. Struble*, 60 N. Y. (1875), 430.

A deed may be attacked legally or equitably. *Phillips v. Gorham*, 17 N. Y. (1858) 270.

It was held in *Wisconsin* in 1874, that an equitable title must be availed of by counter-claim and not by answer. *Du Pont v. Davis*, 35 Wis. (1874) 631. See title "Statutory Provisions in the United States," *ante*.

2. *Gilpin v. Davis*, 2 Bibb (Ky. 1811), 417; *Neave v. Amery*, 16 Com. B. (1855) 328; *Smith v. Allen dem. Bigger*, 1 Blackf. (Ind. 1818) 22; *Stonebaugh v. Wisdom*, 13 B. Mon. (Ky. 1852) 468; *Hall v. Austin*, *Beady* (U. S. Oregon, 1864), 104; *Coleman v. Casey*, 1 A. K. Marsh. (Ky. 1819) 440.

Formerly so held in *Wisconsin*. *Parkinson v. Bracken*, 1 Pinney (Wis. 1842), 174, 181. But it is now allowed by the code, sec. 3078 Rev. Stat. 1878. See title "Statutory Provisions in the United States," *ante*. See title.

3. *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. (1880) 72; *Hallett v. Eslava*, 2 Stew. (Ala. 1829) 115; *Cobb v. Lavalley*, 89 Ill. (1878) 331; *Safford v. Hynds*, 39 Barb. (N. Y. 1862) 625; *Hogans v. Caruth*, 18 Fla. (1882) 587; *Lee v. Cook*, 2 Wy. (1880) 305.

But an outstanding title cannot prevail against a plaintiff who is a purchaser at a sheriff's sale under an execution. *Turner v. Madison Bank*, 78 Ind. (1881) 19. But see *Clements v. Pierce*, 63 Ala. (1879) 284, where it is said that a defendant in execution, when sued by a purchaser at a sheriff's sale, is not an exception to the rule permitting a defendant to show an outstanding title in another.

One who is merely a trespasser or intruder cannot avail himself as a defence of an outstanding title in a third party. *Williams v. Swetland*, 10 Iowa (1859), 51.

An older patent is a defence when outstanding. *Price's Heirs v. Evans*, 4 B. Mon. (Ky. 1844) 387.

4. *Jackson v. Harder*, 4 John. (N. Y. 1809) 202; *Jackson v. Hinman*, 10 John. (N. Y. 1813) 292.

A party in possession of land under another, whose title he has acknowledged, is not permitted to dispute in an action of ejectment the latter's title by showing title in another. *Jackson v. Stewart*, 6 John. (N. Y. 1810) 34, and note *a*, p. 37, citing *Jackson v. De Walts*, 7 John. (N. Y. 1810) 157; *Jackson v. Vosburgh*, 7 John. (N. Y. 1810) 186; *Jackson v. Ayers*, 14 John. (N. Y. 1817) 224.

"But the tenant may show that the

In a *New York* case, the facts were these: an original entry on land was made upon an agreement to purchase the premises, but no consideration money was paid or demanded at any time during the occupancy. It also appeared that possession was had by the defendant, and those holding under him, for a period of more than twenty years from the time the last payment became due; that they had made improvements on the land which were permanent and valuable, and had also defended actions of ejectment brought therefor. It was held that the party so entering and holding possession, as well as those claiming under him, were estopped from disputing the title of the vendor or his heirs, and this although they had even acquired title from a third person.¹

3. *Mortgage*.—It is a good defence in an action of ejectment by the mortgagee that the mortgage debt is paid, and this may be shown by parol.² But it constitutes no defence to an action of ejectment by the mortgagee, that interest was paid and received by him on the mortgage debt down to a time subsequent to that set out in the declaration as the day of the demise.³

4. *Landlord*.—Where the landlord enters as defendant, he stands, so far as the defence is concerned, in the place of the tenant, and no judgment by default after such entry by the landlord should be allowed.⁴ Nor can he make any defence of which the tenant could not have availed himself.⁵

An infant defendant, in an action of ejectment, may show the title to be in himself, notwithstanding a contract of tenancy with the plaintiff.⁶

landlord's title has expired." *England v. Slade*, 4 Term R. (1792) 682; *Doe v. Ramsbotham*, 3 Maule & Selw. (1815) 516. See *Jackson v. Hinman*, 10 John. (N. Y. 1813) 292.

1. *Jackson v. Hotchkiss*, 6 Cow. (N. Y. 1826) 401.

Common Source.—Title from a common grantor or common source cannot be denied. *Miller v. Hardin*, 64 Mo. (1877) 545; *McCready v. Lansdale*, 58 Miss. (1881) 877; *Horning v. Sweet*, 27 Minn. (1880) 277; *Griesler v. McKinnon*, 44 Ark. (1884) 517, citing *Stafford et al. v. Watson*, 41 Ark. (1883) 17.

2. *Jackson v. Stackhouse*, 1 Cow. (N. Y. 1823) 122.

So it is also a good defence, that a deed absolute on its face is in fact a mortgage deed. *Dobbs v. Kellogg et al.*, 53 Wis. (1881) 448, 454.

3. *Doe dem. Rogers v. Cadwallar*, 2 Barn. & Ad. (1831) 473.

A mortgagor will not be permitted, in ejectment, to set up title in a stranger to defeat the title of the mortgagee. *Doe dem. Bristow v. Pegge*, 4 Dougl. (1785) 309; *Goodtitle dem. Edwards v. Bailey, Cowp.* (1777) 597, 601.

4. *Carroll v. Mays*, 8 Dana (Ky. 1839), 178.

5. *Crockett v. Lashbrook*, 5 Mon. (Ky. 1827) 531, 539.

Where the landlord enters and defends with the tenant's consent, his cause will not be permitted to be injured by the tenant's interference in the action to his prejudice. *Kellogg v. Forsyth*, 24 How. (U. S. 1860) 186.

Fraud.—Fraud is a good defence, and may be shown under a general denial to the complaint when it is in the ordinary form, for the purpose of defeating the title of the plaintiff. *Mather v. Hutchinson*, 25 Wis. (1869) 27.

Defendant. — Plaintiff's Wife.—Under the fictitious proceedings in ejectment, the fact that the defendant is the wife of one of the plaintiffs, constitutes no defence to the action, where she has entered into the consent rule. *Doe dem. Daley v. Daley*, 8 Q. B. (1846) 934.

6. *McCoon v. Smith*, 3 Hill (N. Y. 1842), 147.

For other cases of defence, see titles herein, "Statute of Limitations and Adverse Possession," *ante*, and "Defendant's Evidence," *ante*.

XX. The Judgment. — 1. *Generally.* — By the old law, the plaintiff in ejectment could only recover possession of the premises and nominal damages. The action of trespass could be brought by him, however, after such judgment for the recovery of the mesne profits.¹ But in *Iowa*, in addition to the recovery of the possession of the premises, the plaintiff may also have a recovery for the use and occupation of the land.²

2. *Party coming in Pendente Lite.* — A party coming into possession of the property in controversy *pendente lite*, is bound by the judgment, and it may be enforced against him.³

3. *Against Casual Ejector.* — It is held in *Indiana* that judgment may not be had against the casual ejector until after default of the tenant in possession.⁴

4. *Plaintiff's Title terminating.* — It is declared in *New York* to be well settled, that if, before trial or final judgment, the title or right of possession of the plaintiff's lessor terminates, the plaintiff is still entitled to proceed and obtain judgment for the recovery of the costs, and for mesne profits.⁵

5. *What Interest may be recovered.* — Judgment can be recovered by the plaintiff only to the extent of his interest in the

1. *White v. St. Guirons*, 1 Ala. (1824) 331, 352.

Reasonable costs were given against the casual ejector on default. *Doe v. Huddart*, 4 Dowl. (1835) 437; *Norwell v. Roake*, 7 Barn. & Cres. (1827) 404.

By the common law, the judgment under the fictitious proceeding then prevailing must have been for the nominal plaintiff, and not for the plaintiff's lessor. *Chambers v. Hadley*, 3 J. J. Marsh. (Ky. 1829) 98.

2. *Dunn v. Starkweather*, 6 Iowa (1858), 466.

Although such judgment for use and occupation may not be had against the heirs for the full statutory term of six years, but only for the same during their possession after the ancestor's death, rents and profits sought to be recovered for a time prior thereto may be obtained against the administrator. *Cavender v. Smith*, 8 Iowa (1859), 360.

"At the common law, the recovery of rents and profits was not an incident to the action of ejectment: the damages thus recoverable were but nominal." The court in *Rector et al. v. Gaines et al.*, 19 Ark. (1857) 90.

Rent accruing: the code, provision relative to liability of the tenant for rent construed (Code, sec. 3264 [3598]). *Gardner v. Gardner*, 25 Iowa (1868), 102.

Growing Crop. — Where wheat was sowed upon the land after a suit in ejectment was instituted, and judgment and possession thereupon was obtained by the

plaintiff, held that title vested in him to such crop, although it was partly cut. *McLean v. Bovee*, 24 Wis. (1869) 295. See also *Craig v. Watson*, 68 Ga. (1881) 114.

Court may direct Verdict. — The court may direct a verdict in an action for the recovery of real property, where the evidence of plaintiff's right is clear and undisputed. *Hallam v. Doyle et al.*, 35 Minn. (1886) 337.

3. *Jones v. Chiles*, 2 Dana (Ky. 1834), 25, 34; *Hickman v. Dole*, 7 Yerg. (Tenn. 1834) 149; *Howard v. Kennedy*, 4 Ala. (1843) 592.

4. *Jackson v. Goodtitle dem. Bromley*, 7 Blackf. (Ind. 1844) 129; so by statute.

5. *Den ex dem. Price v. Sanderson*, 18 N. J. Law (3 Harr. 1842), 427, citing *Doe v. Black*, 3 Camp. 447; *Bul. N. P.* 98; *Thrustout v. Turner*, 2 Star. 1056; *Jackson v. Davenport*, 18 John. (N. Y. 1820) 295; *Austin adms. Jackson*, 1 Wend. (N. Y. 1828) 27; *Brown v. Galloway*, 1 Pet. Cir. Ct. (1816) 291.

So in *Alabama*, where ejectment, or a statutory action in the nature of ejectment, is brought by a plaintiff who holds under a lease purporting to be for several years, but which in fact is valid for one year only, and where the right of the plaintiff terminates after the commencement of the suit, but before judgment, there can be no recovery of the premises, but mesne profits may be recovered for the time the plaintiff was kept out of possession before the termination of his lease. *Chandler v. Jost*, 81 Ala. (1886) 411.

demanded premises according to his right and title therein as proven.¹

But it is said, that, although he may recover a less interest than that demanded, he may not recover more than the amount specifically set forth;² though where it is sought to obtain recovery of an entire tract of land, judgment may be had for a part, as in case of an undivided interest, and this although the declaration aver a sole or several interest.³

It is declared, however, in *Wisconsin*, and also in *Florida*, that the recovery must be confined to the interest alleged in the declaration, and that it may not be had for a greater or less interest, whether undivided or not.⁴

6. *When not conclusive*.—A judgment in the action of ejectment as it existed at the common law, conferred no additional title upon the successful party: it merely gave him the possession. It was not final, nor was it evidence in an action brought thereafter by or against the same parties, nor did it preclude the party, plaintiff or defendant, who failed in such action, from bringing another suit; and repeated trials might be had unless an injunction was issued to prevent continuous litigation.⁵

1. *Minke's Lessee v. McNamee et al.*, 30 Md. (1868) 294.

Though the amount be less than is claimed. *Dickerson's Heirs v. Talbott's Excr.*, 14 B. Mon. (Ky. 1853) 49, 52; *Barclay v. Howell*, 6 Pet. (U. S. 1832) 498.

2. *Denn dem. Burgess v. Purvis*, 1 Burr. (1757) 326; *Davis v. Whitesides*, 1 Bibb (Ky. 1809), 511.

3. *Doe dem. Moore v. Abernethy*, 7 Blackf. (Ind. 1845) 442, 449; *Larne's Heirs v. Slack*, 4 Bibb (Ky. 1816), 358; *Ward's Heirs v. Harrison*, 3 Bibb (Ky. 1814), 305; *Gist's Heirs v. Robinet*, 3 Bibb (Ky. 1813), 3; *Gray v. Givens*, 26 Mo. (1858) 291.

4. *Allie v. Schnutz*, 17 Wis. (1863) 169; *Riehl v. Bingenheimer*, 28 Wis. (1871) 84; *Bresee v. Stiles*, 22 Wis. (1867) 120. These cases are under a statute. *Contra*, see Rev. Stat. 1878, sec. 3077.

"It is a well-settled rule that a party is bound by the allegations in his declaration, and that he can recover no greater quantity, or a different estate, from that which he has alleged in his declaration. The judgment must follow the complaint; and when that clearly states the interest or estate claimed by the plaintiff, he cannot recover a greater interest or estate. He may, under certain circumstances, recover a baser interest, estate, or quantity of land, but never a greater interest, or a larger quantity." *Horne v. Carter's Admr.*, 20 Fla. (1883) 45, 51.

5. *Camp v. Forrest*, 13 Ala. (1848) 114, 117; *Mitchell v. Robertson*, 15 Ala. (1849) 413; *Adams on Ejectment*, 294, 315, 316.

Kummel v. Benna, 79 Mo. (1879) 62, which says that the common law was adopted in *Missouri* in 1816, and reviews the law of *Missouri* upon this point down to the year 1879. The case is cited and approved in *Ekey v. Inge*, 87 Mo. (1885) 496.

That the judgment was not a bar at the common law, see also *McKenzie et al. v. Renshaw*, 55 Md. (1880) 299; *Troutman v. Vernon*, 1 Bush (Ky. 1866), 482; *Speed v. Braxdell*, 7 Mon. (Ky. 1828) 568. The judgment in this case was rendered prior to the statute; under the common law, *Miles v. Caldwell*, 2 Wall. (U. S. 1864) 35; *Hawkins' Lessee v. Hays*, 3 Harr. (Del. 1842) 489, decides that it is not conclusive of title.

In Maine.—"The common-law writ of ejectment is not recognized by our [Maine] statutes. It was invented in the time of Edward III., and so shaped as to enable the tenant of a term to recover it when deprived of the possession of the premises leased. 1 Wash. R. P. 291. This and trespass are the only forms to recover rents and profits, when the occupation is adverse. 1 Saund. Pl. & Ev. 980. Judgment in ejectment confers no title to the freehold, and therefore can never be final. *Stearns on Real Actions*."

Practice in Civ. Actions and Proceedings at Law, Spaulding, 1881, sec. 29, p. 61.

The cases do not quite agree upon the point that such judgment was not evidence at the common law. See title "Judgment as Evidence," herein, *ante*.

Where a claim is made to the premises under an after-acquired title, such judgment constitutes no estoppel.¹

7. *When conclusive.* — The reason of this rule of the common law no longer applies, since the present actions, which resemble the old action of ejectment, are for the most part dependent upon statutory provisions, and determine the question of title, so that there are numerous decisions to the effect that a judgment in such actions is conclusive, the same as other judgments.²

It is declared in *Pennsylvania*, under the system of jurisprudence which prevails in that State, that an action of ejectment brought for the specific enforcement of articles of agreement, or to rescind a contract, is in the nature of a bill in equity, and that one judgment in such case, or in any action of ejectment upon an equitable title, is conclusive.³

1. *Hanley v. Simons et al.*, 102 Ill. (1882) 116; *Barrett v. Birge*, 50 Cal. (1875) 655; *Bank v. Bridges*, 11 Rich. (So. Car. 1857) 87; *Barrows v. Kindred*, 4 Wall. (U. S. 1866) 399.

And it is decided in *Illinois*, that, if the judgment is vacated on a new trial, it is no bar. *Preachers' Aid Society v. England*, 106 Ill. (1883) 125, 130.

Where a judgment has been obtained against one claiming under a grant from the government, such judgment is not binding upon it, when it neither received notice of, nor defended, the action. *Waples v. United States*, 16 Ct. of Cl. (U. S. 1880) 126.

In the absence of statutory provision, a judgment in trespass *quare clausum fregit* is never a bar to an action of ejectment. *Keyser v. Sutherland*, 59 Mich. (1886) 455, 466.

2. *Craig v. Watson*, 68 Ga. (1881) 114; *Amestri v. Caestro*, 49 Cal. (1874) 325; *Beebe v. Elliott*, 4 Barb. (N. Y. 1848) 457; *Dawley v. Brown*, 79 N. Y. (1880) 390; *Kelsey v. Ward*, 38 N. Y. (1868) 83; *Hammond's Lessee v. Inloes*, 4 Md. (1853) 138; *Shinn v. Young*, 57 Cal. (1881) 525; *Hinton v. McNeil*, 5 Ham (Ohio, 1832), 509; *Payne v. Payne*, 29 Vt. (1857) 172; *Hodges v. Eddy*, 52 Vt. (1880) 434; *Hawley v. Simons et al.*, 102 Ill. (1882) 118; *Miles v. Caldwell*, 2 Wall. (U. S. Missouri, 1864) 35; *Soberz v. Beiler*, 28 Iowa (1869) 235; *Oetgen v. Ross*, 54 Ill. (1870) 79; *Barrows v. Kindred*, 4 Wall. (U. S. 1866) 399; *Marshall v. Shafter*, 32 Cal. (1867) 176.

It is said in *Mississippi* that "With us the action of ejectment is no longer a mere possessory action, but one in which the title is tried, and a judgment in which would conclude not only the question of possession, but also the right of title. Code of 1880, sec. 2513." *Moring v. Ables*, 62 Miss. (1884) 271.

Judgment is conclusive as to the title,

the right of property and the possession. *Marvin v. Dennison*, 1 Blatchf. (U. S. Vermont, 1846) 159.

In *Louisiana* the judgment binds the warrantor — who is the real defendant — when it appears that he had notice of the suit having been brought. *Gaines v. New Orleans*, 17 Fed. Rep. (U. S. 1883) 16.

By statute the judgment is only conclusive as to the title established in an action, and is said not to be an estoppel. *Sheridan v. Andrews et al.*, 49 N. Y. (1872) 478; *Dawley v. Brown*, 79 N. Y. (1880) 390, 398.

Is conclusive in *Georgia* since 1847, that act being held to have repealed the common law as to fictions. *Sims v. Smith*, 19 Ga. (1855) 124.

An award upon reference in ejectment is a bar. *Porter's Lessee v. Matthews*, 2 Harr. (Del. 1835) 30.

In *Kentucky* the common-law rule that such judgment is not a bar, was changed in 1825. *Troutman v. Vernon*, 1 Bush (Ky. 1866), 482.

Is conclusive where title is adjudicated, though not always a bar in other cases, even under the statute, when not rendered on the title. *Oetgen v. Ross*, 54 Ill. (1870) 79.

A judgment operates as *res adjudicata* against one appearing as defendant upon notification, and who is let in to defend, as in case of a warrantor of title. *Wendel v. North*, 24 Wis. (1869) 223; *Somers v. Schmidt*, 24 Wis. (1869) 427. But see *Eaton v. Lyman*, 26 Wis. (1870) 61.

Held in *New Jersey* not to have been conclusive before act of 1857. *Van Blarcom v. Kip*, 26 N. J. L. (2 Dutch. 1857) 351, 360.

In *Minnesota* is conclusive by statute after two trials. *Baze v. Arper*, 6 Minn. (1861) 496.

3. *Winpenny v. Winpenny*, 92 Pa. St.

A judgment in a petitory action that the plaintiff recover possession of the litigated property, but which does not mention or refer to the 'rents' or revenues, either in the reasons therefor, or in the decree, — and it appears that evidence had been introduced regarding the same, — will be deemed, by reason of such silence on the point, to be an absolute and final rejection of the claim, since all issues introduced by the pleadings and evidence in the cause will be considered as adjudicated finally by the judgment.¹

(1880) 440; *Seitzinger v. Ridgway*, 9 Watts (Pa. 1840), 496; *Taylor v. Abbott*, 41 Pa. St. (1861) 352; *Aurick v. Oyler*, 25 Pa. St. (1855) 506, affirming *Seitzinger v. Ridgway*; *Peterman v. Huling*, 31 Pa. St. (1858) 432.

It is said in *Meyers v. Hill*, 46 Pa. St. (1863) 11, that "The rule laid down in *Seitzinger v. Ridgway*, 9 Watts (Pa. 1840), 496, is, that one verdict and judgment in an action of ejectment brought to compel the specific execution of articles of agreement for the purchase and sale of land, is conclusive between the parties, and a bar to any subsequent action; it being regarded as a bill in equity, and not a possessory action at common law. . . . No doubt the decision made in *Seitzinger v. Ridgway* was unexpected when it was made, and the doctrine asserted took most of the members of the legal profession by surprise. What are well known in this State as equitable ejectments, those brought by a vendor by articles of agreement against his vendee in possession, the object of which is to enforce payment of the purchase-money, or those brought by a vendee against his vendor to compel a compliance with the contract, had been in use in this State long before *Seitzinger v. Ridgway* arose, and long before the passage of the act of 1807 [which made certain provisions relative to ejectment]. In *Hawes v. Norris*, 4 Binn. (Pa. 1811) 77, they are spoken of as having been introduced into practice at a very early date. They were introduced as a necessity, growing out of the absence of any distinctive court of equity. Hence parties were allowed to resort to a common-law form of remedy, and compel the observance of equitable rights by legal judgments. The remedy adopted for such cases was ejectment, which settled nothing more than the present right of possession. It had never been supposed to conclude the titles. Prior to 1807 any number of successive ejectments might have been brought; and when the act of that year made two concurrent verdicts and judgments conclusive of the rights of property, it made no distinction between legal and equitable ejectment. It

seems not to have been supposed that the nature of the title set up made any difference in the effect of the judgment. Nor do our books of reports show that, prior to 1840, any distinction was made between verdicts and judgments in ejectments founded on legal title and those returned in ejectments brought to enforce the payment of purchase-money, or to enforce the specific performance of a contract. On the contrary, it was assumed, and more than once said, that when an equitable title had prevailed or been defeated in the first ejectment, another might be brought and maintained. It was thus decided in substance in *Stevenson v. Kleppinger*, 5 Watts (Pa. 1836), 420. The ruling in *Seitzinger v. Ridgway* was then the assertion of a doctrine that had not been understood, and which had not prevailed in practice. It is, however, decisive of what the law was, and of what it was in 1825, when the first ejectment between the privies of these parties was tried. It settled that the law was as it is now; that in equitable ejectments between a vendor and his vendee, by articles, the first verdict and judgment concludes the right."

In order, however, that the first judgment be a bar to the second action, it must clearly appear that the recovery sought in the first ejectment was upon the equitable title. *Meyers v. Hill*, 46 Pa. St. (1863) 11.

And it must also appear to have been regularly entered upon the docket to have such effect. *Ferguson v. Staver*, 40 Pa. St. (1861) 213.

In actions of ejectment in that State which are not of the character above described, one judgment is not a bar, so that where one judgment for an undivided moiety of lands, and another for whole premises, including the moiety, were set up in a third ejectment suit in bar, it was held that they did not constitute two judgments in regard to the whole land, but only as to the moiety, and were, therefore, conclusive merely as to the latter. *Kinter v. Jenks*, 43 Pa. St. (1862) 445.

1. *Villars v. Faivre & Matthews*, 36 La Ann. (1884) 398. The court declared that "all demands passed over in silence must

The rule was laid down in *Tennessee* as late as 1884, that a recovery in ejectment merely determines that the plaintiff has the better legal title, and does not prejudice the equitable rights of the defendant; and that this is so, although the statute provides that a judgment in ejectment "is conclusive upon the party against whom it is recovered."¹

8. *Is Admissible Evidence in Bar.* — When the title and right of possession to real property is determined in an action of ejectment, such judgment is conclusive of the fact that such question was tried and determined by the court, and cannot be contradicted.²

9. *By Default.* — It was declared in *New York* in 1808 that if the defendant in ejectment suffers judgment by default, he admits himself to be in possession, and he may not thereafter controvert such fact.³

And in *Pennsylvania* a judgment by default in this action is absolutely conclusive, and a bar which estops the party against whom it was rendered.⁴

be considered as rejected in the absence of a special reservation."

1. *Boro v. Harris*, 13 Lea (Tenn. 1884), 36.

2. *Schmitt v. Schmitt*, 32 Minn. (1884) 132.

3. So a judgment is declared in *Iowa* to be admissible evidence in bar, whether pleaded or not. *Larum v. Wilmer*, 35 Iowa (1872), 247.

Where a prior judgment was sought to be availed of in evidence, it was held that the objection that it was between other parties could not properly be set up by one who was himself a party to the judgment, although joined with others who were not. *Larum v. Wilmer*, 35 Iowa (1872), 244.

Mesne Profits. — A judgment in ejectment is said to be conclusive evidence in an action for *mesne profits* between parties and privies in *Chirac v. Reinecker*, 11 Wheat. (U. S. 1826) 280, 296.

So a judgment for *mesne profits* is conclusive against the original defendant in possession. So held in *Fisk v. Miller*, 20 Tex. (1857) 581; *Brewer v. Beckwith*, 35 Miss. (1858) 467.

A judgment in ejectment is a bar, in a subsequent action, to the recovery of rents received prior thereto. *Stewart v. Dent*, 24 Mo. (1856) 111.

It was held in an action for *mesne profits* that the time covered by the estoppel of the judgment is only the day of actual service of the writ, and that defendant might show that thereafter he was not in possession. *Miller v. Harris*, 84 Pa. St. (1877) 33, 36. See also *Den v. McShane*, 1 Green

(13 N. J. 1831), 35. See also the title "Damages and Mesne Profits," *post*.

3. *Baron v. Abeel*, 3 John. (N. Y. 1808) 484.

4. *Secrist v. Zimmerman*, 55 Pa. St. (1867) 446.

The court argues that "a judgment confessed in ejectment must be treated upon the same general principles of law that belong to what Mr. Greenleaf calls solemn or judicial confessions in other cases. The effect of these is to conclude the right, and estop the party."

A judgment by default is conclusive against a person holding under the defendant after being docketed for three years under 2 Rev. Stat. 309, sec. 38; so held in *Sheridan v. Linden et al.*, 81 N. Y. (1880) 182. See Statutory Provisions and Rules of Practice in New York.

In *Maryland* see *McKenzie et al. v. Renshaw*, 55 Md. (1880) 299, where the act of 1872, relative to judgments, etc., is construed; and it is said that no provision was made therein in case of a judgment by default as to its being conclusive, but the court intimated that it is conclusive in that State.

A *remittitur* will be allowed in ejectment suits where the judgment is excessive. *Keen v. Schnedler*, 92 Mo. (1887) 516.

A writ of *restitution* will be granted where the tenant, after judgment and writ of possession executed, has been improperly put out of the property. *Smith v. Trabeau*, 1 McLean (U. S. 1830), 87.

A judgment in ejectment against the casual ejector may be set aside after the

XXI. Damages and Mesne Profits.—The action of trespass for *mesne profits* may be brought to recover damages for the use of the land, and also the costs of ejectment.¹

It is held in *Connecticut*, that where the plaintiff in disseizin has legally obtained possession of the premises, an action of trespass lies for mesne profits against the disseizor's tenant, although he had occupied in good faith, and in ignorance of the title of the disseizee, and had paid rent to the disseizor. The fiction of law obtains in such case in favor of the disseizee after re-entry that his possession has been continuous during his disseizin.²

term when obtained. *Lyttle v. Fenn*, 3 McLean (U. S. 1844), 411.

Only the parties to the judgment, their privies and representatives, heirs and assigns, are entitled to have the judgment set aside. *Forsyth v. Van Winkle*, 9 Fed. Rep. (U. S. Indiana, 1881) 247; so by a code provision.

For Recovery and Judgments, see also the title "Pleadings" herein, *ante*.

1. *Baron v. Abeel*, 3 John. (N. Y. 1808) 483; *Holmes v. Davis*, 19 N. Y. (1859) 488; *Masterton v. Hagan*, 17 B. Mon. (Ky. 1856) 325; *Mitchell v. Mitchell*, 1 Md. (1851) 55, 58.

Mesne profits may be recovered in the action of ejectment in *Pennsylvania*. *Dawson v. McGill*, 4 Whart. (Pa. 1838) 230.

The doctrine that "The defendants, therefore, must, in accordance with the very textual provisions of the law, restore all the products of the property which they have possessed. They are also liable for the products which they ought to have realized with ordinary good management," is given as the rule in *Gaines v. City of New Orleans*, 17 Fed. Rep. (U. S. Louisiana, 1883) 30. And it is also said by the court that "The common law, as stated in Bracton's Laws and Customs of England, gives the rule, 'The jurors will diligently inquire what profits the disseizor had received in fruits, rents, and other commodities. They were also to estimate the advantages the disseizin might have derived from the estate if he had not been disseized.' Stearn's Real Actions, 393." The case exhaustively considers the civil and common-law authorities on this point.

The statutory provisions in *Oregon* relative to recovery of damages corresponds to the action for mesne profits. *Wythe v. Myers*, 3 Saw. (U. S. 1876) 595.

Trespass for mesne profits may be brought by either the fictitious or real plaintiff in ejectment. *Lion v. Burtis*, 5 Cow. (N. Y. 1826) 408. See also note to *Aslin v. Parkin*, vol. i. part 2, Smith's Lead. Cases (8th ed.), pp. 1397 to 1405.

In an action of trespass for mesne profits

brought after a judgment in ejectment, the plaintiff can recover profits for but six years prior to the commencement of the action of trespass. *Hill v. Meyers*, 46 Pa. St. (1863) 15.

In *Maryland* in 1869 it was held that the action must be commenced within three years from the time the cause of action accrues. *Tongue v. Nutwell*, 31 Md. (1869) 302.

"It appears that the courts of *Vermont* and *Illinois* stand alone in holding that a tenant who continues unlawfully in possession can, as against the owner who has made a forcible entry, recover damages in an action of trespass *quare clausum*, or the possession of the premises by ejectment." *Moring v. Ables*, 62 Miss. (1884) 263, 271.

Action for rents and profits only lies after judgment and recovery of possession. *Gaines v. New Orleans*, 17 Fed. Rep. (U. S. 1883) 16; *Meloy v. Johnston*, 2 MacArthur (U. S. 1875) 202.

An action lies for mesne profits after judgment by default. *Aslin v. Parkin*, 2 Burr. (1758) 665; *Doe v. Davis*, 1 Esp. (1795) 358.

2. *Trubee v. Miller*, 48 Conn. (1880) 347. The court declared that "It was within the power of the plaintiff to include mesne profits in the judgment in the action of ejectment, and it was equally within her power to take only nominal damages for the trespass, enter a *remittitur*, and institute an action against the defendant for such part of the profits accruing during the time of the disseizin as he actually took to himself. This action rests upon the plain principle, that he who occupies the land of another shall compensate the owner therefor, even if he occupy by virtue of a lease from, and paid rent to, one who is apparently in possession, claiming title, and whom he in good faith, but mistakenly, believed to be the rightful owner; for, as between two persons equally without fault, each should bear the loss, or risk of loss, resulting from his own mistake" (p. 355).

Where a party enters into possession under a defendant in an action of eject-

An action of trespass for *mesne profits* lies in behalf of a tenant in common after a recovery had in ejectment.¹

It is decided in *Wisconsin* that the plaintiff may recover *mesne profits* which have accrued during his minority, but which have not been paid to his guardian.²

An assignee or other party coming into possession *pendente lite* of the litigated property, is liable for the *mesne profits*.³

By the common law it would seem that an executor is not liable for *mesne profits* which accrued during the lifetime of the deceased.⁴

In *New York*, a decision given in the year 1800 decides that the fact that nominal damages have been recovered in an action in ejectment constitutes no bar to a suit for *mesne profits*, the action of ejectment being only to try the title, and is based on purely fictitious proceedings; and nominal damages are not intended as a satisfaction of the *mesne profits*, it having been the practice for a long time to bring a separate action for their recovery.⁵

In *Arkansas*, rents and profits may be recovered by the plaintiff for the length of time the defendant was in possession.⁶

Where it is sought in the action for *mesne profits* to recover damages for a period prior to the time laid in the demise, set out in the declaration, the defendant is not precluded from disputing the title anterior to such time.⁷

Ordinarily the value of the use and occupation is the measure of damages in the action for *mesne profits*.⁸

XXII. Improvements. — Although no recovery for improvements could be had under the common law, — *Webster v. Stewart*, 6 Iowa.

ment, and against whom judgment has been rendered, such judgment is evidence against such occupant in an action for *mesne profits*. *Doe v. Whitcombe*, 8 Bing. (1831) 46.

1. *Tongue v. Nutwell*, 31 Md. (1869) 302, 318.

An action for *mesne profits* also lies in behalf of one tenant in common against his co-tenant after judgment by default. *Goodtitle v. Tombs*, 3 Wils. (1770) 118.

2. *McCrubb v. Bray*, 36 Wis. (1874) 333, 341, 343.

3. *Jackson v. Stone*, 13 John. (1816) 447; *Fogarty v. Sparks*, 22 Cal. (1863) 143, 149.

4. *Pulteney v. Warren*, 6 Ves. (1801) 73, 86.

5. *Van Alen v. Rogers*, 1 John. Cases (N. Y. 1800), 281, 283.

An action in trespass for *mesne profits* may be maintained by the lessor of the plaintiff against the tenant after recovery by default against the casual ejector; and in such action no evidence on the part of the defendant is permitted, of any matter which might have been availed of in the original action. *Baron v. Abeel*, 3 John. (N. Y. 1808) 481.

6. *Jacks v. Dyer et al.*, 31 Ark. (1876) 334, 344.

It was said in *New York* in 1800 that the recovery in the action of ejectment establishes the time of the demise as that from which the right accrues to the *mesne profits*. *Van Alen v. Rogers*, 1 John. Cases (N. Y. 1800), 281.

And damages are allowed to the time of trial. *Vandervoort v. Gould*, 36 N. Y. (1867) 639.

In determining *mesne profits*, they may be estimated to the date of the trial. *McCrubb v. Bray*, 36 Wis. (1874) 333.

7. *Jackson v. Randall*, 11 John. (N. Y. 1814) 405.

8. *Holmes v. Davis*, 19 N. Y. (1859) 488; *Cogger v. Lansing*, 64 N. Y. (1876) 417.

Rule for determining the damages and *mesne profits*. *Gaines v. New Orleans*, 17 Fed. Rep. (U. S. 1883) 16.

For an exhaustive consideration of the action of trespass for *mesne profits*, see note, p. 1397, vol. 1, part 2, of *Smith's Leading Cases* (8th ed. 1885), notes by Hare, Landreth & Lewis.

(1850), 403, — yet an unsuccessful defendant in ejectment proceedings who has been in possession of the premises and occupying them under color of title, is presumed to be holding in good faith, and may now have an action in some States to recover for permanent and valuable improvements made by him thereon, or may in other States offset their value against rents and profits recovered by the plaintiff.¹

A tenant in common will be allowed to set off the value of improvements made by him against his co-tenant.²

The statutory provisions relative to allowing improvements to the defendant must be strictly construed, and cannot be extended so as to warrant their removal as personalty.³

An occupant of lands is not confined to improvements made by himself, but may have a recovery for those made by the parties under whom he claims, or which are made on land which he has purchased, improvements being assignable.⁴

In *Iowa* the land may be occupied by the claimant for improvements until he obtains satisfaction for his claim, and he may use it for such purposes as he deems proper.⁵

1. *Measure of Recovery*. — In determining the value of improvements, the measure of such value is the real benefit to the owner by reason of their having been made: improvements which exceed the actual enhanced value of the premises, or which do not enhance its value, will not be allowed against the owner.⁶

1. *Stark v. Starr*, 1 Saw. (U. S. 1870) 15; *Blodgett v. Hitt*, 29 Wis. (1871) 169; *Love v. Shortzer*, 31 Cal. (1867) 487; *Jones v. Carter*, 12 Mass. (1815) 314; *Dothage v. Stewart*, 35 Mo. (1864) 251; *Brackett v. Norcross*, 1 Green (N. J. 1820), 89.

Improvements will be allowed, although paper title is defective. *Bacon v. Callender*, 6 Mass. (1810) 303, 309; *Newhall v. Sadler*, 17 Mass. (1821) 350.

An unsuccessful defendant in ejectment may have a recovery for improvements if he held possession *bona fide* and under a belief of a good title in himself, *notwithstanding his deed was a quit-claim*. *Griswold v. Bragg*, 6 Fed. Rep. (U. S. Connecticut, 1881) 342.

One who has pre-empted land, and received a certificate therefor upon a proper showing to the land-office, and under a belief of title in himself makes improvements, may recover therefor their value. *Wells v. Riley*, 2 Dillon (U. S. Iowa, 1872), 551.

Improvements made in good faith may be offset against a claim for rents and profits to the amount of the rents and profits. *Wood v. Wood*, 83 N. Y. (1881) 575, 581; *Coulton's Case*, 5 Coke (40 & 41 Eliz.), 30; *Green v. Biddle*, 8 Wheat. (U. S. 1823) 1, 81, 82; *Jackson v. Loomis*, 4

Cow. (N. Y. 1825) 168; *Fenwick v. Gill*, 38 Mo. (1866) 510, 528; *Rector et al. v. Gaines et al.*, 19 Ark. (1857) 70.

Improvements recoverable prior to the statutory period of six years may be offset by the rents and profits during such time. *Davis v. Louk*, 30 Wis. (1872) 308.

Rents and profits may be offset against improvements for the period of six years (as limited by statute) prior to the recovery of possession in the action therefor, and during the action for improvements. *Parsons v. Moses*, 16 Iowa (1864), 440.

2. *Davis v. Louk*, 30 Wis. (1872) 308; 111 Mass. (1873) 386.

3. *Huebschen v. McHenry*, 29 Wis. (1872) 655.

4. *Craton v. Wright*, 16 Iowa (1864), 133; *Parsons v. Moses*, 16 Iowa (1864), 440; *Wright v. Stevens*, 3 G. Gr. (Iowa, 1851) 63.

5. *Webster City, etc., R. R. Co. v. Newson*, 70 Iowa (1886), 355.

And in *Louisiana* the defendant is entitled to hold until the value of useful improvements made by him is paid. *Fletcher v. Cavelier*, 10 La. (1836) 116, 119.

Judgment not Personal. — The judgment for improvements is not intended to be a personal one against the owner. *Dungan v. Von Puhl*, 8 Iowa (1859), 263.

6. *McMurray v. Day*, 70 Iowa (1886), 671.

2. *Statutes allowing Improvements, Constitutionality of.* — It is well-settled law that a statute allowing the defendant, when defeated in actions of ejectment, and the like, to recover the value of permanent improvements made by him in good faith, is constitutional.¹

3. *Prerequisites to Recovery.* — The statutory provisions relative to improvements are held in *Iowa* to apply to occupying claimants only, so that the party demandant must be in possession of the premises; and no recovery may otherwise be had against the owner for such improvements, although made under color of title, and in good faith.²

4. *When Recovery for Improvements does not lie.* — Although a statute provides that the value of improvements made by one upon the faith of a purchase and occupancy under a valid title, may be recovered by him upon being ejected; yet a purchaser of encumbered land, with knowledge of such fact, is not entitled to compensation for improvements.³

The actual enhanced value of the premises, and not their cost, is the measure of recovery. *Childs v. Shower*, 18 *Iowa* (1865), 261.

The value added to the land is the amount of recovery for improvements. *Pacquette v. Pickness*, 19 *Wis.* (1865) 219.

When Claim to be made. — In *Iowa* the claim for improvements must be taken advantage of after the determination of the question of title. *Walton v. Gray*, 29 *Iowa* (1870), 440; *Fogg v. Holcomb*, 64 *Iowa* (1884), 621.

In *Wisconsin* the defendant's claim for improvements precedes and suspends the judgment, and is after verdict. *Scott v. Reese*, 38 *Wis.* (1875) 636; *Hills v. La Porte*, 40 *Wis.* (1876) 113.

Not to exceed Rents, etc. — Upon a recovery by the plaintiff by reason of the failure of the defendant to show a proper title in himself, the latter cannot be allowed a sum for improvements which shall be in excess of the rents. *Marlow v. Adams*, 24 *Ark.* (1863) 109.

1. *Pacquette v. Pickness*, 19 *Wis.* (1865) 219; *Childs v. Shower*, 18 *Iowa* (1865), 261; *Griswold v. Bragg*, 48 *Conn.* (1880) 577; *Hueschman v. McHenry*, 29 *Wis.* (1872) 655, 663; *Fee v. Cowdry et al.*, 45 *Ark.* (1885) 413, citing *Ross v. Irving*, 14 *Ill.* (1852) 171; *Whitney v. Richardson*, 31 *Vt.* (1858) 306; *Armstrong v. Jackson*, 1 *Blackf. (Ind.)* 374; *Fowler v. Halbert*, 4 *Bibb (Ky.)* 1815, 54.

A statute of a State relative to recovery for improvements will be held valid when not repugnant to Constitution of the State or the United States, although it is retro-

spective in its provisions. *Albee v. May*, 2 *Paine (U. S. Vt.)* 1834, 74.

But the statute of 1805 (*New Hampshire*) is held unconstitutional so far as it relates to past improvements. *Society, etc., of the Gospel v. Wheeler*, 2 *Gall. (U. S. N. H.)* 1814) 105, 143.

And a statute which allows a money judgment for improvements is unconstitutional. *Childs v. Shower*, 18 *Iowa* (1865), 261.

2. *Lunquest v. Ten Eyck*, 40 *Iowa* (1875), 213; *Clausen v. Rayburn*, 14 *Iowa* (1862), 136; *Webster v. Stewart*, 6 *Iowa* (1858), 401.

The possession must also have been adverse to the real owner. *Keas v. Burns*, 23 *Iowa* (1867), 235.

And the party seeking recovery for improvements must conform to the statutory provisions. *Blanchard v. Ware*, 43 *Iowa* (1876), 530; *Lunquest v. Ten Eyck*, 40 *Iowa* (1875), 213.

The statute in *Mississippi* (sec. 2512 Code 1880), allowing compensation for improvements, only applies where the right to sue, for or demand mesne profits exists. *Pass v. McLendon*, 62 *Miss.* (1885) 580.

3. *George v. Steam Stone-cutter Co.*, 20 *Fed. Rep. (U. S. Vt.)* 1884) 478.

No Recovery. — Devisee. — In an action of ejectment by the devisee, the defendant will not be allowed for improvements which were made upon the premises under a contract with the owner. His remedy lies in an action against the personal representatives of the devisor for compensation. *Van Alen v. Rogers*, 1 *John. Cases (N. Y.)* 1800, 281.

It was held in *Massachusetts* in the year 1824, that no improvements should be allowed a mortgagee;¹ and a decision given in that State in the year 1864, determines that neither the mortgagee nor his grantee may have a recovery therefor.²

XXIII. Writ of Possession. — Appeal. — In an action for the recovery of real property, judgment was given the plaintiff to recover possession, and the matter came into the United States Court on a writ of error: pending this appeal, a petition to recover the value of the improvements was filed by the occupying claimants. It was held that a writ of possession to the plaintiff could not be granted until the petition was disposed of.³

XXIV. Miscellaneous. — 1. Occupying Claimant. — An occupying claimant need not necessarily be in personal possession to bring him within the statute: an occupancy by a tenant is sufficient.⁴

Waiver of Damages by Plaintiff. — The defendant cannot claim for improvements where all demands for damages, or for other than nominal damages, are waived by the plaintiff. *Daniels v. Bates*, 2 G. Gr. (Iowa, 1849) 151.

1. *Russell v. Blake*, 2 Pick. (Mass. 1824) 505.

2. *Havens et al. v. Allen et al.*, 8 Allen (Mass. 1864), 363.

So it is also held that a claim for improvements made after action is commenced will not be allowed. *Russell v. Blake*, 2 Pick. (Mass. 1824) 505.

Street Improvements. — Nor may street improvements be set off against a claim for mesne profits. *Stark v. Starr*, 1 Saw. (U. S. 1870) 15.

3. *Chicago R. I., etc., R. Co. v. Tharnish*, 54 Iowa (1880), 691. "Section 1976 of the code provides that, in a real action where a judgment of recovery is rendered, no execution shall issue to put the plaintiff in possession after the filing of a petition by the defendant as occupying claimant, until the claim has been disposed of."

In ejectment by a landlord against a tenant holding over, the plaintiff is entitled to a writ of possession, even if his title has expired before trial, unless the defendant shall show affirmatively that it would be unjust or futile to give possession to the plaintiff. "The plaintiff cannot, by the mere verdict and judgment for the mesne profits, have compensation for the defendant's wrongfully withholding possession, when he ought to have given it; for, had he gone out then, the plaintiff would have had the advantage of being in possession at the expiration of the lease." The tenant cannot be allowed to thus take advantage of his own wrong. *Knight v. Clarke*, L. R. 15 Q. B. D. (1885) 294, 297

299, citing the similar case of *Gibbins v. Buckland*, 1 Hurslt. & Colt. (1863) 735, 739, where it is said, "The law of estoppel, as between landlord and tenant, is, I think, applicable to this case." See further on these points, the title "Statutory Provisions in the United States," sub-title "Writ of Possession," *ante*.

New Trials. — Much latitude within legal provisions is allowed the court in granting new trials under the Rev. Stats. 1860, sec. 3584. *White v. Poorman*, 24 Iowa (1867), 108. See also Code 1873, sec. 3268.

And where upon appeal such discretion appears to have been properly exercised, the decision will be no reversal. *Coleman v. Case*, 66 Iowa (1885), 534.

A new trial may be granted under the statutory provisions regulating new trials in actions for the recovery of real property, although it appears that an equitable defence had been availed of on the trial below. *Butterfield v. Walsh*, 25 Iowa (1868), 263, 265; *County of Buena Vista v. I. F. & S. C. R. R.*, 49 Iowa (1878), 657, 662.

Construction of the statute in *Minnesota* relative to another trial, — Gen. Stat. 1878, c. 75, sec. 11, — where there has been no answer, and a judgment by default, the statute held to have no application. *Hal-lam v. Doyle et al.*, 35 Minn. (1886) 337.

The statute applies only to actions for the recovery of real estate. *Knight v. Valentine et al.*, 35 Minn. (1886) 367; *Schmitt v. Schmitt*, 32 Minn. (1884) 130.

The right to a new trial may be waived before trial. *Ladd v. Hildebraut*, 27 Wis. (1870) 135.

4. *Parson v. Moses*, 16 Iowa (1864), 440.

Privies defined. — See *Satterlee v. Bliss*, 36 Cal. (1869) 489.

2. *Injunction*. — An injunction will lie in *Iowa* to restrain defendant from continuing his possession of the premises after judgment for recovery against him, and process has been issued to put him out of possession.¹

3. *Writ of Error*. — In *Indiana* a writ of error in ejectment may not be brought in the name of the casual ejector.²

1. Ten Eyck v. Sjoberg, 68 Iowa (1886), 625.

Who is a Possessor in Good Faith. — "One who has just reason to believe himself master of the thing which he possesses is a possessor in good faith." Huyghe v. Brinkman, 38 La. Ann. (1886) 838, relying upon R. C. C. 3451.

Statute to be followed. — The mode prescribed by statute must be followed in actions of ejectment. Fraser v. Weller, 6 McLean (U. S. Mich. 1853), 11.

Dismissal of Suit. — It is no ground for dismissing the suit that the plaintiff's lessor is insane. Gilleland v. Martin, 3 McLean (U. S. 1844), 490.

2. Stiles v. Jackson, 1 Blackf. (Ind. 1822) 214.

English Cases in Ejectment overruled, etc., from 1756 to 1886 inclusive. — Wheeler v. Montefiore, 2 Ad. & Ell. N. S. Q. B. (1841) 133, explained in Parsley v. Day, 2 Ad. & Ell. N. S. Q. B. (1842) 147; Fairtitle v. Gilbert, 2 Durn. & East Term R. (1787) 171, commented on in Levy v. Horne, 3 Ad. & Ell. N. S. Q. B. (1842) 757, 766; Smales v. Dale, Hob. 120, disapproved in Daniel v. Woodroffe, 2 H. of L. Cas. (1849) 811; Drummond v. St. Albans, 5 Ves. (1800) 433, overruled in Hicks v. Sallett, 23 Law J. Ch. (1853) 571, 589; 3 DeG. Mac. & G. 782; 18 Jur. 915; Watson v. Lane, 11 Exch. (1856) 769, 772, commented on in Delaney v. Fox, 2 C. B. N. S. (1857) 768; Jones v. Carter, 15 Mees. & Wels. (1846) 718, commented on in Dendy v. Nicholl, 4 C. B. N. S. (1859) 376; Dixon v. Gayfere, 17 Beav. (1853) 421, questioned in Asher v. White-lock, 11 Jur. N. S. (1865) 925; 35 L. J. Q. B. 17; Ive v. Scott, 9 Dowl. (1841) 993, commented on in Pearse v. Coaker, L. R. 4 Ex. (1869) 92; Shaw v. Coffin, 14 C. B. N. S. (1863) 372, followed in Crawley v. Price, L. R. 10 Q. B. (1875) 302; Croft v. Lumley, 5 Ell. & B. (1855) 648; 25 L. J. Q. B. 73, commented on in Toleman v. Postbury, L. R. 6 Q. B. (1871) 245; 40 L. J. Q. B. 125; 19 W. R. 623. From Dale & Lehman's English Overruled Cases (ed. 1887).

The following are taken from Jones's Index to Legal Periodicals, and refer to articles, etc., under the subject ejectment.

2 Legal Examiner, 362. Common source of title, 4 Central Law Journal, 99. Competency as a witness of the surviving party to a deed, Annotated Case, 22 Central Law Journal, 156 (W. W. Thornton). County court, practice in, 21 County Courts Chronicle, 5-310 (F. O. Crump). Discovery in, 17 Irish Law Times, 284. For non-payment of rent, 8 Irish Law Times, 471. Has the county court cognizance of, 4 Virginia Law Journal, 76 (A. F. Robertson). Law of, in Ireland (J. McMahon), 15 Irish Law Times, 309. Law and Practice of, 20 Legal Observer, 195, 259, 307, 471. On the title in the county courts, 12 Irish Law Times, 2, 21. Possession necessary to maintain (I. Browne), 7 Albany Law Journal, 401. Right to discovery in actions of, 74 Law Times, 392. Writ of restitution in, 5 Law Times, 7.

For English and American text-books on the subject of ejectment, see Adams on Ejectment (4th ed. Amer. notes); Abbott's Trial Ev. (ed. 1880) chap. 48, p. 691 *et seq.*; Angell on Limitations; Broom's Commentaries on the Common Law; Broom & Hadley's Commentaries, Wait's Notes; Cole on Ejectment; Chitty on Pleadings; Dart & Barber's Real Estate; Dicey's Parties to Actions; Freeman on Judgments; Greenleaf on Evidence; Gilbert on Ejectment; Herman on Estoppel and Res Adjudicata (ed. 1886), vol. 1, secs. 199-207, pp. 220-230, vol. 2, sec. 600, p. 731, text to note 6; Hiliard on Real Property; Hobby's Texas Land Law; Jackson & Gross's Landlord and Tenant in Pennsylvania; Longfield on Ejectment; Perry on Trusts; Peake on Evidence; Pomeroy's Remedies and Remedial Rights; Phillips on Evidence (Cow. and Hills and Edwards's notes, 5th Amer. ed.); Runnington on Ejectment; Roscoe's Digest of the Law of Evidence; Redfield on the Law of Railways; Smith's Leading Cases; Sedgwick on the Measure of Damages; Tyler's Law of Boundaries, Fences, and Window-lights; Taylor on Evidence; Taylor's Landlord and Tenant; Tyler on Ejectment; Troubat & Haly's Practice (5th ed. by Brightly), title "Ejectment" in index to vol. 2; Woodfall's Landlord and Tenant; Wood's Mayne on Damages; Washburn on Real Property.

EJIDOS. (In Spanish law.)—Lands used in common by the inhabitants of a place for pasture, wood, threshing-ground, etc. They are well described by our word *commons*.¹

ELDER.²

ELDEST.—First; first-born.³

ELECT.—Select or choose by the popular voice or vote, as distinguished from appoint, which is by an individual.⁴

1. Hart v. Burnett, 15 Cal. 554.

2. Where a statute provided that at the election of trustees of religious corporations, two elders or church-wardens should be chosen to act as inspectors of election, the term "elders" is exclusive of the clergy, and refers to the subordinate officers known by that title. Although Baptist clergymen are, in their church, called elders, they are not such within the meaning of this act. People v. Peck, 11 Wend. (N. Y.) 604; s. c., 27 Am. Dec. 104.

3. Driver v. Frank, 8 Taunt. 468; Meredith v. Treffry, L. R. 12 Ch. Div. 171.

Where there is but one son, he is the eldest. Tuite v. Birmingham, L. R. 7 H. L. 634.

Where a testator left lands to the second, third, and fourth sons, by name, of S., and to their sons successively in tail-male, and provided that in case either of them "should become the eldest son" of S. the lands should go to the next in remainder; and after the death of the testator, S. died and then his eldest son, the second was held not to have become the eldest son of S. "It is impossible to interpret the shifting clause according to the literal meaning of the words. The eldest son of a man is his first-born, the *primogenitus*." The phrase is to be construed in reference to the motive of the testator, and to avoid the conclusion that he acted capriciously without motive. "But," continues Lord Chancellor Cairns, "I am bound, further, to say that I do not think the words 'shall become the eldest son' of a person living at the date of the will, are words which, unless controlled and explained by a context, extend in their operation beyond the lifetime of that person. . . . I do not think that without an explanatory context explaining and enforcing the construction, a man is, by the death of his elder brother, said to become the eldest son of his father, after his father's death. I think the words 'becomes the eldest son' in their natural and ordinary meaning, point to the attaining a status perfectly well known and well understood, and connected with heirship, of, and right of, succession to a living man." Bathurst v. Errington, L. R. 2 App. Cas. 698.

But in provisions for children "except

an eldest son," this phrase refers, not to an individual, but a character, and means the eldest living son at the time of vesting. Mathews v. Paul, 3 Swanst. 228; Domvill v. Winnington, 53 L. J. R. Ch. Div. 782.

Eldest Male Lineal Descendant.—A bequest to the "eldest male lineal descendant then living of A." goes to the grandson of the eldest son of A., and not to a son of his youngest son, although the latter is older in years. Says Byles, J., "The word 'eldest' is correlative to the words 'second, third, and fourth'; and the words 'second, third, and fourth' are correlatives of the word 'eldest.' If so, then the word 'eldest' means 'first,' and the phrase 'eldest male lineal descendant' means 'first male lineal descendant.' Now, if the words had been 'first male lineal descendant,' at least the appellant's interpretation regarding the personal age of the individual could have found no place.

"But besides this, in the strict propriety of the English language, the word 'eldest' (though its etymology be the same) is not synonymous with the word 'oldest,' for the word 'eldest' does not necessarily or even primarily import eldest in personal age. According to Dr. Johnson, its primary meaning is, 'oldest, that has the right of primogeniture,' and its secondary meaning is, 'the person that has lived most years;' and surely this primary sense of the word is as agreeable to the context as any other. Therefore it should seem that the word 'eldest' here taken in its strict and primary acceptation, means eldest in the order of primogeniture, not eldest in personal age.

"But even supposing the word 'eldest' to be synonymous with 'oldest,' it is by no means clear that it is to be taken out of its place, and read with the word 'descendant,' as if it immediately preceded that substantive, and qualified it, and it only. On the contrary, it may well and more naturally be considered as part of a compound adjective composed of the three words, 'eldest, male, and lineal.' So read, it qualifies the word 'lineal' as well as the word 'descendant,' denoting no less the oldest line, than the oldest descendant in that line." Thellusson v. Rendlesham, 7 H. L. Ca. 429.

4. Speed v. Crawford, 3 Metc. (Ky.) 207;

ELECTION.—See also DOWER; EQUITY; ESTOPPEL; SATISFACTION; WAIVER.

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I. Definition.—Election is the right of choice between two or more steps or things by a person not entitled to all.¹

II. Of Remedies.—**I. *Ex Delicto and Ex Contractu.***—Frequently a party may elect to sue either in tort or contract.² Where his personal property has been obtained by another by means of a fraudulent sale, he may sue for the price on the contract of sale,³ or rescind the contract and maintain replevin for the goods or trover for their value.⁴ Where one has wrongfully obtained the

Police Commissioners *v.* Louisville, 3 Bush (Ky.), 602.

"The word 'elected,' in its ordinary signification, carries with it the idea of a vote,—generally popular, sometimes more restricted,—and cannot be held the synonym of any other mode of filling a position." *Clarke v. Irwin*, 5 Nev. 111; *Magruder v. Swann*, 25 Md. 214.

An act requiring those officers elected at a first general election to qualify within a certain time, applies only to those actually elected at that election, and not to those who should have been, but were not, chosen until a subsequent election. It would be giving a strained and unnatural meaning to the word to interpret it as "elective," or "such as should be elected." *Bean v. Territory* (Wash.), 13 Pac. Rep. 711.

Members elected.—Where the constitution provided that "no bill shall be passed by either branch of the legislature without an affirmative vote of a majority of the members elected thereto," an act will not be adjudged unconstitutional which passed by the vote of eleven senators in a body, which, when full, consisted of twenty-two, but in which there was a vacancy, caused by the resignation of a senator. "It is certainly not clear, beyond a reasonable doubt, that the words 'members elected' can only refer to persons elected at the last preceding elections, although they may have ceased to be members at the time the vote is taken on the passage of the bill; and a reasonable doubt as to this is sufficient to sustain the validity of the act in question." *Osburn v. Staley*, 5 W. Va. 85; s. c., 13 Am. Rep. 640.

1. *Bish. on Cont.* § 781.

"Whenever, by law or by contract, a party has laid before him a variety of steps,

the taking of one of which excludes another, or the rest, he must choose between them. After his choice is made, and by words or by acts expressed in a manner suited to the particular case, he cannot reverse it: he is said to have elected the one step, and waived the other." *Bish. on Cont.* § 808.

2. *Crow v. Boyd*, 17 Ala. 51; *Halleck v. Mixer*, 16 Cal. 574; *Nowling v. McIntosh*, 89 Ind. 593; *Staat v. Evans*, 35 Ill. 455; *Gordon v. Bruner*, 49 Mo. 570; *Jamison v. Moon*, 43 Miss. 598; *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270; *Betts v. Collins*, 13 Wend. (N. Y.) 154; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Lightly v. Clauston*, 1 Taunt. 114.

3. *Sanders v. Hamilton*, 3 Dana (Ky.), 552; *Patterson v. Prior*, 18 Ind. 440; *O'Conley v. Natchez*, 1 Sm. & M. (Miss.) 31; *Betts v. Collins*, 13 Wend. (N. Y.) 154; *McCullough v. McCullough*, 14 Pa. St. 295; *Foster v. Stewart*, 3 M. & S. 191.

If this course is adopted, the action will not lie until the expiration of any credit that may have been given. 1 Chit. Pl. *107; *Kellogg v. Turpie*, 93 Ill. 265; *Dellone v. Hull*, 47 Md. 112; *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 411. Compare *Wigand v. Sichel*, 3 Keyes (N. Y.), 120; *Mann v. Stowell*, 3 Chand. (Wis.) 243; *Hogan v. Shee*, 2 Esp. 522.

4. *Kline v. Baker*, 99 Mass. 255; *Brown v. Pierce*, 97 Mass. 49; *Seaver v. Dingley*, 4 Greenl. (Me.) 306; *Prentiss v. Russ*, 16 Me. 30; *Durrell v. Haley*, 1 Paige (N. Y.), 492; *Noble v. Adams*, 7 Taunt. 59.

The right of election must be exercised within a reasonable time after discovery of the fraud. *Bulkley v. Morgan*, 46 Conn. 393; *Stewart v. Dougherty*, 3 Dana (Ky.), 479; *Johnson v. McLane*, 7 Blackf. (Ind.)

money¹ of another, or has converted his property into money,² or money's worth,³ the latter may waive the tort, and sue on the implied contract to pay over the money; and in some States an action *ex contractu* will lie, though the property has not been sold by the wrong-doer.⁴

In cases where there is a breach both of contract and of duty imposed by law, the plaintiff may elect to sue in either form of action.⁵ An action *ex contractu* will lie on a fraudulent warranty or an action *ex delicto* for the deceit.⁶

2. *Considerations governing Choice.*—A proper choice of remedies may defeat a plea of infancy,⁷ or of the statute of limitations,⁸

501; *Emerson v. McNamara*, 41 Me. 565; *Hopkins v. Appleby*, 1 Stark. 477; *Cash v. Giles*, 3 Car. & P. 407.

And the vendor must rescind the sale *in toto*, and place the vendee in *statu quo*. *Moriarty v. Stofferan*, 89 Ill. 528; *Johnson v. McLane*, 7 Blackf. (Ind.) 501; *Cushing v. Wyman*, 38 Me. 589; *Kimball v. Cunningham*, 4 Mass. 502; *Rutter v. Blake*, 2 H. & J. (Md.) 353; *Fisher v. Fredenhall*, 21 Barb. (N. Y.) 82; *Poor v. Woodburn*, 25 Vt. 234; *Weed v. Page*, 7 Wis. 503.

If this cannot be done, the only remedy, ordinarily, is an action for the deceit. *Perley v. Balch*, 23 Pick. (Mass.) 283; *Hogan v. Weyer*, 5 Hill (N. Y.), 389; *Hammond v. Buckmaster*, 22 Vt. 375; *Hunt v. Silk*, 5 East, 449.

As to circumstances which will justify rescinding a sale, see 25 Am. L. Reg. 247, note.

1. *Byard v. Holmes*, 33 N. J. L. 119; *Tryon v. Baker*, 7 Lans. (N. Y.) 511; *Byxbie v. Wood*, 24 N. Y. 607; *Union Bank v. Mott*, 27 N. Y. 633; *Edmeads v. Newman*, 8 E. C. L. 116.

2. The right to waive the tort, and sue in assumpsit, was denied where the property was sold for an illegal purpose. *Chauncey v. Yeaton*, 1 N. H. 151.

3. *Pike v. Bright*, 29 Ala. 332; *Staat v. Evans*, 35 Ill. 455; *Watson v. Stever*, 25 Mich. 386. But see *Fuller v. Duren*, 36 Ala. 73.

4. *Hudson v. Gilliland*, 25 Ark. 100; *Roberts v. Evans*, 43 Cal. 380; *Morford v. White*, 53 Ind. 547; *Stockett v. Watkins*, 2 G. & J. (Md.) 326; *Gordon v. Bruner*, 49 Mo. 570; *Fiquet v. Allison*, 12 Mich. 328; *Roth v. Palmer*, 27 Barb. (N. Y.) 652; *Hawk v. Thom*, 54 Barb. (N. Y.) 164; *Smith v. Schulenberg*, 34 Wis. 41; *Norden v. Jones*, 33 Wis. 600. Compare *Chamblee v. McKenzie*, 31 Ark. 155; *Howell v. Graves*, 27 Ark. 365; *Pike v. Wright*, 29 Ala. 332; *Tucker v. Jewett*, 32 Conn. 563; *Hutton v. Wetherald*, 5 Harr. (Del.) 38; *Barlow v. Staiworth*, 27 Ga. 517; *Moses v. Arnold*, 43 Iowa, 187; *O'Rees v. Strong*, 13 Ill. 688; *Morrison v. Rogers*, 2 Scam.

(Ill.) 318; *Creel v. Kirkham*, 47 Ill. 344; *Rogers v. Greenbush*, 57 Me. 441; *Balch v. Patten*, 45 Me. 41; *Androscoggin, etc., Co. v. Metcalf*, 65 Me. 40; *Watson v. Stever*, 25 Mich. 386; *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *Tryon v. Baker*, 7 Lans. (N. Y.) 511; *Budd v. Heiler*, 3 Dutch. (N. J.) 43; *Smith v. Smith*, 43 N. H. 536; *Phelps v. Conant*, 30 Vt. 277; *Willett v. Willett*, 3 Watts (Pa.), 277; *Schweizer v. Weiber*, 6 Rich. (S. Car.) 159; *Lindon v. Hooper*, Cowp. 419.

An action *ex contractu* will lie against the executor or administrator of the wrong-doer, though the property has not been converted into money. *Jones v. Hoar*, 5 Pick. (Mass.) 285.

Where services are rendered under coercion, an action will lie either in tort or contract. *Patterson v. Crawford*, 12 Ind. 241; 18 Ind. 440.

The rule has been applied to conversion of the rents and profits of lands. *Hagaman v. Neitzel*, 15 Kan. 383; *Fiquet v. Allison*, 12 Mich. 330; *Trull v. Granger*, 8 N. Y. 115; *Norden v. Jones*, 33 Wis. 600. Compare *Tightmeyer v. Mangold*, 20 Kan. 90; *Carpenter v. Stilwell*, 3 Abb. Pr. (N. Y.) 459.

5. As loss by negligence of a common carrier, inn-keeper, etc. *Miss. Cent. R. v. Fort*, 44 Miss. 423; *Brown v. Treat*, 1 Hill (N. Y.), 225; *Whittenton Mfg Co. v. M. & O. R. Packet Co.*, 21 Fed. Rep. 896; *Church v. Mumford*, 11 Johns. (N. Y.) 479; *Leslie v. Wilson*, 3 Brod. & B. 171; *Bliss*, Code Pl. § 14.

6. *Winter v. Bandel*, 30 Ark. 362.

7. *Studwell v. Shapter*, 54 N. Y. 249; *Fish v. Ferris*, 5 Duer (N. Y.), 49; *Wallace v. Morss*, 5 Hill (N. Y.), 391; *Walker v. Davis*, 1 Gray (Mass.), 506. See also *Shaw v. Coffin*, 58 Me. 254; *Towne v. Willey*, 23 Vt. 359; *Elwell v. Martin*, 32 Vt. 217; *Vasse v. Smith*, 6 Cranch (U. S.), 230. Compare *People v. Kendall*, 25 Wend. (N. Y.) 399.

8. *Huffman v. Hughlett*, 11 Lea (Tenn.), 549; *McCombs v. Guild*, 9 Lea (Tenn.), 81.

or a set-off,¹ or a claim to exemptions.² Suing on the implied contract limits the recovery to the amount received by the wrongdoer where there has been a wrongful sale of property.³ Tort may be preferable where imprisonment for tort is allowed,⁴ or where the proper parties to an action *ex contractu* cannot be joined conveniently.⁵ A defendant may waive a tort to use a claim as a set-off;⁶ and either form of action may be adopted for the purpose of joining a like cause of action.⁷

A discharge in bankruptcy,⁸ or counter-claim arising from the same transaction,⁹ cannot be defeated by changing the form of action.

3. *Other Cases.* — A servant¹⁰ or contractor,¹¹ who has been improperly discharged, may sue at once for breach of the contract, or treat the contract as discharged, and sue on the *quantum meruit*; and, by some authorities, the servant may wait till the expiration of his term of service, and sue for the full amount he would have been entitled to.¹² Frequently an action will lie for the specific performance of a contract, or for damages for the breach thereof.¹³

Where two actions at law or in equity between the same parties for substantially the same relief¹⁴ are pending at the same time,

1. *Allen v. Randolph*, 48 Ind. 496; *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210.

2. *Davis v. Henson*, 29 Ga. 345; *Nowling v. McIntosh*, 89 Ind. 593; *Warner v. Cammack*, 37 Iowa, 642; *Schouton v. Kilmer*, 8 How. Pr. (N. Y.) 527.

3. *Howell v. Graves*, 27 Ark. 365; *Rand v. Nesmith*, 61 Me. 111; *Jamison v. Moon*, 43 Miss. 598; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Nichols v. Gage*, 10 Oregon, 82.

4. Bliss, Code Pl. sec. 19. *Compare Brown v. Treat*, 1 Hill (N. Y.), 225.

5. Bliss, Code Pl. sec. 19.

6. *Brady v. Brennan*, 25 Minn. 210; *Wood v. Mayor*, 73 N. Y. 556; *Coit v. Stewart*, 50 N. Y. 17; *Norden v. Jones*, 33 Wis. 600; *Ainsworth v. Bowen*, 9 Wis. 320; *Eversole v. Moore*, 3 Bush (Ky.), 49; *Haddix v. Wilson*, 3 Bush (Ky.), 527. *Compare Street v. Bryan*, 65 N. Car. 619; *Kurtz v. McGuire*, 5 Duer (N. Y.), 660; *Piser v. Stearns*, 1 Hilt. (N. Y.) 86; *New York v. Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 300.

7. *Hawk v. Thom*, 54 Barb. (N. Y.) 164.

8. *Campbell v. Perkins*, 8 N. Y. 430.

9. *Judah v. Trustees*, 16 Ind. 56; *Ritchie v. Hayward*, 71 Mo. 560; *Thompson v. Kessel*, 30 N. Y. 383; *Brown v. Buckingham*, 11 Abb. Pr. (N. Y.) 387.

10. *Rogers v. Parham*, 8 Ga. 190; *Richardson v. Eagle Machine Works*, 78 Ind. 422; *Booge v. Pac. R.*, 33 Mo. 212; *Moody v. Leverick*, 4 Daly (N. Y.), 401; *Gandell v. Pontiguy*, 4 Camp. 374; 8 So. Law Rev. 432.

11. *McCullough v. Baker*, 47 Mo. 401; *Merrill v. I. & O. R.*, 16 Wend. (N. Y.) 586; *Chamberlin v. Scott*, 33 Vt. 80.

12. See note 3.

13. *Fox v. Kitton*, 19 Ill. 519; *Dotson v. Bailey*, 76 Ind. 434; *Graves v. White*, 87 N. Y. 463; *Lucy v. Bundy*, 9 N. H. 298.

14. *Central R. Co. v. New Jersey, etc.*, R. Co., 32 N. J. Eq. 67; *Hughes v. Vt. Copper Co.*, 7 Hun (N. Y.), 678; *Cocke v. Dotson*, 1 Overt (Tenn.), 170; *Hause v. Hause*, 29 Minn. 252; *Carlisle v. Cooper*, 18 N. J. Eq. 241; *McRae v. Singleton*, 35 Ala. 297.

Ordinarily the plaintiff in one action, who is the defendant in another, cannot be compelled to elect. *Botts v. Cozine*, 2 Edw. Ch. 583.

Usually the court will not compel an election between domestic and foreign suits, but it may do so. *Central R. Co. v. New Jersey, etc.*, R. Co., 32 N. J. Eq. 67; *Bininger's Case*, 7 Blatchf. (U. S.) 159; *Wood v. Lake*, 13 Wis. 94.

Where the same matter is set up as a counter-claim in several actions, the defendant may be compelled to elect. *Strong v. Dist. Columbia*, 17 Ct. Cl. Rep. (U. S.) 217.

Where the United States was plaintiff in an action in the district court, and set up the same cause of action as a counter-claim in the court of claims, the latter court compelled an election. *Boehm v. United States*, 20 Ct. of Cl. Rep. (U. S.) 142.

For instances of qualified election, see

the plaintiff will usually¹ be compelled to elect which one he will pursue.

4. *Effect of Election.*—An election is binding on the party making it, and he cannot afterwards pursue an inconsistent remedy,² though full recovery was not had in the first action;³ but it is a general principle, that an election is not binding unless made with knowledge of the circumstances of the case.⁴

III. *In Criminal Law.*—Where different felonies⁵ are charged in the same indictment, the court usually⁶ will compel the prosecution to elect under which charge it will prosecute the defendant.⁷ The court may refuse to compel an election between counts,

Franklin v. Hersch, 3 Tenn. Ch. 467; Thompson v. Graham, 1 Paige (N. Y.), 452.

It is said that an election will be compelled only where a judgment in one action would be a bar to a judgment in the other. Larassini v. Carquette, 24 Miss. 151.

One of joint defendants may compel an election. Bradford v. Williams, 2 Md. Ch. 1.

The defendant must answer before calling for an election. Dunlap v. Newman, 52 Ala. 178; Semmes v. Mott, 27 Ga. 92; Central R. Co. v. New Jersey, etc., R. Co., 32 N. J. Eq. 67.

By electing to proceed in one court, a party may waive want of jurisdiction. McBroom v. Wiley, 2 Heisk. (Tenn.) 58.

1. Separate actions to foreclose a mortgage, and to recover on the bond or note, are exceptions to the general rule. Central R. v. New Jersey, etc., R. Co., 32 N. J. Eq. 67; Morgan v. Sherwood, 53 Ill. 171. So are actions to enforce admiralty liens, and to recover on the debt. Russell v. Alvarez, 5 Cal. 48; Granger v. Judge, 27 Mich. 406; The Kalorama, 10 Wall. (U. S.) 204.

2. Bulkley v. Morgan, 46 Conn. 394; Brinley v. Tibbets, 7 Greenl. (Me.) 70; Bailey v. Hervey, 135 Mass. 172; Moller v. Tuska, 87 N. Y. 166; s. c., 9 Daly, 207; Rodermund v. Clark, 46 N. Y. 354; Morris v. Rexford, 18 N. Y. 552; Butler v. Hildreth, 5 Met. (Mass.) 49; Dibble v. Sheldon, 10 Blatchf. (U. S.) 178; Floyd v. Browne, 1 Rawle (Pa.), 121; Brewer v. Sparrow, 1 M. & R. 2.

An election is binding though the court had not jurisdiction of the cause of action. Nield v. Burton, 49 Mich. 53.

A vendor of goods who proceeds to judgment in an action on the contract of sale after knowledge of fraud will be held to have waived the tort. Lloyd v. Brewster, 4 Paige (N. Y.), 537.

A suit in attachment affirms the contract. Butler v. Hildreth, 5 Met. (Mass.) 49; Gray v. St. John, 35 Ill. 222. Compare Dean v. Yates, 22 Ohio St. 388.

The nature of the action must be determined by the pleadings. Nowling v. McIntosh, 89 Ind. 593; Chambers v. Lewis, 11

Abb. Pr. (N. Y.) 210. But mere allegations of fraudulent representations do not fix the action as in tort. Sparmann v. Keim, 83 N. Y. 245; s. c., 9 Abb. N. Cas. (N. Y.) 1.

3. Farwell v. Myers, 59 Mich. 179; s. c., 25 Am. L. Reg. 243; Voorhees v. Earl, 2 Hill (N. Y.), 288; Goss v. Mather, 2 Lans. (N. Y.) 283; Wile v. Brownstein, 35 Hun (N. Y.), 768. Compare Morford v. Peck, 46 Conn. 380; Equitable Foundry Co. v. Hersee, 33 Hun (N. Y.), 169. See also Huffman v. Hughlett, 11 Lea (Tenn.), 549; Strong v. Strong, 102 N. Y. 69.

4. Childs v. Stoddard, 130 Mass. 110; Pratt v. Philbrook, 41 Me. 132; Spread v. Morgan, 11 H. L. Cas. 588.

The form of action cannot be amended from tort to contract on the trial. Cushman v. Jewell, 7 Hun (N. Y.) 525; Storrs v. Flint, 46 N. Y. Supr. Ct. 498. See Boone, Code Pl. sec. 233.

5. State v. Nelson, 14 Rich. (S. Car.) 169; Reg. v. Lonsdale, 4 F. & F. 56; Rex v. Young, Russ. & Ry. 281.

The court will not compel an election between different indictments. Bailey v. State, 11 Tex. App. 140. Compare State v. McNeill, 93 N. Car. 552.

In some cases, election has been compelled between distinct offences, no regard appearing to be made of the distinction between felonies and misdemeanors. See State v. Morris, 45 Ark. 62; Busby v. State, 77 Ala. 66; Williams v. State, 77 Ala. 53; State v. Lawrence, 19 Neb. 307.

6. In some States, compelling an election is said to be a matter of judicial discretion, and not reviewable. Johnson v. State, 29 Ala. 62; Weinzorpflin v. State, 7 Blackf. (Ind.) 186. State v. Hood, 51 Me. 363; Commonwealth v. State, 11 Gray (Mass.), 60; State v. Leonard, 22 Mo. 449; People v. Baker, 3 Hill (N. Y.), 159; Bailey v. State, 4 Ohio St. 440; Nelson v. People, 23 N. Y. 293; Beaty v. State, 82 Ind. 228. Compare Cochran v. State, 30 Ala. 542; Rex v. Galloway, 1 Moody, 234.

7. An election is binding on a new trial. Elam v. State, 26 Ala. 48.

charging different felonies growing out of the same transaction,¹ or different counts describing the same felony,² or counts charging different misdemeanors.³

The election should be made before the case is opened for the defence.⁴ It has been required when some transaction was identified by the evidence,⁵ and sometimes permitted after all the evidence was in.⁶

IV. Under Contracts.—One who has the option of two or more ways in which to fulfil an obligation, must make his election before the time for performing the obligation passes, or the right to elect will be lost.⁷

The principal may elect to affirm or repudiate the unauthorized act of the agent.⁸

V. Under Instruments of Donation.—**I. Generally.**—Where the owner of property, by will or deed,⁹ gives it to another, and by the same instrument assumes to dispose of property of such other to a third person;¹⁰ or where, by will, ineffectual for that purpose, a testator attempts to give property to some person, and by the same will makes a valid gift of other property to one who would be entitled upon his death, intestate, to the first gift;¹¹ or where,

1. *Van Sickie v. People*, 29 Mich. 61; *Com. v. Bennett*, 118 Mass. 443; *State v. Porter*, 26 Mo. 201; *State v. Hogan*, R. M. Charl. (Ga.) 474; *Hampton v. State*, 8 Humph. (Tenn.) 69; *Dowdy v. Com.*, 9 Gratt. (Va.) 727; *R. v. Beeton*, 1 Den. C. C. 414; 2 Car. & K. 960; 3 Cox, C. C. 451. *Compare R. v. Flower*, 3 Car. & P. 413.

2. *Mayo v. State*, 30 Ala. 32; *State v. McPherson*, 9 Ia. 53; *Mershon v. State*, 51 Ind. 14; *McGregg v. State*, 4 Blackf. (Ind.) 101; *State v. Jackson*, 17 Mo. 544; *State v. Mallon*, 75 Mo. 355; *State v. Flye*, 26 Me. 312; *State v. Cook*, 20 La. Ann. 145; *Lanergan v. People*, 39 N. Y. 39; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *State v. Morrison*, 85 N. Car. 561; *Dill v. State*, 1 Tex. App. 278; *Masterton v. State*, 20 Tex. App. 574; *United States v. Dickenson*, 2 McLean (U. S.), 325; *State v. Smith*, 24 W. Va. 814; *R. v. Davis*, 3 F. & F. 19.

3. *People v. Costello*, 1 Denio (N. Y.), 83; *State v. Kibby*, 7 Mo. 317; *State v. March*, 1 Jones (N. Car.), 526; *Com. v. Manson*, 2 Ashm. (Pa.) 31; *United States v. Devlin*, 6 Blatchf. (U. S.) 71; *R. v. Jones*, 2 Camp. 131. But in some instances the court has compelled an election between misdemeanors. *Tompkins v. State*, 17 Ga. 356; *Cheek v. State*, 38 Ala. 227; *State v. Nelson*, 29 Me. 329; *Com. v. Malone*, 114 Mass. 295; *People v. Liscomb*, 60 N. Y. 559; *R. v. Fussell*, 3 Cox, C. C. 291; *State v. Lancaster*, 36 Ark. 55; *Tiedke v. Saginaw*, 43 Mich. 64.

4. *Bish. Cr. Proced.* sec. 462; *Com. v.*

O'Connor, 107 Mass. 219; *Gilbert v. State*, 65 Ga. 449.

5. *Hughes v. State*, 35 Ala. 351; *People v. Jenness*, 5 Mich. 305; *People v. Hopson*, 1 Den. (N. Y.) 574; *Stockwell v. State*, 27 O. St. 563. *Compare State v. Smith*, 22 Vt. 74; *State v. Croteau*, 23 Vt. 14.

6. *Com. v. Pierce*, 11 Gray (Mass.), 447; *R. v. Galloway*, 1 Moody, 234.

7. *Waggoner v. Cox*, 40 Ohio St. 539; *Marlow v. Texas*, etc., R., 21 Fed. Rep. 383; *M'Nitt v. Clark*, 7 Johns. (N. Y.) 465; *Husson v. Oppenheimer*, 66 How. Pr. (N. Y.) 306; *Corbin v. Fairbanks*, 56 Vt. 538.

8. *Sentell v. Kennedy*, 29 La. Ann. 679; *Hawkins v. Lange*, 22 Minn. 557; *Meyer v. Morgan*, 51 Miss. 21.

9. The rule applies to all instruments of donation. *Pom. Eq. Juris.* § 470.

10. *Sigmon v. Hawn*, 87 N. Car. 450.

In his own Right.—But the donee must be such *in his own right*, or no election is required. *Cooper v. Cooper*, L. R. 6 Ch. 15; *Grissell v. Swinhoe*, L. R. 7 Eq. 291.

Appointment under Power.—Where the appointor under a power makes a void appointment by will and a devise or bequest of his own property to the object of the power, the latter must elect between the benefits of the will and what comes to him under the power for lack of a valid appointment. *Tomkyns v. Blane*, 28 Beav. 423; *In re Fowler*, 27 Beav. 362; *England v. Lavers*, L. R. 3 Eq. 63.

11. As where real estate is devised to a

by any instrument, a person confers a benefit upon another which is intended to be in satisfaction of a claim of the donee against him,¹ the one upon whom a benefit is conferred in lieu of his interest or demand must elect either to carry out the provisions of the instruments fully, or to assert his proprietary interest or demand, and to renounce the benefits of the instrument,² or enough thereof to compensate the one disappointed by his election.³

2. *Intention of Donor.*—No election is necessary unless there appears upon the face⁴ of the instrument of donation a clear intention on the part of the donor to dispose of property not his own.⁵ If such an intention existed, it is immaterial whether the donor believed the property to belong to himself or another.⁶

Where the donor has only a partial interest in the property upon which the instrument operates, and the donee has a partial interest therein, and the donor's intention is not clear, the courts will favor the interpretation which shows an intention of the donor to give his partial interest only.⁷

stranger, and a legacy in lieu thereof to the heir. *Jones v. Jones*, 8 Gill (Md.), 197; *Kearney v. Macomb*, 1 C. E. Green (N. J.), 189; *Van Dyke's Appeal*, 60 Pa. St. 481.

But if the will is invalid for incapacity of the testator, the heir need not elect. *Tongue v. Nutwell*, 17 Md. 212; *Melchor v. Burger*, 1 Dev. & Bat. Eq. (N. Car.) 634; *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274; *Thellussum v. Woodford*, 13 Wes. 223.

1. See title, "Satisfaction."

2. *Moore v. Harper*, 27 W. Va. 362.

Where a testator in his will declared that any of his children filing a *caveat* against the will should pay the costs thereof, and a *caveat* was so filed, held that the provision of the will must give way to the statute providing for the payment of costs, and that there was no case for an election. *Hoit v. Hoit*, 40 N. J. Eq. 478.

3. *Fitzhugh v. Hubbard*, 41 Ark. 64, and cases cited under "Effects of Election."

4. Parol evidence is admissible to show the condition of the subject-matter and the surrounding circumstances; but the testator's intention to put the devisee to his election must appear from the will itself. *Fitzhugh v. Hubbard*, 41 Ark. 64; *Timberlake v. Parish*, 5 Dana (Ky.), 345; *Waters v. Howard*, 1 Md. Ch. 112; *Philadelphia v. Davis*, 1 Whart. (Pa.) 490; *Honywood v. Forster*, 30 Beav. 14. Compare *Pickersgill v. Rodger*, 5 Ch. D. 163.

5. Cases cited below.

6. *Isler v. Isler*, 88 N. Car. 581; *Stump v. Findlay*, 2 Rawle (Pa.), 168; *Cooper v. Cooper*, L. R. 6 Ch. 15.

7. *Apperson v. Bolton*, 29 Ark. 418; *Morrison v. Bowman*, 29 Cal. 348; *Worthen v. Pearson*, 33 Ga. 385; *Alling v.*

Chatfield, 42 Conn. 276; *Young v. Pickens*, 49 Ind. 23; *Metteer v. Wiley*, 34 Ia. 214; *George v. Bussing*, 15 B. Mon. (Ky.) 558; *Collins v. Carman*, 5 Md. 503; *Smith v. Guild*, 34 Me. 443; *O'Reilly v. Nicholson*, 45 Mo. 160; *Hyde v. Baldwin*, 17 Pick. (Mass.) 303; *Weeks v. Weeks*, 77 N. Car. 421; *Vernon v. Vernon*, 53 N. Y. 351; *Brown v. Brown*, 55 N. H. 106; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Cox v. Rogers*, 77 Pa. St. 160; *Chapin v. Hill*, 1 R. I. 446; *Higginbotham v. Cornwell*, 8 Gratt. (Va.) 83; *Douglas v. Feay*, 1 W. Va. 26.

The rule applies where the donor's interest is future or contingent. — *Smith v. Guild*, 34 Me. 443; *Hamblett v. Hamblett*, 6 N. H. 333; *Havens v. Sackett*, 15 N. Y. 365; *Fulton v. Moore*, 25 Pa. St. 468, — or subject to incumbrances. *Stephens v. Stephens*, 1 De G. & J. 62.

Where the donor uses general terms, as "all my lands," etc., he will be presumed to have intended to give his partial interest only. *Pratt v. Douglas*, 38 N. J. Eq. 516; *Dummer v. Pitcher*, 2 My. & K. 262; *Upsticke v. Peters*, 4 K. & J. 437. But where he uses terms which denote *entirety*, an election is necessary. *Shuttleworth v. Greaves*, 4 My. & Cr. 35; *Miller v. Thurgood*, 33 Beav. 496; *Isler v. Isler*, 88 N. Car. 581; *Penn v. Guggenheimer*, 76 Va. 839.

Dower.—A gift may be in lieu of dower, and the widow be required to elect; but where the rule is not changed by statute, the intention that the gift shall be in lieu of dower must be very clear, or no election will be necessary. *Adams v. Adams*, 39 Ala. 274; *Apperson v. Bolton*, 29 Ark. 418; *Alling v. Chatfield*, 42 Conn. 276; *Worthen v. Pearson*, 33 Ga. 385; *Metteer v.*

3. *Who may elect.* — All persons not under disabilities are entitled and bound to elect.¹ Married women may generally elect.² Infants³ and lunatics⁴ are incapable of electing.

Wiley, 34 Ia. 214; *Smith v. Guild*, 34 Me. 443; *Smith v. Smith*, 14 Gray (Mass.), 532; *Collins v. Carman*, 5 Md. 503; *Pemberton v. Pemberton*, 29 Mo. 408; *Timberlake v. Parish*, 5 Dana (Ky.), 346; *Brown v. Brown*, 55 N. H. 106; *Van Arsdale v. Van Arsdale*, 26 N. J. L. 404; *Church v. Bull*, 2 Den. (N. Y.) 430; *Lefevre v. Lefevre*, 59 N. Y. 435; *Cox v. Rogers*, 77 Pa. St. 160; *Chapin v. Hill*, 1 R. I. 446; *Gordon v. Stevens*, 2 Hill, Ch. (S. Car.) 46; *Dixon v. McCue*, 14 Gratt. (Va.) 540; *Carroll v. Carroll*, 20 Tex. 731; *Douglas v. Feay*, 1 W. Va. 26; *Herbert v. Wren*, 7 Cranch (U. S.), 370; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444.

Statutes. — By statutes in Alabama, Illinois, Kansas, Maine, Massachusetts, Maryland, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, and Wisconsin, a gift by will is presumed to be in lieu of dower, unless the contrary intention clearly appears, and the widow is put to her election. See statutes of States named; *Pom. Eq. Juris.* sec. 494; also *McGrath v. McGrath*, 38 Ala. 246; *Padfield v. Padfield*, 78 Ill. 16; *Haynie v. Dickens*, 68 Ill. 267; *Allen v. Hannum*, 15 Kan. 625; *Dow v. Dow*, 36 Me. 211; *Hastings v. Clifford*, 32 Me. 132; *Atherton v. Corliss*, 101 Mass. 40; *Reed v. Dickerman*, 12 Pick. (Mass.) 146; *Hinkley v. House of Refuge*, 40 Md. 461; *Knighton v. Young*, 22 Md. 359; *Craven v. Craven*, 2 Dev. Eq. (N. Car.) 338; *Bowen v. Bowen*, 34 Ohio St. 164; *Stilley v. Folger*, 14 Ohio, 610; *Anderson's Appeal*, 36 Pa. St. 476; *Melizer's Appeal*, 17 Pa. St. 449; *Malone v. Mayors*, 8 Humph. (Tenn.) 577; *Demoss v. Demoss*, 7 Coldw. (Tenn.) 256.

By statutes in Arkansas, Delaware, Georgia, Missouri, and New Jersey, a gift of real estate is presumed to be in lieu of dower, if the contrary does not appear; but no such presumption attaches to a gift of personality. See statutes; also *Chandler v. Woodward*, 3 Harr. (Del.) 428; *Gibbon v. Gibbon*, 40 Ga. 562; *Clayton v. Aikin*, 38 Ga. 320; *Brant v. Brant*, 40 Mo. 266; *Pemberton v. Pemberton*, 29 Mo. 408; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Stark v. Hunton*, 1 Saxt. Ch. (N. J.) 216.

Intention. — A devise of lands to the widow and others in equal shares is said to be inconsistent with a claim for dower. *Ex parte Durfee*, 14 R. I. 47; *Chalmers v. Storil*, 2 V. & B. 222; *Reynolds v. Torin*, 1 Russ. 129. Compare *Kouvalinka v. Schlegel*, 39 Hun (N. Y.), 451.

Where the testator devises part of lands to the widow, and gives directions as to the sale and disposition of the proceeds

of the remainder, the widow must elect. *Snyder v. Miller*, 67 Ia. 261; *Brokaw v. Brokaw*, 41 N. J. Eq. 304. See also *Thompson v. Burra*, L. R. 16 Eq. 592; *Goodfellow v. Goodfellow*, 18 Beav. 356; *Miall v. Brain*, 4 Madd. 119. Compare *French v. Davies*, 2 Ves. 572; *Ellis v. Lewis*, 3 Hare, 310. But where no pecuniary provision is made for the widow in addition to the lands devised to her, and the remaining lands are devised to others for their own benefit, and no sale is directed, the widow may claim dower in such lands without any election against the will. *Brown v. Brown*, 55 N. H. 106; *Mills v. Mills*, 28 Barb. (N. Y.) 454; *Lefevre v. Lefevre*, 59 N. Y. 435; *Wiseley v. Findlay*, 3 Rand. (Va.) 361; *Coldwell v. Brown*, 1 Speer's Eq. (S. Car.) 322; *Strahan v. Sutton*, 3 Ves. 249. Compare *Alling v. Chatfield*, 42 Conn. 276; *Apperson v. Bolton*, 29 Ark. 418.

The use of all the estate for life is inconsistent with dower. *In re Zahrt*, 94 N. Y. 605. See also *Endicott v. Endicott*, 41 N. J. Eq. 93.

An annuity or rent charge on land for the widow is not necessarily inconsistent with dower therein. *Hatch v. Bassett*, 52 N. Y. 359; *Smith v. Kniskern*, 4 Johns. Ch. (N. Y.) 9; *Pitts v. Snowden*, 1 Bro. Ch. 292 n.; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444. Compare *White v. White*, 1 Harr. (Del.) 202.

The widow has been allowed dower in lands taken by devise. *Metteer v. Wiley*, 34 Ia. 214; *Mills v. Mills*, 28 Barb. (N. Y.) 454. Compare *Smith v. Bone*, 7 Bush (Ky.), 367; *Cunningham v. Shannon*, 4 Rich. Eq. (S. Car.) 135; *Stark v. Hunton*, 1 Saxton (N. J.), 217.

Community Property. — The rules applicable to dower apply to the wife's interest in community property. *In re Estate of Frey*, 52 Cal. 658; *Beard v. Knox*, 5 Cal. 252.

1. *Pom. Eq. Juris.* sec. 507; *Prentice v. Janssen*, 79 N. Y. 478. Sometimes the personal representative may elect. *Dillon v. Parker*, 1 Swanst. 385.

2. *Anderson v. Abbott*, 23 Beav. 457; *Barrow v. Barrow*, 4 K. & J. 409. But not to the injury of the marital rights of the husband. *Brodie v. Barry*, 2 V. & B. 127.

3. The court may defer the election until the infant comes of age. *Boughton v. Boughton*, 2 Ves. Sr. 12. Or direct an inquiry to determine the best interests of the infant. *Bigland v. Huddleston*, 3 Bro. Ch. 285 n.; *Ebrington v. Ebrington*, 5 Madd. 117.

4. The court may direct an election. *Van Steenwyck v. Washburn*, 59 Wis. 483;

4. *Time of Election.*—In the absence of some statutory provision,¹ the time in which the right of election must be exercised is not limited,² except that there must not be such unreasonable delay as to injure rights acquired by others.³ An election will not be compelled until the party has had time and opportunity to become fully informed of the facts affecting his choice.⁴

5. *Mode of Election.*—An election may be express, or it may be implied from unequivocal acts indicating choice;⁵ but no election will be implied from the acts of a party, unless performed with knowledge of his right to elect,⁶ and of the facts affecting an intelligent choice.⁷

6. *Effects of Election.*—An election made with knowledge of the party's rights,⁸ and of the value and condition of the things between which election is made,⁹ is binding on the party and those claiming under him.¹⁰ It is not binding on those having

s. c., 48 Am. Rep. 532; *Kennedy v. Johnston*, 65 Pa. St. 451; *In re Marriott*, 2 Moll. 516.

1. The time in which a widow must elect between dower and a provision in a will is limited in many States. See statutes of Arkansas, Connecticut, Florida, Iowa, Kentucky, New Hampshire, New York, Rhode Island, and Vermont, and note to sec. 513 Pom. Eq. Juris.

2. *Dillon v. Parker*, 1 Swanst. 381; *Sopwith v. Mangham*, 30 Beav. 235.

The delay of the one having the right to elect does not bind the one having the right to compel an election. *Spread v. Morgan*, 11 H. L. Cas. 588.

3. *McCracken v. Finley*, *Sneed* (Ky.), 195; *Cooper v. Cooper*, 77 Va. 193; *Tibbitts v. Tibbitts*, 19 Ves. 663.

4. *Reaves v. Garratt*, 34 Ala. 558; *Dabney v. Bailey*, 42 Ga. 521; *Richart v. Richart*, 30 Ia. 465; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Dunlop v. Ingram*, 4 Jones, Eq. (N. Car.) 178; *Kreiser's Appeal*, 69 Pa. St. 194; *Hall v. Hall*, 2 McCord, Eq. (S. Car.) 269; *Waterbury v. Netherland*, 6 Heisk. (Tenn.) 512; *Upshaw v. Upshaw*, 2 Hen. & Mun. (Va.) 381; *United States v. Duncan*, 4 McLean (U. S.), 99; *Douglas v. Douglas*, L. R. 12 Eq. 617.

5. *Reaves v. Garratt*, 34 Ala. 558; *Sewall v. Smith*, 54 Ga. 567; *Stoddard v. Cutcompt*, 41 Ia. 329; *Clay v. Hart*, 7 Dana (Ky.), 1; *Davidson v. Davis*, 86 Mo. 440; *Whitridge v. Parkhurst*, 20 Md. 62; *Camden Mut. Ins. Co. v. Jones*, 23 N. J. Eq. 171; *Cox v. Rogers*, 77 Pa. St. 160; *Buist v. Dawes*, 3 Rich. Eq. (S. Car.) 281; *Kinnaird v. Williams*, 8 Leigh (Va.), 400; *Harcourt v. Seymour*, 2 Sim. U. S. 12, *Spread v. Morgan*, 11 H. L. Cas. 588.

The possession of both properties and receipt of the profits thereof is not an election. *Whitridge v. Parkhurst*, 20 Md.

62; *Padbury v. Clark*, 1 Macn. & G. 298. But possession of one only with receipt of profits generally is. *Dewar v. Maitland*, L. R. 2 Eq. 834.

Signing a conveyance of one's property is an election. *Warren v. Morris*, 4 Del. Ch. 289.

An election may be presumed after the lapse of many years. *Rutherford v. Mayo*, 76 Va. 117; *Penn v. Guggenheimer*, 76 Va. 839.

6. *Edwards v. Morgan*, 1 Bligh (U. S.), 401; *Briscoe v. Briscoe*, 7 Ir. Eq. 123.

7. *Penn v. Guggenheimer*, 67 Ga. 61; *Anderson's Appeal*, 36 Pa. St. 476; *Payton v. Bowen*, 14 R. I. 375; *Sopwith v. Mangham*, 30 Beav. 235.

8. A widow was permitted to elect between dower and a provision in a will after the statutory time for election had passed, where the delay was induced by the fraud of the heirs. *Akin v. Kellogg*, 39 Hun (N. Y.), 252. But ordinarily ignorance of the law will not affect the validity of an election already made. *Cox v. Rogers*, 77 Pa. St. 160; *Waterbury v. Netherland*, 6 Heisk. (Tenn.) 512.

9. An election made under mistake or ignorance of the value and condition of the properties, may be revoked in the absence of statute, and where subsequently acquired rights of others are not affected. *Evans's Appeal*, 51 Conn. 435; *Dabney v. Bailey*, 42 Ga. 521; *Richart v. Richart*, 30 Ia. 465; *Sill v. Sill*, 31 Kan. 248; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448; *Elbert v. O'Neil*, 102 Pa. St. 302; *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 294; *Dillon v. Parker*, 1 Swanst. 359.

10. *Cannon v. Apperson*, 14 Lea (Tenn.), 553; *Cory v. Cory*, 37 N. J. Eq. 198; *Whitley v. Whitley*, 31 Beav. 173; *Dewar v. Maitland*, L. R. 2 Eq. 834.

an equal right to elect,¹ or entitled in remainder to the property.²

If a party elects to take against an instrument of donation, a court of equity will compensate the one disappointed by such election from the benefits intended for the refractory donee, but any surplus after such compensation will be restored to the latter.³

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An election in favor of a will precludes the widow's allowance. *Estate of McManus*, 14 Phila. (Pa.) 660.

A widow so electing cannot claim a preference over other creditors of the husband's estate. *In re Beekman*, 3 Dem. (N. Y.) 619.

1. *Fytche v. Fytche*, L. R. 7 Eq. 494; *Ward v. Baugh*, 4 Ves. 623.

2. *Long v. Long*, 5 Ves. 445; *Ward v. Baugh*, 4 Ves. 623.

3. *Pom. Eq. Juris.* sec. 468; *Estate of Delaney*, 49 Cal. 77; *Wilbanks v. Wil-*

banks, 18 Ill. 17; *Marriott v. Sam Badger*, 5 Md. 306; *Roe v. Roe*, 21 N. J. Eq. 253; *Maskell v. Goodall*, 2 Disney (O.), 282; *Sandoe's Appeal*, 65 Pa. St. 314; *Key v. Griffin*, 1 Rich. Eq. (S. Car.) 67; *Gretton v. Haward*, 1 Swanst. 409, 433; *Pickersgill v. Rodger*, 5 Ch. D. 163.

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 13. *Action for Penalties*, 444.
- XXIV. *Meaning of Phrases*, 445.
- XXV. *Illegal Contracts*, 445.
 1. *What Contracts are void*, 445.
 2. *Wagers*, 446.

I. Definition. — An election signifies a choice ; but, in speaking of the law of elections, it will be limited to the choice of persons for political offices by the vote of the people, or of a somewhat numerous body of electors, as distinguished from an appointment by a single person,¹ and to the determination of questions submitted by law to the popular vote. Of this latter class, which are called elections in the statutes, and the reports of cases, are such questions as the location of county-seats, the adoption of municipal charters, questions of local option, and of incurring municipal indebtedness.

II. Qualifications of Voters. — 1. *Suffrage not a Natural Right.* — The right of suffrage is a political, and not a natural, right ; and there have always been limitations upon its exercise, even in the most liberal democracies. In nearly all countries the right has been denied to females, minors, aliens, and persons *non compos mentis*. In England, at an early day, the right to vote for member of Parliament was limited to those possessed of a certain property qualification ; and, in a number of the States of this country, the right of suffrage depends upon the possession of a certain amount of property, or upon the payment of taxes ; and in some, upon the ability to read and write.²

2. *How the Franchise is extended or restricted.* — Where a certain rule for the exercise of the right of suffrage has become a part of the fundamental law of the land, the right can only be extended or restricted in a democratic form of government, by the consent of the majority of those who already possess it, or by revolution.³ Where the qualification is fixed by the constitution of a State, it can only be changed by an amendment to that constitution ; but in this country, when, by an amendment to the Federal Constitution, a State is forbidden to restrict the right of suffrage as to certain classes, this operates to confer the right of suffrage upon the classes mentioned, without an amendment to the State Constitution.⁴

3. *Right controlled by States under the Federal Constitution.* — Before the adoption of the Fifteenth Amendment to the Federal Constitution, the right of suffrage was under the exclusive control of each State, so far as State officers were concerned ;⁵ and

1. Abbott's Law Dict. Art. Elections ; Police Comrs. v. Louisville, 3 Bush (Ky.), 602.

2. It is said by Judge Cooley (Const. Lim. *589), that "Participation in the elective franchise is a privilege rather than a right, and it is granted or denied upon grounds of general policy."

3. Cooley, Const. Lim. *30.

4. **Adoption of Amendments.** — Thus, the adoption of the Fifteenth Amendment to the Federal Constitution gave the right to vote to all persons who had not been permitted to vote because of their color, if they pos-

sessed the other necessary qualifications, without amendments to the constitutions of those States, which conferred the right to vote only upon white citizens. *Yarborough Ex p.* 110 U. S. 651 ; *U. S. v. Reese*, 92 U. S. 214.

5. *Ridley v. Sherbrook*, 3 Coldw. (Tenn.) 569. In the case of *Huber v. Reilly*, 53 Pa. St. 112, *Strong, J.*, says, "It is not to be doubted that the power to regulate suffrage in a State, and to determine who shall, and who shall not, be a voter, belongs exclusively to the State itself. The Constitution of the United States confers no

the only limitation upon this control was, that no State could prevent one who was qualified to vote for members of the Lower House of the State Legislature from voting for representatives in Congress.

4. *Right to vote for Member of Congress.* — Under the provisions of sect. 2 of art. 1 of the Federal Constitution, the right to vote for representative in Congress, is made to depend upon the possession of the qualification required by the State of one's residence to permit one to vote for the members of the most numerous branch of the State legislature: so that, while Congress has power, by virtue of sect. 4 of the same article, to prescribe rules for the time, place, and manner of choosing representatives, it has no power to interfere with qualifications of the electors, except as that power is given by the Fourteenth and Fifteenth Amendments to the Constitution.¹

5. *Effect of Constitutional Amendments.* — Sect. 1 of the Fourteenth Amendment to the Constitution of the United States

authority upon Congress to prescribe the qualifications of electors within the several States which composed this Federal Union. The right of suffrage at a State election is a State right, a franchise conferrable only by the State, which Congress can neither give nor take away."

In the case of *Morris v. Campbell*, 3 Har. & M. (Md.) 554, it was *held* that the provision of the Constitution of the United States, that "The citizens of each State shall be entitled to the privileges and immunities of citizens of the several States" (art. 4, sec. 2), is to be given a limited and not a full operation, and that it does not confer the right to vote or to hold office. See also *Murray v. McCarty*, 2 Munf. (Va.) 398; *Austin v. State*, 10 Mo. 591.

In the case of *Anderson v. Baker*, 23 Md. 531, Chief Justice Bowie says, "The regulation of the right of suffrage has been reserved by the States to themselves, and was not delegated to the General Government by the Federal Constitution." In this case it was *held*, that the right of suffrage was the creation of the organic law, and might be modified or withdrawn by the same authority which conferred it without being considered as the infliction of any punishment upon those who are disqualified; and the same doctrine is laid down in *Blair v. Ridgely*, 41 Mo. 63.

In *State v. Staten*, 6 Coldw. (Tenn.) 233, the doctrine was laid down that while a State could confer the right of suffrage, or take it away from any one who had it, subject to the restrictions of the Federal Constitution, yet when an elector had complied with the provisions of the law, and thereby gained a right to vote at a particular election, this was a vested right; and that while the legislature might change the

qualifications for a voter, it could not deprive the person of the right to vote at that election.

1. *Boynton v. Loring*, 5 Cong. El. Cases, 346. In this case it was *held* that Congress had no power to judge of the policy of that provision of the Constitution of Massachusetts which required a person to be able to read and write in order to vote, but must be governed by the State law.

In the case of *Burch v. Van Horn*, 3 Cong. El. Cases, 205, in a report which was adopted unanimously, it was *held* that the right of a State by a new constitution to require all persons to take an oath that they have not done certain acts, and that they have been loyal to the United States as a prerequisite to registration, and to the right to vote, was absolute, and was not forbidden by the principle of the decision in the case of *Cummings v. Missouri*, 4 Wall. (U. S.) 277, which *held* that the provisions of this same constitution forbidding persons from engaging in certain avocations without taking this oath, were, in effect, *ex post facto*, and void.

Judge Poland, in the report of the committee in speaking of the right of suffrage, says, "When once granted, it is not a vested irrevocable right, but it is held at the pleasure of the power that gave it; and the State may, by a change of its fundamental law, restrict as well as enlarge it. When, therefore, the State of Missouri, in changing its constitution, saw fit to declare that the interests of the State and the people of the State would be promoted by withholding the right of voting from all persons who could not take the required oath, they exercised no greater or higher power than exists in every State."

provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

The second section provided that if any State should deny, the right to vote to male citizens of the United States above the age of twenty-one years, except for participation in the rebellion, or other crime, its representation in Congress should be reduced in proportion to the number of citizens so disfranchised compared with the whole number of adult male citizens.

Art. 15 prohibits the denial or abridgement of the right of suffrage on account of race, color, or previous condition of servitude.

It may be considered as settled, that the Fourteenth Amendment did not confer the right of suffrage upon any person, nor affect the power of the States to determine who may vote within their limits.¹

It is equally true, that the provisions of the Fifteenth Amendment do not extend beyond the particular classes named in the amendment, nor affect the power of the State to make any restrictions not based upon race, color, or previous condition of servitude.² But they did have the effect to abrogate the restrictions in the constitutions of the States, which were based upon those conditions.³

1. *Van Valkenburg v. Brown*, 43 Cal. 43; *Minor v. Happersett*, 53 Mo. 58; *id.* 21 Wall. (U. S.) 162.

In *United States v. Anthony*, 11 Blatchf. (C. C.) 200, it was held that this amendment did not abrogate the provision of a State constitution, restricting the right of suffrage to males.

2. It was held, in the case of *Van Valkenburg v. Brown*, 43 Cal. 43, that the Fifteenth Amendment did not affect the right of a State to exclude persons from voting on account of sex; and in *Anthony v. Haldeman*, 7 Kan. 50, that it did not give negroes the right to vote independently of such qualifications as residence, required of the whites.

The question as to the limitations of the Fifteenth Amendment has arisen several times in cases under the act of Congress of May 30, 1870; and it was held in *McIlwee Ex p. Brightly's El. Cases*, 65, that this act did not interfere with any State law, except so far as it was founded upon the distinction of race, color, or previous condition of servitude; and that an officer who refused to permit a person to vote for State

officers because he did not possess other qualifications required by the State law, could not be tried by the United States courts, for his judgment as to the qualification of the voter under the State laws. See also *McKay v. Campbell*, 2 Abb. (U. S.) 120.

The language of the act is broad enough to apply to such cases, and Judge Jackson of the district court of West Virginia so construed it in a charge to the grand jury (*Brightly's El. Cases*, 67, note); but for this reason it was held to be unconstitutional so far as it applied to the State or local elections by the Supreme Court of the United States, in *U. S. v. Reese*, 92 U. S. 214.

3. *Wood v. Fitzgerald*, 3 Oregon, 568; *United States v. Cruikshank*, 96 U. S. 542.

As to whether the second section of the Fourteenth Amendment, in regard to the reduction in the representation in Congress, is to extend to cases where other than the colored citizens have been denied the right to vote by State law, has been rendered doubtful by the language of *Justice Miller* in the *Slaughter-House Cases*, — 16 Wall.

6. *Constitutional Qualifications Exclusive.* — In all but one or two of the States, the qualifications of the electors are fixed by the constitution; and, where this is so, the legislature has no power to require any other or different qualifications from those embodied in the constitution.¹

7. *Application to Registry Law.* — While a registry law may be passed which is reasonable in its requirements, and such a law is held not to abridge the right of voting, yet the regulations must be subordinate to the enjoyment of the right which is to be regulated. The right must not be impaired by the regulations: it must be regulation merely, and not destruction under the pretence of regulation.²

8. *Extension of Constitutional Right.* — The legislature cannot extend the right of suffrage to those not possessed of the constitutional qualifications, nor permit it to be exercised in a different way from that prescribed in the constitution.³

9. *Qualification of Citizenship.* — In most of the States a person must be a citizen of the United States in order to vote; but in *Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Nebraska, Oregon, and Wisconsin*, a person having the other qualifications

(U. S.) 36, — where he says, "The Fourteenth Amendment is so clearly a provision for the colored race, that a strong case would be necessary for its application to any other;" and the question has not been settled by any case before the House of Representatives.

1. *State v. Adams*, 2 Stew. (Ala.) 239.

An act of the legislature, which required election officers to reject the ballots of those who had been registered as deserters from the military service of the United States, when they had not been convicted, was held to be unconstitutional. *McCafferty v. Guyer*, 59 Pa. St. 109.

Where the constitution merely requires residence in a precinct, a legislature cannot require that the residence shall have been for a stated period, — *Quinn v. State*, 35 Ind. 485, — nor that it shall have been for a period immediately preceding the election. *State v. Tuttle*, 53 Wis. 45. And where the time of residence is fixed in the constitution, it cannot be extended in a particular class of cases. *People v. Canaday*, 73 N. Car. 198.

This principle applies as well to special as to general elections. *State v. Williams*, 5 Wis. 308; *State v. McLean*, 9 Wis. 279. But in Kentucky it was held, that an act which made the payment of taxes a condition of the right to vote for town officers, where there was no such provision in the constitution, was valid, upon the ground that the provision of the constitution did not apply to municipal elections. *Buckner v. Gordon*, 81 Ky. 665.

It has also been held that a law requiring a person to vote in the district of his residence, is valid where the constitution gives the right to vote when the person had resided a certain time in the State and county. *Dyson v. Pope*, 71 Ga. 205. And where the law provided that any person holding a certain office should not vote for other officers, unless there was a tie, in which case he should have the casting vote, it was held to be valid upon the ground that a citizen might waive a constitutional privilege by the acceptance of an office. *State v. Adams*, 2 Stew. (Ala.) 231.

2. *Page v. Allen*, 58 Pa. St. 338.

When a person is required to take an oath which embraced a qualification different from the constitutional one, as a condition of registration the condition was held invalid. *Davis v. McKeeby*, 5 Nev. 369; *Clayton v. Harris*, 7 Nev. 64. And it has also been held that the legislature has no right to prescribe an oath that a person had not been guilty of acts by which he would forfeit his right of suffrage, and authorize the officers to consider the refusal to answer as equivalent to a conviction of the offence. *Burkett v. McCarty*, 10 Bush (Ky.), 758.

This will not, however, invalidate a requirement that the voter shall take an oath as to his residence or citizenship, as a condition of registration. *People v. Hoffman*, 116 Ill. 587.

3. *Chase v. Miller*, 41 Pa. St. 403; *Bourland v. Hildreth*, 26 Cal. 161; *Twitchell v. Blodgett*, 13 Mich. 127.

may vote if he has declared his intention to become a citizen before the proper courts.

In *Illinois*, aliens who had resided in the State before 1848, in *Michigan* those who resided in the State before 1835, or had declared their intention to become citizens before 1850, and in *California* citizens of Mexico who resided in the State, and who had elected to become citizens, are allowed to vote.

In *Pennsylvania*, in some of the local elections, residents were allowed to vote without regard to citizenship.

10. *Citizenship: what constitutes.* — By the first section of the Fourteenth Amendment to the Federal Constitution, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are declared to be citizens of the United States, and of the States wherein they reside.

Before the adoption of this amendment, it was held, in *New York*, that the common-law doctrine that the place of birth, and not nationality of the parents, determined the citizenship of the child, was in force in the United States.¹

It was also held that the children of American parents born abroad during a temporary sojourn of their parents, are citizens of the United States.² And this is the doctrine of the Continental writers upon international law.³

There is a decided contradiction between the doctrines that the child of foreign parents, born while its parents were temporarily sojourning here, is an American citizen, and that held by the civilians that the children take the *status* of the father, and that the children of an American father born abroad are American citizens.

As the question of citizenship is a national one, and as there is no common-law doctrine in national affairs,⁴ if the question should arise as to the power of this government to compel a person born of foreign parentage to bear arms, it would depend for its solution on the rules of international law.

The qualification in the Fourteenth Amendment, "subject to the jurisdiction thereof," undoubtedly excludes children born in the United States, whose fathers were in the diplomatic service of any foreign government, as they would not be considered as subject to jurisdiction of the United States.⁵ But a serious ques-

1. *Lynch v. Clark*, 1 Sanf. Ch. (N. Y.) 584; *Munro v. Merchant*, 26 Barb. (N. Y.) 383.

2. *Ludlam v. Ludlam*, 31 Barb. (N. Y.) 486; *Sasportas v. De La Motta*, 10 Rich. Eq. (S. Car.) 38; *Davis v. Hall*, 1 Nott. & M. (S. Car.) 292; *Campbell v. Wallace*, 12 N. H. 362; *State v. Adams*, 45 Iowa, 99; *Old Town v. Bangor*, 58 Me. 353.

This view prevails in Canada, *Stormont Case*, *Hodgins' El. Cases*, 21; *Lincoln Case*, *Hodgins' El. Cases*, 571; and England, *Dundalk Case*, 1 P. R. 2 D. (Eng. El. Cases) 89.

3. *Vattel*, § 212; *Savigny*, *Private Int. Law*, 351.

4. In the case of *Wheaton v. Peters*, 8 Pet. (U. S.) 657, it was said, "It is clear that there can be no common law of the United States;" and again, "There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of the federal system only by legislative adoption."

5. *Wheaton*, *International Law*, § 224.

tion arises as to the *status* of the children of aliens merely visiting in, or passing through, the United States, who would be subject to the criminal jurisdiction of the United States, and of the States through which they pass, where they were not subjects of, or subject to, the political jurisdiction of the United States.

In the first section of the Civil Rights Bill¹ we have a legislative exposition of the meaning of this phrase by the same Congress which framed the amendment, this act providing that "All persons born in the United States, and not subject to any foreign power, are declared to be citizens of the United States."

Under the principles of international law, as above set forth, there is no doubt that the children of aliens temporarily sojourning here would be subject to the power of the native State of the father, and therefore not included in the class of those who are citizens of the United States by birth; and this view seems to be upheld by the weight of authority in the courts of the United States, although the decisions are conflicting.²

1. Rev. Stat. U. S. § 1992.

2. The Supreme Court of the United States, in the Slaughter-House cases, 16 Wall. (U. S.) 73, sustained this doctrine where the opinion says that the phrase, "subjected to the jurisdiction thereof," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

In the case of Look Tin Sing, 21 Fed. Rep. 905, a Chinese boy, who was born of parents residing in this country, had been sent by them to China, and upon his return it was sought to prevent him from landing by virtue of the act to prevent the landing of Chinese laborers in this country. It was held that the boy was a citizen of this country. *Justice Field*, who delivered the opinion, speaking of the first section of the Fourteenth Amendment, said, "This language would seem sufficiently broad to cover the case of the petitioner: he is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words, 'subject to the jurisdiction thereof.' They alone are subject to the jurisdiction of the United States, who are within their dominions, and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subjected by birth or naturalization are within the terms of this amendment."

The exceptions made by the judge are the children of persons in the diplomatic service of foreign governments, upon the ground that their residences are, by fiction of law, deemed to be a part of their own country, and children born on foreign vessels in our ports, and persons who have expatriated themselves.

In a case decided about two months afterward in the Supreme Court of the United States, — *Elk v. Wilkins*, 112 U. S. 94, — this subject is discussed, and the language of the opinion is strongly against the view that birth alone will confer citizenship.

Mr. Justice Gray, in speaking of the first section of the Fourteenth Amendment, says, "This section contemplates two sources of citizenship, and two sources only, — birth and naturalization. The persons declared to be citizens are, 'All persons born or naturalized in the United States, and subjected to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do for the time of naturalization in the other.

"Persons not thus subject to the jurisdiction of the United States at the time of birth, cannot become so afterwards except by being naturalized, either individually, as by proceedings under the naturalization act, or collectively, as by force of a treaty, by which foreign territory is acquired."

There may be a middle view; and that is, that a person born in a country of alien parents, might, when of age, elect as to which country he would choose to be a citizen. Under the view held by the statesmen in this country, he could do this upon the ground that the right of expatriation is recognized. See case of Look Tin Sing, 21 Fed. Rep. 905, and opinion of Attorney-General Black, cited therein; *Stoughton v. Taylor*, 2 Paine (C. C.), 655. It is said by an able writer, that this view prevails in

11. *Fourteenth Amendment only Declaratory.* — There can be no doubt, that, if the above interpretation is correct, the first section of the Fourteenth Amendment is only declaratory of the principles, not of the common law, — for, as we have seen, there can be no common-law doctrine in national affairs, — but of the principles of international law.¹

12. *Effect of Slavery of Parents.* — Where persons born in the state of slavery, escaped to Canada, where a son was born to them, it was held that he could not exercise the rights of a citizen upon coming to this country.²

13. *Persons of Color.* — Since the adoption of the Fourteenth and Fifteenth Amendments, there is no doubt that children of slaves born in the United States are citizens; ³ but, before the adoption of those amendments, it was a doubtful question, whether children of free persons of color, whose ancestors had been slaves, were citizens, the authorities being in conflict upon that point; ⁴ and it was also a question of doubt what was the *status* of the persons freed by the Thirteenth Amendment before the adoption of the Fourteenth.⁵

14. *Presumption of Citizenship from Residence.* — It has been held in an early case in Indiana, that a presumption of citizenship will be raised by proof of the fact that the party was a resident of this country unless alienage was proved; ⁶ and where a resident of this country had removed to another country where a son was born to him, it was held that in the absence of proof that the father had been an alien, it would be presumed that the child was a citizen of the United States.⁷

15. *Naturalization.* — Congress having enacted laws for a uni-

England and Portugal, though not admitted by other Continental writers on international law. Hall on Intern'l Law, § 68.

1. This view is upheld, so far as white persons are concerned, by the Supreme Court of California; by which it was held that no white person born within the United States, or naturalized under its laws, owed his *status* of citizenship to the recent amendments. *Van Valkenburg v. Brown*, 43 Cal. 43.

2. *Hodgman v. Board of Registration*, 26 Mich. 51. His parents, being slaves, were not recognized as citizens; and their children born abroad were not considered as within the provisions of the act of Congress of 1802, and the case was not covered by either the Fourteenth or the Fifteenth Amendment.

3. *United States v. Canter*, 2 Bond. (C. C.) 389.

4. In *Pendleton v. Baker*, 6 Ark. 509; *Cooper v. Major*, 4 Ga. 68; *State v. Claiborne*, 1 Meigs (Tenn.), 311; and in the opinion of Chief Justice Taney, in *Dred Scott v. Sanford*, 19 How. (U. S.) 397, it

was held that such persons were not citizens, while the contrary view was maintained in *Smith v. Moody*, 26 Ind. 299. Opinion of Justices, 44 Me. 506; and Opinion of Judges, 32 Conn. 563.

5. Since the adoption of the Thirteenth Amendment, it was held, in 1866, in the case of *U. S. v. Rhoades*, 1 Abb. (U. S.) 28, that the opinion in the *Dred Scott* case was only *dictum* upon the question of the *status* of free negroes, and that the emancipation of a slave by this amendment removed the disability of slavery, and made him a citizen of the United States; but in the case of *Marshall v. Donovan*, 10 Bush (Ky.), 681, it was held, that, under the laws existing between the adoption of the Thirteenth and that of the Fourteenth Amendment, negroes could not become citizens.

6. *State v. Beackmo*, 6 Blackf. (Ind.) 488. But in Canada it was held, that when proof of foreign birth is made, the burden shifts, and it must be shown that the voter was naturalized. *Lincoln Case*, *Hodgins' El. Cases*, 511.

7. *Campbell v. Wallace*, 12 N. H. 362.

form system of naturalization, no State can pass any law to confer citizenship of the United States.¹ The person desiring citizenship must, unless he has lived in the country three years during his minority, or has enlisted in the army or navy of the United States, and been honorably discharged therefrom,² make a declaration of his intention to become a citizen before a court of the United States, or a court of record of a State or Territory.³ The residence of a party must be proved by testimony other than his own oath.⁴

The pardon of a man convicted of felony does not render him a man of good moral character so as to entitle him to naturalization.⁵

16. *What Courts may naturalize.* — It is not necessary that a court shall possess all common-law jurisdiction; it is sufficient if it has common-law jurisdiction in a certain class of cases;⁶ but it must be a court of record for all purposes,⁷ and must have a clerk distinct from the judge.⁸

While Congress has conferred the power of naturalization upon certain State courts, there seems to be a doubt as to whether they can act in this manner, without a State law, also authorizing such action.⁹

17. *Children of Naturalized Persons.* — It has been held that the act of Congress of 1802 is prospective as well as retrospective in its operation, and that the minor children of a naturalized person who resides in the United States become citizens by the father's naturalization.¹⁰

1. *Chirac v. Chirac*, 2 Wheat. (U. S.) 269; *Lantz v. Randall*, 4 Dill. (C. C.) 425. But in an early case it was held that the power of Congress and of the States over naturalization was concurrent. *Collet v. Collet*, 2 Dall. (U. S.) 294. And in *Wisconsin* it was held that each State being sovereign in matters not referred to the General Government, as a result of such sovereignty it may confer a right of citizenship in that State upon any person it pleases, although he will not thereby become a citizen of the United States. *Wehlitz Re*, 16 Wis. 444. Granting the right, however, to vote and hold office in a State, will not make the party a citizen of the State. *Lantz v. Randall*, 4 Dill. (C. C.) 425.

2. A person who has served in the navy is treated as though he had served in the "army," so as to entitle him to naturalization after one year's residence. — *Stewart Re*, 7 Robt. (N. Y.) 635; — but not when he has served in the Marine Corps. *Baily Re*, 2 Sawyer (C. C.), 200.

3. The power to naturalize is a judicial power, and must be exercised by the court, and not by the clerk. *Clark Re*, 18 Barb. (N. Y.) 444. But the declaration of intention may be made before the clerk. *Butterworth Case*, 1 Woodb. & M. (U. S.) 323.

4. *Rev. Stat. U. S.* 165; *Anon.* 7 Hill (N. Y.), 137.

5. *Spencer Re*, 5 Sawyer (C. C.), 195.

6. *Cragg Ex p.* 2 Curtis, 98; *State v. Whittemore*, 50 N. H. 245; *People v. McGowan*, 77 Ill. 644. But compare *Mills v. McCabe*, 44 Ill. 194.

7. *People v. McGowan*, 77 Ill. 644.

8. *State v. Webster*, 7 Neb. 469.

9. It has been held in *California*, that no State court had this power, unless it was conferred by the State law. *Knowles Ex p.* 5 Cal. 300. And in *New Hampshire*, *Beavin's Case*, 33 N. H. 89, that no State court was competent to naturalize if prohibited by a State law; and while on principle it might be considered doubtful whether Congress would confer any judicial power on the State courts, yet this power to naturalize has been expressly upheld in *State v. Penney*, 10 Ark. 621; and it is probable that this view would be taken by all the courts to avert the results which would follow a contrary decision.

10. *West v. West*, 8 Paige (N. Y.), 433; *Morrison Re*, 22 How. Pr. (N. Y.) 99; *State v. Penney*, 10 Ark. 621; *O'Connor v. State*, 9 Fla. 215; *Dale v. Irwin*, 78 Ill. 170. But compare *Brown v. Shilling*, 9 Md. 74.

Even the minor child of an alien woman who married a naturalized citizen of the

18. *Regular Certificate not impeached collaterally.* — Where a certificate of naturalization has been regularly issued to a person by a court of competent jurisdiction, the general rule is, that it is in the nature of a judgment, and his right to vote cannot be called in question in an election contest.¹ In some of the States the rule is, that the certificate makes a *prima facie* case of the person's right to vote, and that the election officers cannot go behind it.²

When, however, the record shows on its face that the law had not been complied with, and that the person holding the certificate is not entitled to it, it may be assailed in any proceeding.³ When the certificate is not issued in court, this fact may be shown, and the vote cast by the holder rejected; and where there was no hearing by the court, the certificate is void;⁴ but the judicial function extends no farther than to the decision of the question, whether the applicant has proven his right to be admitted to citizenship; and the filing of the papers and issuing the certificates are merely ministerial acts, and may be done by the clerk.⁵

19. *Citizenship by Acquisition of Territory.* — When territory is acquired by purchase or conquest from a foreign country, in the absence of a treaty stipulation to the contrary, the inhabitants of

United States has been *held* to be a citizen. *United States v. Kellar*, 11 Bissell (C. C.), 314.

The illegitimate minor children of a naturalized person do not become citizens by his naturalization. *Guyer's Lessee v. Smith*, 22 Md. 239. But where the mother of the child is the wife of the adopted father, and the child is a member of their family, it will be presumed that he became a citizen; and the courts, in a contested election case, will not investigate a charge that he was illegitimate. *Dale v. Irwin*, 78 Ill. 170.

1. *People v. Pease*, 30 Barb. (N. Y.) 588. In the absence of fraud, an order admitting a person to citizenship is conclusive on the question of residence for the required time. *The Acorn*, 2 Abb. (U. S.) 434. And it is conclusive in a collateral proceeding, that the preliminary steps required had been taken. *People v. McGowan*, 77 Ill. 644.

In the case of *Wigginton v. Pacheco*, 5 Cong. El. Cases, 16, a person holding a certificate of naturalization, admitted that it had been procured by false and perjured testimony; but the committee, in a report upheld by the House, decided that admission was not competent as testimony. Speaking of the person, they say, "His papers were issued by a court of competent jurisdiction, were regular in every respect; and upon the evidence before the court at the time, the court decided rightly, Your committee are of the opinion that the

papers issued in this manner cannot be attacked in a collateral proceeding." In the recent case of *Campbell v. Morey*, — 48 Cong. H. Rep. No. 1845, — however, a committee, without discussing the legal question, deducted the votes of naturalized persons who were shown not to have been in the country the requisite time, although they had voted for the party of the majority of committee.

2. *People v. Walch*, 9 Abb. N. Cas. (N. Y.) 465; *Com. v. Lee*, 1 Brews. (Pa.) 273; *Com. v. Sheriff*, 1 Brews. (Pa.) 183; *Com. v. Leary*, 1 Brews. (Pa.) 270.

3. When it appeared from the record that the alien had not declared his intention the requisite length of time before the application, and that the court had mistaken the certificate of registration, of his arrival in the United States, for that of his declaration of intention, his naturalization was *held* to be invalid. *Banks v. Walker*, 3 Barb. Ch. (N. Y.) 438.

4. When the evidence showed that the declarations had been filled out in blank, and the oaths afterward administered by a justice of the peace, the certificates were *held* void; — *State v. Stumpf*, 23 Wis. 630, — and it was also so *held* when it was shown that there was no hearing by the court. *People v. Sweetman*, 3 Parker, Cr. Cas. (N. Y.) 358; *Van Wyck v. Greene*, 3 Cong. El. Cases, 631; *McCrory on El.* (2d ed.) § 21.

5. *Campbell v. Morey*, 48 Cong. H. Rep. No. 1843.

the acquired district who remain there, become citizens of the United States without naturalization.¹

By the provisions of the treaty with Mexico, at the close of the Mexican war, the inhabitants of the territory ceded by Mexico to the United States had the privilege of remaining Mexican citizens, by making known their elections so to do within one year; and as the treaty prescribed no way of signifying such election, and none was provided by act of Congress, it was held that filing a declaration of such election with the Territorial courts in accordance with a proclamation of the governor of the Territory was sufficient, and that persons who had filed such declarations were not entitled to vote for delegates to Congress;² and that, in the absence of such a proclamation, a formal declaration made before a court of record would have been sufficient.³

20. *When Naturalized Citizens may vote.* — An alien otherwise qualified becomes a voter as soon as he is naturalized, and, unless required to be registered a certain length of time before election, may vote as soon as he becomes a citizen.⁴

21. *Mental Qualifications for voting.* — A number of States have constitutional provisions disqualifying idiots, lunatics, persons *non compos mentis*, and those under guardianship, from voting, and it seems at common law this disqualification prevails as to idiots and lunatics;⁵ but where a lunatic has lucid intervals, so as to be able to comprehend the questions put to him, he is entitled to vote during those intervals.⁶

As to the degree of mental capacity required of a voter, Judge McCrary says,⁷ "Where a vote is attacked on the ground that the voter who cast it is *non compos mentis*, it is necessary to establish

1. Thus, it was held that persons who resided on the disputed land-claims by *Maine and Canada*, were made citizens by the treaty of 1842 which settled the boundary. Opinions of Justices, 68 Me. 589. And a native of *Saxony*, who was a resident of *Louisiana* when that territory was ceded to the United States, and who afterward removed to *Pennsylvania*, was held to be entitled to vote without naturalization. *Harold Re*, 1 Pa. L. J. Rep. 214. And see *Tobin v. Walkingshaw*, McAll (C. C.), 186.

2. *Otero v. Gallegos*, 2 Cong. El. Cases, 176.

3. *Carter v. Territory*, 1 N. Mex. 317. In this case, however, it was held that a paper declaring the intention of a person to remain a citizen of Mexico, proved to be in his handwriting, and contained in a book produced from the office of the secretary of the Territory, but without any evidence that the book was kept in accordance with any proclamation, and without any evidence of the time or place of signing, or that the parties ever appeared before a

court of record for that purpose, was not sufficient to show an election to remain a citizen of Mexico.

4. Anon. 1 Brews. (Pa.) 158; 2 Brews. (Pa.) 738.

In Tennessee it was held that as a person of foreign birth is not a citizen until naturalized, he cannot vote at any election in the State unless he has resided in the county six months after his naturalization, and next preceding the election, — *State v. Clocksey*, 5 Sneed (Tenn.), 586, — but this is contrary to the general practice in the other States. And in Massachusetts it was held that the legislature had no authority to require a residence of thirty days after naturalization before the party can be registered. *Kineen v. Wells*, 144 Mass. 497.

5. 1 Bl. Com. 303; *Male on Elect.* 165, 242; *Heywood County Elect.* 259; *Thompson v. Ewing*, 1 Brews. (Pa.) 104; *Covode v. Foster*, 3 Cong. El. Cases, 610.

6. *Orme on Elect.* 101; 1 *Rogers on Elect.* 104; *Bishop's Castle Case*, *Heywood's County Elect.* 260.

7. *Am. Law of Elect.* § 50.

satisfactorily, by competent evidence, the alleged want of intelligence; and the test will probably be about the same as in cases when the validity of a will is attacked, on the ground that the testator was not of sound mind when it was executed."

It may, however, be doubted whether the authorities would require such a degree of intelligence as would be necessary to make a will, and whether it would not be sufficient if he understood for what party and person he wished to vote.¹

22. *Deaf and Dumb Persons.* — Although the early writers on election held that deaf and dumb persons were not qualified voters,² there is now no doubt, that, if they are otherwise of sufficient mental capacity, they are competent to vote.³

23. *Property Qualification.* — *Pauperage.* — By the common law, the receipt of alms as a pauper from the parish authorities was held to disqualify a person from voting for a member of Parliament. But the alms must have been received within one year preceding the election; ⁴ and this did not extend to alms given upon extraordinary occasions, — such as an accidental injury, or to a case of sickness in time of an epidemic.⁵

In this country, in the absence of express provisions in the Constitution, pauperage is not a disability, when the vote is offered at the proper place.⁶

When a person has been a pauper, or under guardianship, he may vote as soon as his disability is removed.⁷

24. *Freeholders.* — When an estate of freehold is required as a condition of voting, it is the rule in England that an equitable estate is sufficient, if the party is in possession, and enjoying the rents and profits; ⁸ but, in two early Congressional cases, the votes

1. In an early English case, *Oakhamp-ton Case*, 1 *Fras.* (El. Cases) 166, the person whose vote was objected to, was upwards of seventy-five years of age, was affected with a paralytic tremor, and was extremely disconcerted by the noise at the poll; and when the officers asked him for whom he wished to vote, he could not answer, but named two former candidates; but upon the noise being quieted, in answer to a question by his wife he named the candidates of one party, for whom he had promised to vote; and it was *held* that his vote was good.

In the *Bridge-water Case*, 1 *Peckw.* (El. Cases) 106, the voter's mind had become disordered, so he frequently lost his memory, his knowledge of accounts, and of the value of money, so he could do but little at his trade; but he took an active part at the election in favor of his candidate, and his vote was *held* good.

In the case of *Sinks v. Reese*, 19 *Ohio St.* 306, it was *held* that the court below erred in rejecting the vote of a person whose faculties had become greatly enfeebled by age. *Judge Brinkerhoff* says,

"This is not a legal disqualification, and the reverence which is due to the hoary head ought to have left his vote unquestioned;" and the Supreme Court of Illinois, in the case of *Clark v. Robinson*, 88 *Ill.* 498, *held* that a mental hallucination or illusion, if it did not disqualify the party from the management of his business, or extend to political affairs, would not prevent his voting; and also that a man who was of such weak and vacillating disposition as to be *non compos mentis*, but who could do the work of an ordinary laborer, could vote.

2. *Orme on Elect.* 101; *Simeon on Elect.* 24.

3. *Rogers on Elect.* 106; *Letcher v. Moore*, 1 *Cong. El. Cases*, 751.

4. *Cricklade Case*, 2 *Luder's El. Cases*, 365.

5. *Cirencester Case*, 2 *Fras. El. Cases*, 453; *Colchester Case*, 1 *Peckw. El. Cases*, 548.

6. *Koontz v. Coffroth*, 3 *Cong. El. Cases*, 145.

7. *Opinion of Justices*, 124 *Mass.* 596.

8. *Middlesex Case*, 2 *Peckw. El. Cases*,

of persons who held land under title bonds not conveying a legal estate, were rejected.¹

Where it was required that a person should be rated as a freeholder for taxation, it is not sufficient that he was ratable, if not actually rated.² A husband who had an estate of curtesy in his wife's freehold, or was interested in it, was held to be entitled to vote in Rhode Island.³

25. *Payment of Taxes.* — When the payment of taxes assessed upon a party is required as a qualification for voting, if the tax is on land which was assessed in the name of the father of the present owner, it is sufficient.⁴

The fact that the tax was illegal will not deprive the party paying it of the right to vote.⁵

The assessment must have been regularly made; and it cannot be made upon the parties after it was regularly closed, merely to enable him to vote.⁶

Taxes assessed against land are sufficient, if paid by the party owning it.⁷

When the payment of a tax is all that is required, if there are different taxes levied, the payment of one is sufficient;⁸ but, if all taxes must be paid, this will include a city poll tax.⁹

If a person paying no property tax claims exemption from his poll tax by reason of his age, he cannot vote, if the payment is a condition of the right to vote.¹⁰

Payment by an agent is sufficient; and, if paid without authority, a subsequent recognition, and promise to repay, will be sufficient;¹¹ and a provision in a statute, that no person shall pay a tax for another, will not render the vote of the person for whom it was paid illegal.¹²

Payment to an officer *de facto* is sufficient.¹³

26. *Inhabitants.* — When the right of suffrage is conferred

116; Wordsworth on Elect. 57; Male on Elect. 147.

1. Porterfield v. McCoy, 1 Cong. El. Cases, 261; Draper v. Thompson, 1 Cong. El. Cases, 702.

2. State v. Woodruff, 2 Day (Conn.), 504. When a land list was required to be kept for taxation in Virginia, it was held that if the land was not entered on the list, the possession of the freehold might be proved otherwise; and if it was entered, it was *prima facie* evidence of the qualification, but was not conclusive. Taliaferro v. Hungerford, 1 Cong. El. Cases, 246; Loyall v. Newton, 1 Cong. El. Cases, 520.

3. Voting Laws *Re*, 12 R. I. 586.

4. Draper v. Johnson, 1 Cong. El. Cases, 702.

5. Humphrey v. Kingman, 5 Met. (Mass.) 162.

6. Catlin v. Smith, 2 S. & R. (Pa.) 267;

Opinion of Justices, 18 Pick. (Mass.) 575.

7. Providence Voters *Re*, 13 R. I. 737.

8. Com. v. Peltz, 1 Brews. (Pa.) 159.

9. McMahan v. Savannah, 66 Ga. 217.

10. Opinion of Justices, 5 Met. (Mass.) 591.

11. Humphrey v. Kingman, 5 Met. (Mass.) 162; Gillan v. Armstrong, 12 Phila. 626; Dist. Atty. of Dauphin Co. *Re*, 11 Phila. 645; Draper v. Johnston, 1 Cong. El. Cases, 702.

12. U. S. v. Foster, 4 Hughes (C. C.), 514.

13. Massey v. Wise, 48 Cong. H. Rep. 2024.

For miscellaneous provisions, see Sparrow v. Wood, 16 Mass. 457; Registry Laws *Re*, 12 R. I. 58; Pearce's Appeal, 6 R. I. 589; Providence Voters *Re*, 13 R. I. 737; Austin v. State, 71 Ga. 565; Ford v. Holden, 39 N. H. 143; Biddle v. Wing, 1 Cong. El. Cases, 504.

upon inhabitants, those not citizens are not excluded, though the authorities are not entirely unanimous upon this question.¹

27. *Householder*. — When the law confers the right of suffrage upon a householder, the head of a family, this will embrace an unmarried man who resides with, and supports, his widowed mother and his younger brothers and sisters;² and, when a person is living with a woman as his wife, the legality of the marriage will not be inquired into, in an election contest.²

28. *Sex*. — Women are not included in the constitutional term, "freeman,"³ nor is the right to vote conferred upon woman by the first clause of the Fourteenth Amendment to the Constitution;⁴ and this does not give them the right to vote in the District of Columbia, where the act of Congress only allows males to vote.⁵

29. *Infancy*. — In England, and all the States in this country, the age for voting was fixed at twenty-one years. A person is entitled to vote on the day preceding the twenty-first anniversary of his birthday.⁶

30. *Color*. — A person half white and half Indian is not a white person within the meaning of the naturalization laws of the United States,⁷ nor is a native of China of the Mongolian race so considered.⁸

31. *Disfranchisement for Crime*. — In most of the States, conviction of treason or felony, and in some States, conviction of other offences, work a forfeiture of the elective franchise; and it has been held that this is not a "cruel or unusual punishment," in the sense of that term, as used in the constitutional prohibition against such punishments.⁹

1. In *Illinois* the language of the constitution was, that "all white male inhabitants shall enjoy the rights of electors," and it was held that a person need not be a citizen to be a voter. *Spragins v. Houghton*, 2 Scam. (Ill.) 377. And in *Pennsylvania* it was held that when a law conferred the right of suffrage upon the inhabitants of the borough, an inhabitant need not be a citizen in order to vote. *Stewart v. Foster*, 2 Binn. (Pa.) 110.

In *Massachusetts*, however, it was held, where the elective franchise was conferred upon inhabitants and residents, that there was an implied limitation to such as were citizens. *Harvard College v. Gore*, 5 Pick. (Mass.) 370; *Malden Case*, Cushing's El. Cas. 377; *Opinion of Judges*, Cushing's El. Cas. 120.

2. *Draper v. Johnson*, 1 Cong. El. Cases, 702.

3. *Burnham v. Lanning*, 1 Leg. Gaz. Rep. (Pa.) 411.

4. *Anthony v. U. S.*, 11 Blatchf. (C. C.) 200; *Minor v. Happersett*, 53 Mo. 38, and 21 Wall. (U. S.) 162.

5. *Spencer v. Board of Registration*, 1 McArthur (D. C.), 169.

For decisions upon statutory rights of woman, see *Lyman v. Martin*, 2 Utah, 136; *Wheeler v. Brady*, 15 Kan. 26; *State v. Cones*, 15 Neb. 444; *Winans v. Williams*, 5 Kan. 227.

6. *Wells v. Wells*, 6 Ind. 447; 2 Kent, Com. 233; *Bishop's Castle Case*, in *Wordsworth on Elect.* 128.

7. *Camille Re*, 6 Sawyer (C. C.), 541.

8. *Ah Yup Re*, 5 Sawyer (C. C.), 155.

Under the laws of the Territory of *Michigan*, conferring the right of suffrage upon white male citizens, and civilized male inhabitants of Indian descent, a person half white and half Indian, who abjured his tribal relations, and adopted the habits of the whites, was held to be a voter. *Biddle v. Wing*, 1 Cong. El. Cases, 504. But a person of one-eighth Indian, one-fourth African, and the remainder of white blood, was held not to be a voter. *Walker v. Brockway*, 1 Mich. N. P. 57.

9. *Anderson v. Baker*, 23 Md. 531; *Ridley v. Sherbrook*, 3 Coldw. (Tenn.) 569.

When the Constitution gives the power to disfranchise, upon conviction of infamous offences, this power will be limited to that class of cases.¹

When the right of suffrage depends upon citizenship of the United States, if Congress passes a law which deprives a person of citizenship, as a punishment for crime, this will deprive a convicted person of his right to vote, and Congress has the power to pass such a law;² but a person must have been convicted of the offence before a proper tribunal before he can be deprived of this right;³ and a legislature has no power to pass a law authorizing the election officers to reject the vote of a man who is merely charged with such a crime, if he has not been convicted.⁴

A plea of guilty is a conviction.⁵

When a conviction of an offence punishable by imprisonment in the penitentiary disfranchises a person, a conviction will work this result, although the offence may also be punished by a fine, and the fine only is inflicted.⁶

The conviction of an offence works the loss of the right to vote, only when expressly provided by law;⁶ the only exception being in cases where the offence is the reception of a bribe for casting the vote, in which case it has been the universal practice in parliamentary election contests to reject the vote, upon proof that the voter was bribed, without his having been convicted of the offence;⁷

1. *Barker v. People*, 20 Johns. (N. Y.) 457.

Larceny is an infamous crime; and a conviction of *petit* larceny works a forfeiture of the right of suffrage, under a statute providing that a conviction of an infamous offence shall have that effect. *State v. Buckman*, 18 Fla. 267; *Anderson v. State*, 72 Ala. 187. But when the infamous offence must have been a felony, it was *held* that counterfeiting securities of the United States was not such, as it was only a statutory offence. *U. S. v. Barnabo*, 14 Blatchf. (C. C.) 74. A conviction of conspiracy to commit a crime against the United States is not a felony. *Gandy v. State*, 10 Neb. 243.

2. *Huber v. Reilly*, 53 Pa. St. 112.

3. *Huber v. Reilly*, 53 Pa. St. 112; *Gotcheus v. Mattheson*, 58 Barb. (N. Y.) 152; *State v. Symonds*, 57 Me. 148; *Holt v. Holt*, 58 Me. 564.

This rule has not been followed in the Congressional cases. And in the cases of *Delano v. Morgan*, 3 Cong. El. Cases, 168, and *McKee v. Young*, 3 Cong. El. Cases, 458, the house deducted the votes of persons shown to have been deserters by other evidence than the record of a judgment of a court-martial; but in the recent case of *Garrison v. Mayo*, 48 Cong. H. R. 954, the committee refused to deduct the votes of persons alleged to have been convicted of crime, because there was no record evidence of their conviction.

4. *McCafferty v. Guyer*, 59 Pa. St. 109.

5. *U. S. v. Watkins*, 7 Sawyer (C. C.), 85.

6. The statute of Upper Canada imposed a penalty for selling liquor near the polls on election day; and it was *held* that this did not warrant the rejection of the vote of the person guilty of such an offence, in the absence of a plain enactment to that effect. *Brockway Case*, 32 Up. Can. Q. B. 132.

7. The declaration of a parliamentary Committee, that a person had been guilty of bribery, will not justify the rejection of his vote at another election. Nothing but a conviction will be sufficient to have that effect. *Ilchester Case*, 2 Peckw. (El. Cases) 245; *Coventry Case*, 1 Peckw. (El. Cases) 97; *Bridgewater Case*, 1 Peckw. (El. Cases) 102. But it is the rule in parliamentary cases to reject the votes of all persons shown to have been bribed at that election. As said in Wordsworth's Law of Elect. 245, "It is understood that, independently of positive statutes against bribery, whenever a person is returned in consequence of an undue influence acquired by that means, his election is void, the person who gave his vote under such influence being considered as if he had not given his vote at all." See also Wolfertan's Law and Prac. of Elect. Petitions, 99; Cox & Grady, Registration and Elections, cxci.

and this practice has been followed in the Congressional cases,¹ and by the courts of several States.²

Where a person convicted of an offence has received a pardon, the weight of authority is to the effect that the pardon releases the person from the disabilities imposed by the conviction;³ but where the right to a pardon exists, if it has not been actually issued, the disability still remains.⁴

32. *Residence as a Qualification for Voting.*—The constitutions of nearly all the States, and the laws of nearly all the Territories, require a residence for a definite period, ranging from three months to two years, as a prerequisite to the right of suffrage; and they generally require residence for a certain period within the county and precinct.

In such cases Indian reservations not under the jurisdiction of the State or Territorial government are not considered as a part of the State for this purpose;⁵ nor are the grounds ceded to the United States for navy yards,⁶ or for the purpose of a soldiers' home; and persons living on such grounds are not voters.⁷ This doctrine, however, does not apply to military reservations in Territories.⁸

33. *Residence defined.*—In the Revised Statutes of Ohio, § 2946, a person's residence is defined "as the place in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning."

The term "residence" signifies place of habitation, and has not

1. *Deiano v. Morgan*, 3 Cong. El. Cases, 168; *Abbott v. Frost*, 4 Cong. El. Cases, 594; *Platt v. Goode*, 4 Cong. El. Cases, 650.

2. *State v. Olin*, 23 Wis. 327; *State v. Purdy*, 36 Wis. 213; *State v. Collier*, 72 Mo. 13.

3. *Wood v. Fitzgerald*, 3 Oregon, 568; *State v. Foley*, 15 Nev. 64; *Denning*, 10 Johns. (N. Y.) 202; *Perkins v. Stevens*, 24 Pick. (Mass.) 277; *Garland Ex p.* 4 Wall. (U. S.) 333; *Jonas v. Registers*, 56 Miss. 766; *Hildreth v. Heath*, 1 Bradw. (Ill.) 82. In *Illinois*, however, it was held that where the disability was imposed by reason of the conviction, it was not removed by the pardon. *Freeman v. Baldwin*, 24 Ill. 298. In *Tennessee* it was held that while the pardon of the President would restore a person to citizenship, it could not, without the consent of the State, restore the right of suffrage from which the sovereign power of the State had seen fit to exclude him. *Ridley v. Sherbrook*, 2 Coldw. (Tenn.) 569. And in *Virginia*, where a person was disqualified from acting as justice of the peace by a conviction for felony, it was held that a pardon did not remove this disqualification. *Fugate's Case*, 2 Leigh (Va.), 724.

4. *Campbell v. Morey*, 48 Cong. H. R. 1845.

5. *Daily v. Esterbrook*, 2 Cong. El. Cases, 299; *Bennett v. Chapmen*, 2 Cong. El. Cases, 204; *Morton v. Daily*, 2 Cong. El. Cases, 402; *Burleigh & Spink v. Armstrong*, 4 Cong. El. Cases, 89.

6. *Opinion of Judges*, 1 Met. (Mass.) 580. See also *Com. v. Clarey*, 8 Mass. 72; 2 Story's Const. § 1227.

7. *Sinks v. Reese*, 19 Ohio St. 302. After this decision, the United States, by act of Congress, ceded back to the State of Ohio jurisdiction over the territory of the Soldiers' Home, retaining only the property in the building and grounds; and in the case of *Renner v. Bennett*, 21 Ohio St. 431, it was held that the residents of this territory were thereby made residents of the State, and became entitled to vote at an election held in less than one year from the date of the retrocession. In this case the court held that they had been residents of the State for the entire year within the meaning of the constitution; but it is tacitly conceded that the word "State" is used in different senses in the two cases, and this was excused as being in favor of the right of suffrage.

8. *Burleigh & Spink v. Armstrong*, 4 Cong. El. Cases, 89.

the same idea of permanency as that expressed by the term "domicile," as used by European writers,¹ but conveys the same idea as that word, as used by Judge Storey, who defines it as "the place where a person's habitation is fixed, without any present intention of removing therefrom," which definition is adopted by the Supreme Court of Pennsylvania² as being better suited to the migratory habits of our people than that given to it by the European authors; and it is in this sense that the word "domicile" is generally used by the courts of this country when they use it as a definition for the term "residence."³

34. *Residence, how gained.* — Going into a place for a particular purpose, with an intention to return to the place from which one came, when the purpose is accomplished, will not give a per-

1. Vattel defines domicile as a habitation fixed in any place with the intention of always staying there.

2. Hindman's Appeal, 85 Pa. St. 466.

3. By the election law of Illinois, residence is defined to be a "permanent abode;" and this is held to be a proper definition of the term as used in the constitution. *Johnson v. People*, 94 Ill. 505.

In *Pennsylvania*, it is said, residence in the constitution means the same as domicile,—the place where a man establishes his abode, makes the seat of his property, and exercises civil and political rights. *Chase v. Miller*, 41 Pa. St. 403.

In *Georgia* it is held that a man's residence is where his family permanently resides, though he may be boarding and doing business in another place. *Cunningham v. Maund*, 2 Ga. 171. And this is so by the statutes in *Ohio*. But in the absence of such statutory provisions, the residence of a married man for voting purposes does not necessarily depend upon that of his family. Thus, in *Lask v. U. S.*, 1 Pinney (Wis.), 77, when a married man went into the Territory of Wisconsin in advance of his family, purchased land and made improvements, and afterwards removed his family there, it was held that he was a resident from the time he first went into the Territory.

In one sense residence implies more than domicile, and in another sense not so much. Thus, in *Foster v. Hall*, 4 Humph. (Tenn.) 346, it is said that the term "domicile" has a more extended meaning than residence,—that it embraces in it the idea of making the residence a permanent home. On the other hand, it is said that residence implies personal presence; but an infant may have a domicile where he has never been, as the domicile of the parent is that of the child. *Wolcot v. Botfield*, Kay. 534.

According to the English doctrine, a person must always have a domicile, as it is said that if a man abandons his domicile

of choice, and does not gain another, his domicile of origin revives; but he may have no residence, as he may have left his last place of residence with no intention of returning, and may keep travelling from place to place, with no intention of stopping and establishing a residence. *King v. Foxwell*, 3 L. R. Ch. Div. 518. And in *Bempde v. Johnson*, 3 Vesey, 198, it is said, that, while the place of residence is *prima facie* that of the domicile, this may be rebutted or supported by circumstances, because the actual abandonment of a residence, with an intent to abandon the domicile, will not deprive a man of his domicile until he gains another. *Forbes v. Forbes*, Kay. 341.

This difference is also indicated in a number of American cases. Thus, in *Virginia* it is held that there is a wide difference between residence and domicile; that to constitute a domicile, two things must concur,—first, residence; second, intention to remain there.

Residence is to have a permanent abode for the time being, as distinguished from "mere locality of existence." *Long v. Ryan*, 30 Gratt. (Va.) 718.

In *Illinois*, it is said, residence means something more transient than domicile, yet always implies some intent of permanent abode. *Way v. Way*, 64 Ill. 406.

In *Mississippi* it is held that the two terms are not convertible, as the residence may be in one place, and the domicile in another. *Alston v. Newcomer*, 42 Miss. 186.

In *Mayor of New York v. Genet*, 4 Hun (N. Y.), 487, it is said that domicile is the habitation fixed in any place with the intention of always staying there (adopting the definition of Vattel); while residence is much more temporary in its character.

The word "resident" does not denote such a fixed and permanent abode as the word "inhabitant." *Tazewell County v. Davenport*, 40 Ill. 197; *Hawley &c.*, 1 Daly (N. Y.), 531.

son a residence, or a right to vote.¹ As the question of the right to vote depends in some measure upon the occupation of the party, this subject will be treated under the subdivisions in the following section.

35. *Soldiers, Sailors, etc.* — The constitutions of several of the States provide that no person shall be held to gain or lose a residence by living in or out of the State in the military or naval service of the United States; but this provision seems to be only declaratory of the common law,² and does not prevent a person from gaining such a residence because he is in such service; and if other things show that a person intends to make his residence at the place where he is stationed, he may become a voter there.³ The burden is upon the soldier who claims the right to vote where stationed, to prove his residence.⁴

36. *Residence of Pauper in Almshouse.* — A pauper residing in an almshouse neither gains a residence at the almshouse, nor loses his old residence, by virtue of the mere fact of his residence at the almshouse; but the weight of authority seems to uphold the doctrine, that the mere fact of dwelling at the almshouse does not prevent a pauper, having no family elsewhere, from gaining a residence in the district where the almshouse is situated.⁵

1. *Vanderpoel v. O'Hanlon*, 53 Iowa; *People v. Peralta*, 4 Cal. 175; *Anon.* 9 Phila. 497.

2. Thus, in an early case in Congress, where there was no special provision against the right of soldiers to gain a residence, it was *held* that one did not gain the right to vote by being stationed at the place in a garrison. *Biddle v. Wing*, 1 Cong. El. Cases, 504; and see *Green Re*, 5 Fed. Rep. 145.

3. *Ames v. Duryea*, 6 Lans. (N. Y.) 155.

In *California*, where the constitution contained the provisions stated in the text, it was *held* in two cases, that, while a man is not disqualified from gaining a residence because in the army, he will not gain such a residence merely by being stationed at a place as a soldier. *People v. Riley*, 15 Cal. 48; *Devlin v. Anderson*, 38 Cal. 92. And in *People v. Holden*, 28 Cal. 123, it was *held* that this provision did not prevent a man from gaining a residence while in the service. And this was also decided in *Hunt v. Richard*, 4 Kan. 549. But in *Wigington v. Pacheco*, 5 Cong. El. Cases, 3, it was *held* that a married man in the military service, as a signal officer, who had moved his family to his station, and had applied for registry and been registered, had not a right to vote.

This, however, seems to be opposed to the principle of the well-considered case of *Taylor v. Reed*, 3 Cong. El. Cases, 665, in which the committee found that there were three classes who had voted, — 1st,

those who had enlisted in the precinct, and had resided there before they had enlisted, whose votes should be counted; 2d, those who had families elsewhere, or were single men who had enlisted from other places, whose votes should be rejected; 3d, those who were married men who had enlisted from other places, but who had moved their families there, and rented or purchased property, thus giving evidence of their intention to remain, and that their votes should be allowed to stand.

4. *Election Laws Re*, 9 Phila. 497.

5. Thus, it has been *held* that where a pauper has become a county charge, and an inmate of the poorhouse, he did not thereby lose his residence in the precinct where he had formerly been a voter. *Dale v. Irwin*, 78 Ill. 170; *Clark v. Robinson*, 88 Ill. 498. And a person under confinement for crime cannot adopt a new residence until discharged from imprisonment. *Anon.* 2 Brews. (Pa.) 138.

That a person permanently residing in an almshouse may elect that as his residence is *held* by the case of *Sturgeon v. Korte*, 34 Ohio St. 525. See also *Covode v. Foster*, 3 Cong. El. Cases, 600; *Taylor v. Redding*, 3 Cong. El. Cases, 661; *Cessna v. Myers*, 4 Cong. El. Cases, 60; *Lemoine v. Farwell*, 4 Cong. El. Cases, 406; *Campbell v. Morey*, 48 Cong. H. Rep. 1845. But in New York it was *held* that an inmate of a soldiers' home who could not support himself, could not gain a residence. *Silvey v. Lindsay*, 13 N. E. Rep. 444.

37. *Sojourners, Laborers, etc.*—The votes of mere sojourners are to be rejected.¹ Residence in a precinct is a matter of substance; and where persons have remained in the precinct only long enough to gain a residence, and have removed immediately after the election, their votes should be rejected in a contest.² It is not, however, necessary that the person should intend to remain always in the precinct, provided he has no present intention of removing.³

The home of a person is more or less stable according to the character of his occupation; and the proper rule should be, to find out whether the person has any other prospective home to which he expects to go at any specified time. As to the right of laborers employed temporarily upon public works, there seems to be some difficulty in adopting a rule which will not do injustice, without apparently violating, or at least limiting, some of the principles laid down as settled by the courts.⁴

If a pauper has been in the almshouse, and, after having been discharged, he remains there in the employment of the officers of the institution, he will have gained a residence, and be entitled to registration as a voter. Registry Lists *Rz*, 10 Phila. 213.

1. Lower Oxford Election, 11 Phila. 641.

2. Howard *v.* Cooper, 2 Cong. El. Cases,

275.

3. Miller *v.* Thompson, 2 Cong. El. Cases, 118.

4. This difficulty will be more fully appreciated when we consider that a man of the ability of Judge McCrary, and one so familiar with the principles of the law of elections, in a report made by him in the Forty-first Congress, laid down principles greatly at variance with those laid down in a report made by Mr. Hoar in the Forty-second Congress, in a case in which Judge McCrary was chairman of the committee. In the first case, Mr. McCrary, in his report, said, "No person is a legal voter under the constitution of Kentucky unless he be a resident of the State, county, and voting precinct."

"A temporary sojourner was not a resident within the legal sense of that term. A person who goes to a place for a specified purpose, and with the intention of leaving it when that purpose was accomplished, does not gain a residence, however long he may remain.

"It follows that such persons as went into any of the precincts in question for the purpose of working on the railroad, and with the intention of leaving it when the road should be completed, had not the right to vote. The committee are of the opinion that the following rules should govern in determining what votes to reject. Whenever it appears that a person came into the

precinct for the purpose of working on the railroad, that he resided in a temporary habitation, and was generally regarded as a temporary inhabitant, and he actually left soon after the road was completed, and soon after the election, his votes should be rejected." Barnes *v.* Adams, 3 Cong. El. Cases, 770. This report was a unanimous one, and was adopted by the unanimous vote of the House; and yet, in the subsequent case of Cessna *v.* Myers, 4 Cong. El. Cases, 60, in a report presented by Mr. Hoar, which is very highly spoken of by Judge McCrary, this doctrine was materially modified.

After a lengthy argument, he lays down these principles:—

"The cases of the railroad laborers and contractors should be disposed of by the following rules:—

"*First*, When no other fact appears than that a person, otherwise qualified, came into the election district for the purpose of working on the railroad an indefinite period, or until it should be completed, and voted at the election, it may or may not be true that his residence was in the district. His vote having been accepted by the election officers, and the burden being upon the other side to show that they erred, we are not warranted in deducting the vote.

"*Second*, When, in addition, it appears that such voter had no dwelling-house elsewhere, had his family with him, and himself considered the voting-place as his home until his work on the railroad should be over, we consider his residence in the district as affirmatively established.

"*Third*, On the other hand, when it appears that he elected to retain a home, or left a family or a dwelling-place, elsewhere, or any other like circumstances appear, negating a residence in the voting pre-

38. *Students.* — There have been a large number of cases in the courts and in Congress concerning the right of students to vote in the precinct in which they reside while in attendance upon institutions of learning. In some States it is provided by law that students shall not be deemed to have gained or lost a residence by reason of attendance upon an institution of learning; but, as in the case of soldiers, sailors, etc., such provisions are only declaratory of the principles of the common law. The principles applicable to students are not dissimilar to those which apply to laborers. If the student has a family and property, and he disposes of his property, and removes his family from his last place of residence, not intending to go back, and determines to stop at the college town for either an indefinite time or for a definite time, with no intention of going to any particular place when he leaves the college town, he should be considered a resident of the town in which the college is situated.

Going to a public institution, and residing there, solely for the purpose of education, will not of itself give the student the right to vote there, but his right to vote would depend upon all the circumstances connected with his residence. If he has a father living; if he still remains a member of his father's family; if he returns to his father's house to pass his vacations; if he is maintained and supported by his father; or, in case he has no father living, if he has a dwelling-house of his own, of which he retains the occupation; or if he has other relatives with whom he had before resided, and to whose family he returns in his vacation, — these will be circumstances to prove that he has not changed his residence: if he, however, should remain a member of his father's family, and should remove with that family to the town where the college is situated; or if, having a family of his own, he removes with them to such a town, and takes up his permanent abode there, without intending to return to his former residence, — these are circumstances more or less conclusive to show his change of residence and his right to vote.¹

39. *Time when Residence begins.* — A man's residence may be said to begin from the time at which he removes his family, although he may have determined to remove, and may himself have gone to his new place of residence, before that

cinct, the vote should be deducted from the candidate for whom it is proved to have been cast."

In the early case of *Letcher v. Moore*, 1 Cong. El. Cases, 751, the votes of journey-men mechanics, and of all other laborers having no fixed and settled residence, but remaining for the time being where they could get employment, were held good.

1. *Cessna v. Myers*, 4 Cong. El. Cases, 60; *Opinion of Judges*, 5 Met. (Mass.) 587. For cases in which the right of students to vote is discussed, see Allentown

Case, *Brightly's El. Cases*, 468; *Granby v. Amherst*, 7 Mass. 1; *Putnam v. Johnson*, 10 Mass. 408; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246; *Fry's Election Case*, 71 Pa. St. 302; *Lower Oxford Election*, 11 Phila. 641; *Duffy v. Moore*, 5 Cong. El. Cases, 361; *Dale v. Irwin*, 78 Ill. 170; *Sanders v. Getchell*, 76 Me. 158; *Letcher v. Moore*, 1 Cong. El. Cases, 752; *Farlee v. Runk*, 2 Cong. El. Cases, 87; *Koontz v. Coffroth*, 3 Cong. El. Cases, 147; *Mickey v. Loomis*, Ohio Senate Journal, 1884; *Morey v. Campbell*, 48 Cong. H. Rep. 1845.

time.¹ In computing the time of residence, the day of the election must be excluded.²

40. *Residence, how lost.* — When one has a residence, either of origin, or has acquired another of choice, said residence is not lost by forming an intention to remove, without actual removal: the intent and the act must concur.³ A temporary absence, however long continued, coupled with an intent to return, will not result in a loss of residence, if one actually returns;⁴ but if one removes from a State with the intention of making his home elsewhere for an indefinite time, the fact that he may have a floating intention to return at some future time, will not save his residence.⁵ Leaving one's residence with an intention to remain away if suited, but to return if not suited, will not cause one to lose his residence if he returns before election.⁶ One does not lose a residence by confinement in the penitentiary.⁷

1. *Williams v. Whiting*, 11 Mass. 424; *Webster Case*, *Cushing's El. Cases*, 526; *Wigginton v. Pacheco*, 5 Cong. El. Cases, 13. But see *Lask v. U. S.*, 1 Pinney (Wis.), 77; *People v. Holden*, 28 Cal. 123.

2. *People v. Holden*, 28 Cal. 123.

When a person under disability has resided in the precinct the length of time required by law, he may vote as soon as the disability is removed. *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693; *Com. v. Peltz*, 1 Brews. (Pa.) 158; *Wood v. Fitzgerald*, 3 Oregon, 568; *Renner v. Bennett*, 21 Ohio St. 431. But see *State v. Clocksey*, 5 Sneed (Tenn.), 586.

In *Vermont* when a man was resident of a town, and subject to and assessed for taxation on real estate in town, he was allowed to vote, although he had been a resident of another town at the time of the assessment. *Wilson v. Wheeler*, 55 Vt. 446. In *North Carolina*, a person who has resided a year in the State can vote in the county of his residence, though he may have lived in other counties a part of the time. *Roberts v. Cannon*, 4 Dev. & B. (N. Car.) 256.

The constitution of Texas provides that every male person who shall have resided in the State one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector, and that all electors shall vote in the precinct of their residence. It was held that a residence of six months in the district, although in different counties, entitled the party to vote in the precinct of his residence for all State and district officers. *U. S. v. Slater*, 6 Fed. Rep. 824.

Where a person resides in different places during different portions of the year, he will be entitled to select his resi-

dence, and vote in the precinct which he chooses as his residence. *State v. Judge*, 13 Ala. 865.

3. *State v. Hallet*, 8 Ala. 159; *Lincoln v. Hapgood*, 11 Mass. 350; *Williams v. Whiting*, 11 Mass. 424; *Smith v. Croom*, 7 Fla. 81; *Brewer v. Linnaeus*, 36 Me. 428; *Griffin v. Wall*, 32 Ala. 149.

4. *Calwallader v. Howell*, 18 N. J. Law, 138; *Boyd v. Beck*, 29 Ala. 793; *Harbaugh v. Cicott*, 33 Mich. 241.

5. *State v. Groome*, 10 Iowa, 308; *State v. Frest*, 4 Harr. (Del.) 558; *State v. Casinova*, 1 Tex. 401; *Holmes v. Greene*, 7 Gray (Mass.), 299.

6. *Beardstown v. Virginia*, 81 Ill. 541. When a person had rented his house, sold part of his personal property, but, being a lawyer, had retained his State reports, and moved with his family to another State, and opened a law office there, and, not succeeding, had returned to his former home, it was held that he had not lost his residence. *Smith v. People*, 44 Ill. 16.

7. *Anon. 2 Brews. (Pa.)* 138.

Residence abroad in the diplomatic service of the United States will not deprive a person of his residence. *Forsythe's Case*, 1 Cong. El. Cases, 497. Nor will residence in the District of Columbia, in the service of the government, deprive a person of a right to vote at the place of his former residence, unless he intends to change his dwelling-place. *Dennis v. State*, 11 Fla. 389; *State v. Grizzard*, 89 N. Car. 115. But where one had been in the District of Columbia in the government service for a number of years, it was held that he ceased to be an inhabitant of the State where he had resided, so as to be eligible to election to Congress. *Bailey's Case*, 1 Cong. El. Cases, 411.

Leaving one's residence weekly for the purpose of complying with the homestead

41. *Effect of voting on Residence.* — Where one might select either of two places as his residence, the act of voting at one of the places will be considered as making the selection, and he cannot vote at the other place.¹

III. Constitutional Law. — Power of Legislature. — Power of Congress.

— 1. *Power to submit Questions to Popular Vote.* — One of the most difficult subjects connected with the law of elections, is that which has reference to the power of the legislature to submit questions to the popular vote; for while upon some points there is a comparative uniformity in the decisions, upon other questions they are so conflicting that no generally accepted rule can be gathered from them.

In some States it is held that the constitutions are limitations upon the power of the law-making body, instead of grants of power, and that, in the absence of restrictions either expressed or implied in the constitution itself, the legislature has as absolute authority to pass laws as the British Parliament.² The courts of other States hold that this power of the legislature is far more limited in its scope, and that there are reserved powers in the people which cannot be exercised by the legislature, even if there is no express limitation in the constitution.³

law, will not cause the loss of residence. *Preston v. Culbertson*, 58 Cal. 198.

Where a person who had moved into a town, and gone into business there, intending to become a resident, and a few days afterward went away for a month on business, it was *held* that this temporary absence did not prevent his residence from beginning with his first coming into the town. *Spencer Case*, *Cushing El. Cases*, 164.

When a single man who had lived in a town four or five years, sold his property six or eight months before election, left the town, saying that he left for good, and started off travelling with a circus, but returned on the morning of the election, swore in his vote, and left the town on the same day, it was *held* that his vote should be stricken out. *Wigginton v. Pacheco*, 5 Cong. El. Cases; 11.

1. *Queen v. Cæsar*, 11 Up. Can. Q. B. 461.

2. *Mason v. Wait*, 4 Scam. (Ill.) 127; *Davis v. State*, 68 Ala. 58.

3. Thus, in *Ohio* it has been *held* that the legislature exercises only a delegated power, which it cannot delegate to others. *Cincinnati, etc., R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 84. The court, by *Ranney, Justice*, say, "As the General Assembly, like other departments of the government, exercises only delegated authority, it cannot be doubted that any act passed by it, not falling fully within the scope of legislative power, is as clearly

void as though expressly prohibited. That the General Assembly cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or bodies, is a proposition too clear for argument, and is denied by no one. This inability arises no less from the general principle applicable to any delegated power, requiring knowledge, discretion, and rectitude in its exercise, than from the positive provisions of the constitution itself. The people in whom it resided have voluntarily relinquished its exercise, and positively ordained that it shall be vested in the General Assembly. It can only be reclaimed by them by an amendment or abolishment of the constitution, for which they alone are competent. To allow the General Assembly to cast it back upon them, would be to subvert the constitution, and change its distribution of powers, without their action or consent.

"The checks, balances, and safeguards of that instrument are intended no less for the protection and safety of the minority than the majority: hence, while it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence, and integrity of the whole representation of the State."

"This, however, is not denying to the legislature the power to frame a law complete in all its parts, affecting the whole people of the State, or those of a particular

2. *Acceptance of Corporate Powers.*—It may be considered as settled law, that the legislature has general power to provide for the creation or change of certain municipal corporations, and to provide that the charter shall not be binding, until it is accepted by vote of the people interested, or that the change shall only take effect if approved by the vote of the inhabitants of the district affected.¹

3. *Taxation for Local Improvements.*—A legislature has power to allow the people of a district to determine by vote whether they will raise taxes for local improvements.²

4. *Municipal Subscriptions to Capital Stock.*—It has become such a well-settled principle of law, that the proposition to subscribe to the capital stock of corporations organized for the purpose of making such public improvements as railroads, or to make donations to such corporations, may be submitted to the voters of the districts interested, that numerous citations of authorities are unnecessary.³

district, and to allow them to make its taking effect depend upon a vote of the people to be affected by it. This is also asserted in the same case, where it is said, 'But, while this is so plain as to be admitted, we think it equally undeniable that the complete exercise of legislative power by the General Assembly does not necessarily require the act to so apply its provision to the subject-matter as to compel their employment without the intervening assent of other persons, or to prevent them taking effect only upon the performance of conditions expressed in the law.'

1. Thus, it has been *held* that an act providing for the division of a county, and the formation of a new county from part of the territory, to take effect on a majority of the votes being cast in favor of such a division, is not unconstitutional. *People v. Reynolds*, 5 Gilm. (Ill.) 1; *People v. Nally*, 49 Cal. 478. Also that the legislature might constitutionally submit to the voters the question of the formation of a new township, — *Com. v. Judges of Quarter Sessions*, 8 Pa. St. 391, — the consolidation of adjacent territory with a municipal corporation, — *Smith v. McCarthy*, 56 Pa. St. 359, — the appointment of a board of public works in the city, — *State v. O'Neill*, 24 Wis. 149, — the conferring of certain powers on certain municipal officers, — *Bank v. Rome*, 18 N. Y. 38; *Clark v. Rochester*, 24 Barb. (N. Y.) 446, — changing a county-seat, — *Peck v. Weddell*, 17 Ohio St. 271; *Clarke v. Jack*, 60 Ala. 271, — organizing a free school district, — *Bull v. Reede*, 13 Gratt. (Va.) 78, — granting a charter to a municipal corporation, — *Patterson v. Society*, etc., 24 N. J. L. 385; *Clark v. Rogers*, 81 Ky. 43; s. c., 28 Alb. L. J. 273; — but in the New Jersey case, it was *held* that it would have been unconsti-

tutional if submitted to the vote of the people of the State or of a county.

In *New York* it was *held*, that an act amending a charter of New York City, and providing for its submission to a vote of the people, and to go into effect if approved, was unconstitutional. *People v. Stout*, 23 Barb. 349. But the contrary doctrine, and one which seems to be more in accordance with the general current of authority, was held in *Brunswick v. Finney*, 54 Ga. 317; and in other cases in New York, it was *held* that it did not make the law unconstitutional to provide that it should not affect any town unless the consent of two-thirds of the taxpayers should be obtained. *Grant v. Carter*, 24 Barb. (N. Y.) 232; *Starin v. Genoa*, 23 N. Y. 439.

2. *Alcorn v. Hamer*, 38 Miss. 652; *Police Jury v. McDonough*, 8 La. Ann. 341; *New Orleans v. Graihle*, 9 La. Ann. 562; *New Orleans v. St. Rones*, 9 La. Ann. 574. Where one section of the statute authorized township trustees to purchase land for a cemetery, and to assess a tax for that purpose, and another section required a preliminary vote of the voters of the township, it was *held* not to be in conflict with a provision of the constitution prohibiting the passage of acts, to take effect upon the approval of any other body than the General Assembly. As said by the court, "The vote of the township is rather to be regarded as a condition precedent, or a request to the trustees to proceed under the statutes already made operative as a law by the General Assembly. It differs, in effect, nothing from what it would be if the law had contained any other condition precedent, upon which, by its provisions, the authority of the trustees depended." *Weaver v. Cherry*, 8 Ohio St. 564.

3. The case of *Cincinnati*, etc., R. Co. v.

5. *General Laws.* — As to the power of the General Assembly to submit a general law to the votes of the people, for adoption or rejection, it is said by Judge Cooley,¹ "If the decision of these questions up to the present time is to depend upon the weight of judicial authority, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the State, any more than there is to refer it to any other authority.

"The prevailing doctrine in the courts appears to be, that, except in those cases where by the constitution the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration." It is very clear, however, from his note to p. 146 of the fourth edition² of his work on Constitutional Limitations, that he has grave doubt of the correctness of the prevailing opinion; and an examination of the authorities including the later decisions, may well be considered as raising a doubt whether the opposite view may not now be said to be sustained by the weight of the best-considered authorities.³

Clinton County Commissioners, 1 Ohio St. 77, is a leading case on this subject; and the matter was fully discussed by *Ranney*, 7, who makes a clear distinction between delegating the power to make laws, and making laws the provisions of which are to take effect upon certain conditions precedent.

The decisions upon the class of cases above referred to, are many of them based upon the fact that the laws are local, and affect only the people of the district interested, and that the legislature may make a local law depend for its effect upon the will of a majority of the voters in the locality interested. See *Hobart v. Supervisors*, 17 Cal. 23.

1. Cooley's Const. Lim. *120.

2. The language of Judge Cooley is so forcible, that it is doubtful whether it can be better expressed. He says, "It is worthy of consideration, however, whether there is any thing in the reference of a statute to the people, for acceptance or rejection, which is inconsistent with the representative system of government. To refer it to the people to frame and agree upon a statute for themselves, would be equally impracticable with the representative system; but to take the opinion of the people upon a bill already framed by representatives, and submitted to them, is not only practicable, but is in precise accordance with the mode in which the constitution of the State is adopted, and with the action which is taken in many other cases.

"The representative in these cases has fulfilled precisely those functions which

the people as a Democracy could not fulfil; and when the case has reached a stage when the body of the people can act without confusion, the representative has stepped aside to allow their opinion to be expressed.

"The legislature is not attempting in such case to delegate its authority to a new agency; but the trustee, vested with a large discretionary authority, is taking the opinion of the principal, upon the necessity, policy, or propriety of an act which is to govern the principal himself."

3. The case of *Rice v. Foster*, 4 Harr. (Del.) 479, is among the leading cases against the authority of the legislature to submit general laws to the people. An act was passed by the legislature of the State of Delaware authorizing the people of the several counties of the State to decide by ballot whether the retailing of intoxicating liquors should be permitted in the respective counties. It was provided that if, in any county, the majority was against the sale, retailing was to be prohibited in that county; but if for license in any county, the old law should continue in force, and license be granted as before.

In a lengthy opinion, and one in which the competency of the people to decide upon the necessity or propriety of proposed legislation is strongly denied, the court held the law unconstitutional, upon the ground that the legislature had no more right to submit the question to the people, than the governor would have to submit the question whether a convicted criminal should be pardoned or executed; or than a court would have to submit a

6. *Power of Legislature over Qualifications of Voters.* — Where there is no provision in the constitution as to the qualifications of voters, the legislature may fix them, as well as the time, place, and manner of voting;¹ but, as we have already seen, the legislature cannot add to the qualifications of voters as fixed by the constitution, or extend the franchise to those not invested with it by the constitution, upon the ground that the grant of the right to certain classes is by implication a restriction to those classes.²

case to the popular vote of the county, and to render a judgment in accordance with the popular decision. This same doctrine has been held in the case of *Parker v. Com.*, 6 Pa. St. 507; but this case was afterwards overruled in *Lock's Appeal*, 72 Pa. St. 491. The view of the Maryland case was also maintained in Iowa. *Geebrick v. State*, 5 Iowa, 485. See also *Santo v. State*, 2 Iowa, 165; *State v. Beneke*, 9 Iowa, 203; *State v. Weir*, 33 Iowa, 134; *Wall Ex p.* 48 Cal. 279; *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 484.

Local option laws have, however, been held constitutional in a number of the States. *Hammond v. Haines*, 25 Md. 541; *Fell v. State*, 42 Md. 71; *State v. Morris County*, 36 N. J. L. 72; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Dean*, 110 Mass. 357. See also *State v. Noyes*, 10 Foster (N. H.), 279; *State v. Wilcox*, 42 Conn. 364; *Com. v. Fredericks*, 119 Mass. 199; *Groesch v. State*, 42 Ind. 547.

In *New York*, a school law was passed to take effect if it was approved by the people; and in one of the divisions of the Supreme Court it was held to be valid, — *Johnson v. Rich*, 9 Barb. (N. Y.) 680, — but in two other divisions it was held unconstitutional, — *Thorn v. Cramer*, 15 Barb. (N. Y.) 112; *Bradley v. Baxter*, 15 Barb. (N. Y.) 122, — and also by the court of appeals. *Barto v. Himrod*, 8 N. Y. 490.

In *Missouri*, where a school law was passed in which it was left to be determined by the people of each county whether they would organize under it or not, it was held that it was valid. *State v. Wilcox*, 45 Mo. 458. But where a law provided, that in counties, where, on submission to a popular vote, there should be a majority in favor of the restraint of stock, it should not be permitted to run at large, it was held to be unconstitutional. *Lammert v. Lidwell*, 62 Mo. 188. But the opposite view was held in *Erlinger v. Boneau*, 51 Ill. 34.

In *Oregon* it has been held that the legislature cannot delegate the legislative power, except to municipal corporations. *Brown v. Flechner*, 4 Oregon, 132.

Upon the other hand, that the legislature may provide that a law may or may not take effect, as determined by a popular

vote, see the cases of *Williams v. Carmack*, 27 Miss. 209; *People v. Salomon*, 51 Ill. 34; *Com. v. Weller*, 14 Bush (Ky.), 218; *Gillespie v. Palmer*, 20 Wis. 291; *Smith v. Jamesville*, 26 Wis. 29; *State v. Parker*, 26 Vt. 357. In the above case, *Chief Justice Redfield* says, "After a full examination of the arguments by which it is attempted to be sustained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare that I am fully convinced — although at first, without much examination, somewhat inclined to the same opinion — that the opinion is the result of false analogies, and so founded on a latent fallacy."

"It seems to me that the distinction attempted between a popular vote and other future contingencies is without any just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than from choice, — rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases." He further says, "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so that it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statutes as not to be a mere idle and arbitrary one."

1. *State v. Bush*, 15 Iowa, 304.

2. The constitution of *Minnesota* provided that the legislature might grant the right to vote for school officers, and to hold school offices to women, and also provided that any person who was entitled to vote at any election should be eligible to any office voted for. It was held that this did not invalidate a law which rendered women eligible to hold the offices without giving them the right to vote. *State v. Gordon*, 33 Minn. 345.

Where the constitution provided that a county-seat might be removed by vote of the majority of the votes of the elections of the county in favor of such removal, it was held that the legislature could not provide for such removal if a majority of the

7. *Power to change Voting Precincts.* — The grant of a right to vote upon certain conditions impliedly prohibits the exercise of the right of suffrage at other places, and under other conditions.¹

In the absence of a constitutional provision, the legislature may fix the places of the voting, and also the manner of voting, as well as the qualifications of the electors.²

8. *Soldiers' Voting-places.* — In a number of States, during the war, it was held that under their constitutions the legislature had no right to authorize soldiers to vote at their camps in the field outside of the precincts of their residence;³ but in a number of Congressional cases it was held that these constitutional provisions did not affect the right of the legislature to allow this in elections for representatives in Congress.⁴

9. *Regulations for Elections for Senators and Representatives.* — In the absence of Congressional legislation, the laws prescribed by the State legislatures in regard to the time, place, and manner of holding and conducting elections for senators and representatives in Congress will govern in contested cases in Congress.⁵

10. *Power to change Congressional Districts in Cases of Vacancies.* — The legislatures of the States have the power to fix the boundaries of the Congressional districts, subject to the restriction in

votes "cast at a general election" should be in favor of such removal. *Bayard v. Klinge*, 16 Minn. 249.

In *Wisconsin*, the constitution, after mentioning certain classes as entitled to vote, gave the legislature authority to extend the right to other persons; and it was held that this authorized the extension to women to vote for school officers. *Brown v. Philips*, 36 N. W. Rep. 242.

1. Thus, where the constitution provided that persons otherwise qualified might vote if they had resided in the election district ten days immediately preceding the election, it was held that the legislature had no power to pass a law that a voter, otherwise qualified, who removed from one district to another within ten days preceding an election, might vote in the district from which he had removed. *Thompson v. Ewing*, 1 Brews. (Pa.) 68, 103.

2. *State v. Burt*, 15 Iowa, 304.

3. *Chase v. Miller*, 41 Pa. St. 403; *Bourland v. Hildreth*, 26 Cal. 161; Opinion of Judges, 30 Conn. 591; *Twitchell v. Blodgett*, 13 Mich. 127; Opinion of Judges, 44 N. H. 663.

4. Opinion of Judges, 45 N. H. 595; Opinion of Judges, 37 Vt. 665; *Baldwin v. Trowbridge*, 3 Cong. El. Cases, 46.

These decisions are based upon the provisions of the Constitution of the United States, which provide that the time, place, and manner of holding elections for senators and representatives in Congress shall be prescribed in each State by the legisla-

ture thereof; which were held to give this power to the legislature, regardless of the limitations of the State constitution.

In *Wisconsin*, *Iowa*, and *Ohio*, it was held that the provisions of the State constitution did not prohibit the legislature from granting the right to soldiers to vote in their camps. *Chandler v. Main*, 16 Wis. 398; *Morrison v. Springer*, 15 Iowa, 304; *Lehman v. McBride*, 15 Ohio St. 573.

5. When a State was entitled to one member of the House of Representatives, and the State statute provided that each voter should place on his ballot the names of two persons, one of whom was not a resident of the same county with himself, it was held by the House of Representatives that such a statute was valid, and that ballots containing the names of two persons from the same county with the voter, and also ballots with but one name on, should be rejected. *Lattimer v. Patton*, 1 Cong. El. Cases, 69. This, however, does not authorize a State to provide, that, in case of a tie vote, the governor and council shall decide between the candidates, because this is not an election by the people as required by art. 1, sect. 2, of the Federal Constitution. *Reed v. Cosden*, 1 Cong. El. Cases, 353.

A legislature may provide that a plurality may elect representatives in Congress, even if the State constitution requires a majority. *Plurality Elections R^e (R. I.)*, 8 At. Rep. 881.

the law of the United States, that they must be of contiguous territory; yet where an election has once been held, and a member elected from certain territory, the question as to the power of the legislature to change the boundaries, and to provide, that, in case of a vacancy, a representative may be elected in a new district composed only partially of the same territory, does not seem to be definitely settled, the authorities being conflicting.¹

11. *Legislature cannot indirectly disfranchise Voters.* — Any law which has the effect of disfranchising a part of the voters will be unconstitutional.²

12. *May provide for challenging Voters.* — A statute providing for the challenge of voters, and the rejection of the votes of any one challenged if he refuses to answer the questions put to him, is not unconstitutional, if it does not add any new qualification to those prescribed in the constitution.³

13. *May punish Bribery at Nominating Elections.* — An act to punish fraud or bribery at nominating elections is valid.⁴

14. *Power of Congress over Qualifications of Voters.* — Congress can only pass an act to enforce the provisions of the Fifteenth Amendment to the Federal Constitution, so far as it affects the

1. In an early case, where there had been a redistricting act passed, the old act repealed, and no provision made to fill vacancies, it was *held*, by a vote of 98 to 90, by the House of Representatives, that the election, as held in the district formed under the new law, was valid, although the vote of the old district, to which four towns had been added, would have given the majority to the other candidate. Perkins Case, 2 Cong. El. Cases, 142. In the later case of Hunt v. Menard, 3 Cong. El. Cases, 477, the House refused to admit either party, upon the ground that the election was held in a different district from that in which the vacancy occurred. In the Forty-seventh Congress, Taylor of Ohio and Dr. McLean of Missouri were elected at elections held in the old districts, after the new districts had been formed and the old acts repealed; but the House admitted them as entitled to the seat. In the Forty-eighth Congress the same question came up in the case of Pool v. Skinner, H. Rep. 727, where the governor had issued writs for an election in the new districts. The majority report, which was adopted, was in favor of the validity of the election, on the ground that the House always acquiesced in the action of the State authorities.

2. Thus, where it was provided that a county might subscribe to the capital stock of a railroad company, upon the majority of the voters in a certain township authorizing it, the provision was held unconstitutional, although the act also provided that the county debt was to be paid by the levy

of a special tax upon the voting district only. Madison v. People, 58 Ill. 456.

When an act provided that the question of the removal of a county-seat should be submitted to the people of the different townships at their town-meetings, and there were cities in the county, the inhabitants of which did not vote at the town-meeting, and in which the elections were held at a different time from the town-meetings, the act was held to be void because there was no provision for the vote of the people of the city upon the question of removal. The Attorney-General v. Supervisors, 11 Mich. 63.

When a statute made a new county, and did not provide that the inhabitants should be placed in any senatorial or judicial district, so that the inhabitants could take part in the elections for judges and senators, it was *held* void, and that the expectation that a future legislature would remedy the difficulty did not cure the defect in the act. Lanning v. Carpenter, 20 N. Y. 447; People v. Maynard, 15 Mich. 471. But in Wisconsin, where a law was passed providing that any municipality might hold a special election to vote a tax to raise bounties to secure soldiers to save a draft, and providing for only one polling place, it was *held* to be constitutional, and that it was not inapplicable to a large city having nine wards, with eight thousand voters, because it was impossible to receive all the votes in one day, it not having been shown that any voters went away without being able to vote. Broadhead v. Milwaukee, 19 Wis. 624.

3. State v. Leon, 9 Wis. 279.

4. Leonard v. Com. (Pa.), 4 At. Rep. 220.

qualifications for voting at the State election, and has no authority to prescribe regulations for the qualification of voters at such elections, except for the purpose of enforcing that amendment.¹ But the fact that an act of Congress may incidentally affect the rights of voters by depriving them of qualifications required by the said laws as a punishment for crime, will not render the act unconstitutional.²

15. *Power to punish Individual Acts at State Elections.* — Under the powers conferred by the Fifteenth Amendment, the authority of Congress to punish offences against the right of suffrage at State elections, is limited to acts done under color of authority derived from State legislation, and does not extend to punishing individuals acting without authority, but their punishment must be left to the States;³ and courts of the United States have no jurisdiction in any form of action, in cases of contested elections for State officers, except in cases where the sole question as to the title arises out of the denial to citizens of the right to vote on account of their race, color, or previous condition of servitude.⁴

16. *Power of Congress over Congressional Elections.* — While, in the absence of Congressional legislation, the State legislatures may prescribe the time, place, and manner of holding elections for senators and representatives in Congress, yet Congress may, at any time, make or alter such regulations, except as to the place of choosing senators. Art. 1, sec. 4, U. S. Const.

Under this section, Congress has a supervising power over the subject, and may either make new regulations, or add to, or modify, those made by the State law; and any regulations made by it which are inconsistent with those of the State, will necessarily supersede the State regulations.⁵

1. *U. S. v. Reese*, 92 U. S. 214; *Huber v. Reilly*, 53 Pa. St. 112; *State v. Symonds*, 57 Me. 148.

2. *Barker v. People*, 20 Johns. (N. Y.) 457; *State v. Symonds*, 57 Me. 148; *Delano v. Morgan*, 3 Cong. El. Cases, 168.

3. *U. S. v. Amsden*, 6 Fed. Rep. 819.

4. *Harrison v. Hadley*, 2 Dill. (C. C.) 229.

5. *Siebold Ex p.* 100 U. S. 371; *Clark Ex p.* 100 U. S. 399.

Under these two decisions, Congress has the power to pass laws providing for the punishment of any State officer of election, for unlawful acts or neglect, at elections for members of Congress, and to provide for the appointment of supervisors of such election, and that deputy marshals shall have power to keep peace at the polls. See *Yarborough Ex p.* 110 U. S. 651.

An election officer is liable to punishment, under the acts of Congress, for doing an unauthorized act with intent to affect the election of a member of Congress, and its results. *U. S. v. Bader*, 16 Fed. Rep. 117; *U. S. v. Gale*, 109 U. S. 65.

Where an act of Congress in its terms applies to elections generally, — but by the Constitution it could properly apply only to elections for representatives in Congress or presidential electors, — it will be presumed that it was the intent of Congress to limit its provisions to such elections, and the act will be held to be constitutional. In *U. S. v. Mumford*, 16 Fed. Rep. 233, and *Brown v. Mumford*, 16 Fed. Rep. 175, it was held that Congress has the authority to pass laws that the supervisor of elections may occupy such a position as will enable him to scrutinize the ballots to the best advantage; and if there is any conflict between this law and that of the State, as to the method of canvassing the ballots at a federal election, the act of Congress must govern. *U. S. v. Brady*, *Giaque El. Laws*, 17.

Sec. 2021 of the Revised Statutes of the United States, authorizing the appointment of deputy marshals where no supervisors of elections are appointed, is constitutional; and the marshals may arrest, without pro-

17. *Power to compel Elections by Districts.* — Although Congress has the power under the Constitution to prescribe the manner of holding Congressional elections, it has in several instances admitted representatives who were elected under State laws which were in conflict with the provisions of the act of Congress requiring the election to be held by districts.¹

18. *Power to punish Fraudulent Registration.* — An act to punish fraudulent registration by a person not having a legal right to vote at an election for representative in Congress, is not unconstitutional, as affecting the qualifications of voters under the State law.²

IV. *Registration.* — 1. *Constitutional Provisions.* — The constitutions of *Alabama, Arkansas, Florida, Georgia, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Rhode Island, South Carolina, and Virginia*, either authorize or require the legislature to enact registry laws for the purpose of determining who are entitled to vote at the election, while that of *Texas* forbids the passage of such law. Where this is required by the constitution, there is no power which can compel the legislature to enact such laws; and, if none are enacted, the elections are not invalid.³

2. *General Power to enact Registry Laws.* — In the absence of any limitation or prohibition in the constitution, it seems to be well settled, that, under the general authority of the legislature, registration laws may be passed, provided the laws are such as will only determine the qualification of the voter, and not such as to add to the constitutional qualifications.⁴

On the other hand, no law can be passed by which the free exer-

cess, any one voting, or attempting to vote, illegally; but they have no right to keep any person from voting, nor to interfere with the election officers in the discharge of their duty. *Deputy Marshal Re*, 22 Fed. Rep. 153.

1. *New Hampshire Case*, 2 Cong. El. Cases, 47; *Phelps v. Cavanaugh*, 2 Cong. El. Cases, 148.

2. *U. S. v. Quinn*, 8 Blatchf. (C. C.) 48.

3. The constitution of the State of South Carolina, adopted in 1868, required the legislature to pass a registration law, but none had been passed before the Presidential election in 1876. Before the Electoral Commission, objections were made to counting the electoral vote of the State, for this reason. In reply to these objections, it was said that the Constitution of the United States had devolved the duty of directing the manner of appointing of presidential electors on the legislatures of the States, and that the requirement of the State constitution could not bind the legislature so far as such elections were con-

cerned. There was no difference of opinion upon this point between the commissioners, Messrs. Abbott and Bayard expressly holding it to be of no validity. Mr. Commissioner Abbott, in speaking of the laws of the State as being calculated to promote fraud, said, "But although this is reprehensible in the highest degree, and shows the fraudulent intent of the party in power, I agree it does not furnish a sufficient reason to reject the vote of the State. The law certainly is mandatory upon the legislature; but if that body refuses to obey, to do its duty, and execute the mandate, by making a law to provide for registration, such a refusal, however fraudulent, cannot deprive the State and its people of the right to vote. Any other construction would put an end to the government, and prevent the people from electing any officers, State or national." Cong. Rec. vol. 5, pt. 4, 237.

4. *Capen v. Foster*, 12 Pick. (Mass.) 485; *Byler v. Asher*, 47 Ill. 101; *State v. Baker*, 38 Wis. 71; *Edmunds v. Banbury*, 28 Iowa, 267; *Page v. Allen*, 58 Pa. St. 338.

cise of the right of suffrage, granted by the constitution, will be impaired; nor can the constitutional qualifications be abridged, or other qualifications added, under the pretence of regulation; nor can such conditions be required as to make it burdensome to comply with them.¹

3. *What Regulations are Reasonable.* — Where the registry is to be closed before the day of election, and no proof allowed of the voter's right to vote where the name is not on the register, the authorities are not so much in harmony as to what constitutes reasonable regulations; and it will be necessary to examine the cases somewhat in detail, as no general rule can be deduced from them.²

1. *Page v. Allen*, 58 Pa. St. 347. It is not necessary that the same requirements should be made in all parts of the State. *Patterson v. Barlow*, 60 Pa. St. 54; *People v. Hoffman*, 116 Ill. 587.

A provision that no person shall be permitted to vote whose name is not on the register, will not render the law unconstitutional. *Judge McCrary* says, "The power to provide for the orderly exercise of the right of suffrage, which we have seen belongs to the State legislatures, includes the power to prohibit persons from voting whose names are not registered. It is now generally admitted that these laws do not add to the constitutional qualifications of voters, and are not therefore not invalid. *Am. Law of Elections*, § 11. An examination of the authorities will show that the above statement of Judge McCrary is generally upheld. *Edmunds v. Banbury*, 28 Iowa, 267; *Byler v. Asher*, 47 Ill. 101; *People v. Laine*, 33 Cal. 55; *Webster v. Byrnes*, 34 Cal. 273. Although a recent case decided by the Supreme Court of Oregon — *White v. Moreland*, 10 W. Coast Rep. 245 — held that any law which makes prior registration a condition of voting, is unconstitutional, where the constitution provides that those persons who have certain qualifications shall be entitled to vote at all elections authorized by law.

2. In the case of *State v. Butts*, 31 Kan. 537, the constitution required that a registry law should be enacted; and by the law the registry was to be closed ten days before election, and the name must be on the register in order to entitle the party to vote.

The law allowed the voter to register before the county clerk at any time during the year previous to the ten days before the election, and this law was upheld; and in the Circuit Court of the United States for the Northern District of Georgia, in the case of *Weil v. Calhoun*, 25 Fed. Rep. 865, a law of similar character was held to be constitutional. *McKay, Dist. J.*, says, "I am inclined to the opinion, that the fact

that the registration law makes no provision for the registration of those who become competent to vote after the registration is closed, and before the election, does not vitiate the registration. If the period between the registration and election be brief, and only such as is proper for making and putting in shape the registration papers, it seems to me that both reason and authority sanction such registration laws.

"The authorities are in conflict; but, in my judgment, sound sense, and a due regard to the true interest of the State, should lead a court to sustain such laws as strike one as but a prelude and preparation for the election, and a part of its machinery, even though some days intervened between the close of the registration and the actual opening of the polls. It is self-evident that some time must be taken for working out the returns of the registration, and putting them in shape for use at the polls; and whether this shall be one hour, or one, two, or ten days, would seem to depend on the legislative will, and, if not grossly excessive, ought to be sustained."

In the case of *Dells v. Kennedy*, 49 Wis. 555, the Supreme Court of Wisconsin, in passing upon a later law than the one upheld in *People v. Baker*, 38 Wis. 71, held, that, where a law provided that no votes should be received at any general election unless the name of the voter was on the register as completed by the board of registry, only accepting those who had become qualified after the completion of the register, it was invalid as being in violation of that portion of the constitution defining the qualification of electors; and as that provision was an essential part of the registry act, the whole act was held to be invalid. The court, by *Orton, J.*, say, "This law undertakes to do what no law can do; and that is, to deprive a person of an absolute right, without his laches, default, negligence, or consent, and in order to exercise and enjoy it, to require him to accomplish an impossibility.

No registry law can be sustained which

4. *Effect of Unconstitutionality of Law upon Election.*—If a registry is had under an unconstitutional law, and an election held upon the basis of such registry, there can be but little, if any,

prescribes qualifications of an elector additional to those named in the constitution; and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method prescribed by law for such purpose, and to such end, deprive a fully qualified voter of his right to vote at an election, without his fault and against his will, and require of him what is impossible, and make his right to vote to depend upon a condition he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disfranchised him without any pretended power or reason, or required of an elector qualifications additional to those named in the constitution.

In *North Carolina*, when the law required a challenged person to prove before the registers by persons known to them, that he was of lawful age, and had resided in the lot, block, and ward specified, it was held that this was a practical denial of the right to register and vote, and that the law was invalid. *Van Bokkelen v. Canaday*, 73 N. Car. 198. In Ohio a law was enacted which provided for a registry, and that the registers should be in attendance for six successive days, the third week before the election, and on the Wednesday before the election, to enable the voters to register. The elector must appear personally before the register, and no provision was made for registering at any other time, nor for proving the qualifications of the voter on the day of election; and no vote was allowed to be received unless the name of the person offering it was on the registry. The court held the law to be unconstitutional, because no provision was made by which a voter, who was necessarily absent during the seven days provided in the statute for registration, might be registered, or prove his right to vote, or excuse his personal presence at the place of registration, and because no provision was made by which a person who should become entitled to vote during the five days preceding the election could be registered, or prove his right to vote. *Daggett v. Hudson*, 43 Ohio St. 548. And this case was followed by the Supreme Court of Nebraska in the case of *State v. Connor*, 34 N. W. Rep. 499. On the other hand, in Rhode Island, an act which required the registry to be closed four days before the election, and

required votes offered by persons whose names were not on the list to be rejected, was upheld. *Polling Lists Re*, 13 R. I. 729. And in Illinois, in a recent case, the court upheld the law which only gave two days at short intervals in which to register, and required the registry to be completed three weeks before the election, and that the votes of all persons whose names were not on the list should be rejected. *People v. Hoffman*, 116 Ill. 587.

This doctrine of the right of the legislature to pass a registry law, and to provide for the rejection of the votes of all persons whose names were not on the list, was carried farther in the case of *McLean v. Broadhead*, 48th Cong. H. Rep. 2613, than in any other case, either in the courts or legislative bodies; and it is hardly probable that it would be followed. About fifty votes of qualified voters were rejected because their names were not on the judge's list; they having been stricken from the registry, as it was claimed, illegally and improperly. In contested elections in the House, it has been the constant practice to count votes offered where they had been improperly rejected.

The constitution of Missouri rendered eligible to vote all male citizens of the United States, or all persons who had declared their intention to become such not less than one year nor more than five years before the election, and who were above the age of twenty-one years, and who had resided in the State one year, and in the county, city, or town sixty days immediately preceding the election.

The constitution required that registration laws should be passed for all cities having a population of more than 100,000, and permitted them to be passed for cities having a population greater than 25,000, and nowhere else. An act was passed which allowed registry to persons having the qualifications specified in the constitution, and who resided in the ward ten days, and who were not directly interested in any bet or wager depending upon the result of the election. This law was held binding, notwithstanding the additional qualifications prescribed; and the votes which, if received, would have given the contestant his seat, were rejected by the committee, although the evidence showed that the provisions of the law in regard to the manner of striking off names had been violated; but in no other case has any law been upheld which required qualifications for registration in addition to those prescribed in the constitution for voting.

doubt, that the election will be held valid, unless it is shown that a sufficient number of legal voters to have changed the result were prevented by such law from casting their ballot. The legislature cannot, by passing a law containing unreasonable regulations, destroy the validity of an election, if the voters see fit to comply with the unreasonable requirements.¹

5. *Failure to make Register.* — Where, by the terms of the act requiring a registry, one cannot be made of all the inhabitants in the district in which the election is to be held, the election will not be valid if the number of such inhabitants is great enough to change the result.² Where, however, an act provides for an election at a time when it is impossible to make a registration, and the election is held without one, the election will be valid.³ Where the law requires a registry, and provides that no one shall be permitted to vote unless his name is upon the register, the failure to make a list will invalidate the election.⁴

6. *Presumption in Favor of Election.* — An election will not be held void, unless it clearly appears that there is a failure to perform the duties required by the Registration Act; and in the absence of proof to the contrary, it will be presumed that the officers performed their duty as far as possible.⁵

1. *Andrews v. Saucier*, 13 La. Ann. 301. This doctrine was also declared in the case of *Weil v. Calhoun*, 25 Fed. Rep. 865, where *McKay* says, "Besides, it seems to me that such objections ought, for reasons of public policy, to conform to the rules applicable to objections, that elections were not held in strict conformity to law; to wit, it should be made affirmatively to appear that the result would have been different if the illegality had not existed. Perhaps the voter might have private redress for the wrong done him in refusing his vote, but that is a very different thing from making an election void on a mere abstraction not affecting the result."

2. Thus, where an act providing for a registration in a city directed that the wards should be divided into precincts, but a large part of one ward was not placed in any division, and thus the inhabitants could not register or vote, it was held the election was void. *Van Bokkelen v. Canaday*, 73 N. Car. 198.

3. Thus, where a special election was required by statute to be held at an earlier period than registry could be made under the law, the lack of such register was held not to avoid the election. *State v. Piper*, 17 Neb. 614; *Boren v. Smith*, 47 Ill. 482; *People v. Ohio Grove*, 51 Ill. 191.

4. *Caverhill v. Ryan*, 18 Lower Can. Jur. 323; *Bisbee v. Finley*, 6 Cong. El. Cases, 172; *State v. Albin*, 44 Mo. 346; *Nefzger v. Davenport*, etc., R. Co., 36 Iowa, 642; *Pitkin v. McMair*, 56 Barb. (N. Y.) 75;

People v. Koppelcorn, 16 Mich. 342; *McDowell v. Rutherford Ry. Const. Co.* (N. Car.), 2 S. E. Rep. 351. And the fact that there had been no board of registration appointed, — *People v. Laine*, 33 Cal. 55, — or that the registration officers refused to perform their duty, will not change this rule. *Zeiler v. Chapman*, 54 Mo. 502. But under the act of 1878, where the county commissioners in Pennsylvania were required to furnish a list of resident taxpayers for the use of the officers of election, it was held that the failure to furnish the list would not vitiate the election, or be ground to reject the vote of a precinct, as the constitution of the State provided that no person's vote should be rejected because his name was not registered. *Wheelock's Case*, 82 Pa. St. 297.

5. Where a city was re-organized but a few days before an election, and the election was held without registration, it was held that it should be presumed that the failure to make a registration was caused by lack of time. *Campbell v. Braden*, 31 Kan. 754.

When the State law required the assistant register to be present at the polls, on the day of the election, to register those electors who had failed to register prior to that time, and it was shown that votes had been cast by persons whose names were not on the original registers, it was held; that, in the absence of proof to the contrary, it would be presumed that the names of the persons which were not on the original register had been registered by the officers

7. *Effect of Irregularities of Registration.*—Where a strict compliance with the terms of the registry law by the election officers is not essential to preserve the purity of the election, the votes of the electors should not be rejected on account of irregularities, unless they are such as would affect the result;¹ but where the irregularities are in matters of substance, the vote of the precinct must be rejected.²

8. *Intimidation of Registers.*—Where, by intimidation, the registers of a county were compelled to place a large number of names of illegal voters upon the lists, and they were permitted to vote, the House of Representatives in two cases rejecting the report of the majority of the committee, held that the vote of the county should be rejected.³

9. *What constitutes a Registration.*—Under the laws of the United States statutes providing for assessment lists, upon which the names of parties must be placed, and for the correction of such lists by the assessors, and by a court, and providing that a person cannot vote unless his name is upon such lists, is in effect a system of registration, and authorizes the appointment of supervisors of elections in cases of Congressional elections.⁴

10. *Conclusiveness of Register as to Right to vote.*—By Sect. 7 of the English Ballot Act, it is provided that a person shall not be entitled to vote unless his name is on the register, and every person whose name is on such register shall be entitled to vote; but this does not relieve the person from the penalty for illegal voting, where he is prohibited from voting, either by statute or by the common law of Parliament.⁵

before they had voted. *Lowe v. Wheeler*, 6 Cong. El. Cases, 77.

1. *Stimson v. Sweeney*, 17 Nev. 309; *Barnes v. Pike County*, 51 Miss. 305.

In a case in *New York*, where there had been some irregularities in the registration, it was *held* that the object of the law was to prevent unregistered voters from voting, and not to make the right to vote depend upon the observance of all the minute directions of the act, as to the preparation of the registry, and thus make the constitutional right of suffrage liable to be defeated, without the fault of the electors, by reason of the fraud, caprice, or negligence of the inspectors. *People v. Wilson*, 62 N. Y. 186.

Where the registration took place at a store, three hundred yards from the place named in the notice, but word was left at that place where the books would be found, it was *held* that this did not vitiate the registry, or the election held under it. *Newsome v. Earnhart*, 86 N. C. 388.

2. Where the law required the register to be made on certain days, and to contain the residence of the voter, and be certified by the officers, and all these requirements

were disregarded, it was *held* by the New York Assembly that the registration was not legal, and the vote of the district was rejected. *Hawkins v. Ducker*, N. Y. Cont. El. Cases, 448. Where the law required that the registers should be residents of the district, and that lists should be made at a certain place and in a certain way, and the registers were not residents of the district, the sworn clerk did not act, but substituted his brother who was not sworn, and the requirements of the law were nearly all disregarded, and the vote of the district was nearly doubled over that of the prior election, it was *held* that the registry was such a cloak for fraud that the whole vote of the district should be rejected. *Dodge v. Brooks*, 3 Cong. El. Cases, 78.

Making the register on Sunday will not necessarily vitiate it. *State v. Schneierle*, 5 Rich. (S. Car.) 299.

3. *Switzler v. Anderson*, 3 Cong. El. Cases, 374; *Switzler v. Dyer*, 3 Cong. El. Cases, 777.

4. Supervisors of Election *Rz*, 1 Fed. Rep. 1.

5. *Cox & Grady*, Registration and Election, 227; *Busby on Elect.* (4th ed.) 74.

In a number of the States, the laws provide that no person shall vote whose name is not on the register; some provide that the names may be placed on the register on the day of election, by the proper officers; and others, that when a name does not appear on the register, the person may vote by proving his right in the manner prescribed. Under the laws of some States, if the name is on the register, it is conclusive of the person's right to vote; but in most States, his vote may still be challenged.¹

11. *Improper Refusal to Register Voter for Congressional Elections.*—Sec. 2007 of the Revised Statutes of the United States provides that whenever under the authority of the constitution or laws of any State, or the laws of any Territory, any act is required to be done by a citizen as a prerequisite to qualify or enable him to vote, the offer of such citizen to perform the act required to be done, shall, if it failed to be carried into execution by reason of the wrongful act of the person, or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing, and being otherwise qualified to vote, shall be entitled to vote in the same manner as if he had in fact performed such act.²

12. *At State Elections.*—It may well be doubted whether a provision that no person shall be permitted to vote whose name is not on the register, is constitutional, without providing that his

1. In *Connecticut* it was held that under the registry act of 1860, the perfected list of electors used at the polls is conclusive, and that one whose name is on it cannot be challenged on the day of election. *Hyde v. Brush*, 34 Conn. 454.

In *Louisiana* it was held that the election officers had no authority to question the right to vote of a man who held a certificate of registration, unless for causes which had arisen since the certificate was given. *Auld v. Walton*, 12 La. Ann. 129.

In *Tennessee* it was held, that, where a person had complied with the provisions of the registration act for a certain election, his right to vote at that election became a vested one, and that the legislature had no authority to authorize the governor to set aside the registration in any county in whole or in part. *State v. Staten*, 6 Coldw. (Tenn.) 233.

The laws of *Arkansas* gave the governor authority to set aside the registration in any county for certain reasons, and order a new one. It was held that this did not give the governor power to set aside the registration, and disfranchise the voters, and that the only way to set aside the old registration, was to make a new one in accordance with the law. *Gause v. Hodges*, 4 Cong. El. Cases, 291.

In *Mississippi* it was held, that, where one had registered, he had gained the right to vote, and need not register anew in order to conform to the limits of a new precinct. *Perkins v. Caraway*, 59 Miss. 222.

In *Missouri* it is held that the registration is not conclusive as to the right of the registered parties to vote, and that, where the vote of a registered person is rejected by the judges of an election, it will be presumed to have been rightfully rejected, in the absence of proof to the contrary.

In *California*, where a person's name had been on the great register, and, upon a new registration being ordered, the clerk refused to place the name upon the register, on the ground that he had failed to furnish him with the date of his naturalization, it was held that his name being enrolled on the great register uncanceled, he was entitled to be registered. *Cohen v. Harvey*, 56 Cal. 70.

2. Before, however, the votes could be counted, it should not only be proved that the person tendering the vote was a legal voter, but that he offered to comply with the law at the proper time and place, or that he had so complied, and his name had been improperly erased, and that the tender of his vote had been made at the proper time and place. *McCrary*, Am. Law of El. § 11.

right to register may be decided by a judicial tribunal, or that an offer to register, accompanied by the proper proofs, shall be equivalent to a registration. This provision is made in the English law, and in the law of Illinois which was upheld in the case of the *People v. Hoffman*, 116 Ill. 587.¹

13. *Registering Officers Quasi Judicial Officers.* — In most of the States it is held that registering officers act in a judicial, or quasi judicial, capacity.²

14. *Effect of Fraud upon Registration.* — Where fraud is proved in a registry, it will have the effect of vitiating and of destroying the validity of the election held under it; ³ and if enough persons who are entitled to vote are denied the opportunity of registering to change the result, the election will be set aside.⁴

15. *Erroneous Spelling of Names.* — If the name of a person is on the registry list, his vote should not be rejected because the name is erroneously spelled.⁵

V. Authority to hold Elections. — 1. *Whence derived.* — In an organized state of society, the power of a majority to bind the minority by a popular vote depends upon the fact that the elections are held by virtue of some legal authority.

In the States in this country, the power to hold elections for senators and representatives in the Congress, and for electors for President and Vice-President of the United States, depends upon the provisions of the Federal Constitution, and of the acts of Congress, and the State laws enacted under the provisions of that Constitution; and the power to hold State or local elections, depends upon the constitutions and laws of the various States.

In the organized Territories, the right to hold elections depends entirely upon the laws of Congress, or of the Territorial legislature, created by virtue of an act of Congress; and an election held in any State, without the sanction of statutory or constitutional

1. In *Florida* it has been held, that where a voter's name had been stricken from the list of voters, and he had applied to the county commissioner to have it re-instated, and tendered the proper oaths, and they refused, he may compel them to do so by a *mandamus*. *State v. Jefferson County Comm'rs*, 17 Fla. 707.

2. *Perry v. Reynolds*, 53 Conn. 527; *Walker v. Brockway*, 1 Mich. (N. P.) 57; *People v. Board of Registration*, 15 Mich. 427; *Keenan v. Cooke*, 12 R. I. 52; *Auld v. Walton*, 12 La. Ann. 129.

3. In *Missouri*, under the constitution of 1865, and the registration laws enacted under it, superintendents of registration for each county were appointed by the governor, and they appointed the commissioners of registration by whom the register was made up.

In one county a man was appointed superintendent by the governor as a Republican,

and he appointed three Republicans as commissioners; but, having been defeated for the Republican nomination for sheriff, it was alleged, and said to have been proved, that, for a money consideration, he removed the commissioners and appointed three others who registered all applicants, though known to have been disloyal, if they took the oath of loyalty; and that, as a result of this action, the number of voters registered was double the number registered at the preceding and at the subsequent elections.

The committee having found that the corrupt agreement was established by the evidence, they rejected the vote of the county based upon the fraudulent registration. *Shields v. Van Horn*, 3 Cong. El. Cases, 932.

4. *McDowell v. Rutherford Ry. Const. Co.* (N. Car.), 2 S. E. Rep. 351.

5. *Anon.* 2 Brews. (Pa.) 138; *McLean v. Broadhead*, 48 Cong. H. R. No. 2613.

provisions, would be entirely without validity, notwithstanding a unanimous vote should be cast in favor of any proposed measure.¹

There is no inherent reserved power in the people to hold elections; they are therefore of no effect, unless held by virtue of some law in force when the election was held;² and if there is no authority to hold the election in a majority of the precincts, it will be wholly void.³

This authority may be given by the constitution itself without any statute.⁴

The authority to hold an election at one time will not warrant an election at another time.⁵

Authority to elect a certain number of officers confers no right to vote for a greater number.⁶

Where authority is given by law to hold an election, but there are provisions in the law which restrict the constitutional right of suffrage, — which are enforced by the officers, — the election will be void,⁷ unless assented to by all, or disregarded by all, the voters, in which case the election might be allowed to stand.⁸

1. *State v. Sims*, 18 S. Car. 460; *Brewer v. Davis*, 9 Hun (N. Y.), 214; *Matthews v. Shawnee Co.* (Kan.), 9 Pac. Rep. 765.

2. *Brooks v. Medary*, 15 Cal. 58; *Sawyer v. Hyde*, 1 Nev. 75; *State v. Collins*, 2 Nev. 351; *State v. Jenkins*, 43 Mo. 261; *West Virginia Contested Election Cases*, 4 Cong. El. Cases, 108; *Patterson v. Belford*, 5 Cong. El. Cases, 52.

In California a statute provided that harbor commissioners should be elected or appointed, and should hold office, as provided in another part of the code; but in such part there was no provision made for such an election. Upon the resignation of a harbor commissioner, it was held that no successor could be elected by the people, until a passage of a law authorizing them to hold the election; and that the governor having power to fill the vacancy, his appointee would hold the office until the next legal and authorized election. *People v. Matthewson*, 47 Cal. 442.

It is said in Pennsylvania that majorities go for nothing at an irregular election; they are not even regarded as majorities, for orderly citizens have the right to stay away from such elections. *Commonwealth v. Baxter*, 35 Pa. St. 263.

Where a law was not to go into effect until a certain day, but one of the sections provided for an election to be held on a day preceding that upon which the law was to go into effect, there being no other law in force authorizing the election, it was held to be a nullity. *People v. Johnston*, 6 Cal. 673.

3. *People v. Salomon*, 46 Ill. 415.

4. When a term of an office was fixed by the constitution, and this also required that

a general election should be held on a certain day each year, and there was a general law which provided all the machinery requisite for conducting an election and declaring the result, if the time of the commencement of the first term is prescribed by law, an omission to provide by statute for an election for subsequent terms will not affect the validity of an election for that office held at the general election preceding the expiration of the term, as the constitution is considered as conferring the requisite authority to hold the election. *State v. Thomas*, 10 Kan. 191.

5. Thus, where the law required an election for the removal of a county-seat to be held within fifty days from the filing of the petition, one held seventy days afterward was held void. *Hess v. Washoe Co.*, 6 Nev. 104. And when a local option law authorized an election to be held not less than fifteen, nor more than thirty, days from the date of filing the petition, one held thirty-one days after was held illegal. *Boone v. State*, 10 Tex. App. 418.

6. *Perry v. Cross*, 3 Sanf. Ch. (N. Y.) 1.

7. A law to organize a board of police commissioners of a city provided that no elector should vote for more than two members, when there were four to be elected; and in a *quo warranto* proceeding, the law was held to be unconstitutional, the election void, and the incumbents were ousted. *State v. Constantine*, 42 Ohio St. 437.

8. In Louisiana it was held that where the police regulations for the conduct of an election were unconstitutional, the election will not be set aside if the people acquiesce in them and hold the election, as they may disregard such regulations if they see fit

2. *Must be called by Proper Authorities.* — Where the power to call an election is conferred by law upon certain officers, it cannot be exercised by others,¹ nor can this power be delegated to another.²

3. *Authority to elect Delegates to Congress.* — The people of an unorganized territory have no authority to elect a delegate to Congress, without previous authority conferred by act of Congress.³

Andrews v. Saucier, 13 La. Ann. 301. And in New York, the view taken by the Supreme Court of Ohio, in State v. Constantine, 42 Ohio St. 437, was not adopted; as in two cases where the law provided that each elector should vote for only two candidates for an office where there were three to be elected, it was held that the election was not invalidated by this provision, as the elector might have disregarded it, and voted for the full number. People v. Perley, 80 N. Y. 624; People v. Kenney, 96 N. Y. 294.

1. Schuyler Co. v. Farwell, 25 Ill. 181; Clark v. Hancock Co., 27 Ill. 305; Marshall v. Cooke, 38 Ill. 444; State v. Buck, 13 Neb. 273.

Where it was provided that elections to be held in a city or village must be ordered by the council, or the board of trustees, an election called by the city or town clerk was held void. Jacksonville, etc., R. Co. v. Virden, 104 Ill. 339. And when it was provided that a town-meeting might be called by a town, and such a meeting was called by the supervisor, it was held illegal, Force v. Batavia, 61 Ill. 99. Where the statute allowed an election to be called, when a petition was signed by ten legal voters, one called upon the filing of a petition signed by ten persons, a portion of whom were not legal voters, was held illegal. People v. Cline, 63 Ill. 394.

Where a statute provides for holding a special election, it will be held valid if held according to the provisions of the law for holding general elections in the election district. Wells v. Taylor, 5 Montana, 202.

Where there was a vacancy in the office of representative in Congress, in a certain district, which occurred after the State had been redistricted by law, a proclamation was issued by the governor calling an election in the old district, to fill the vacancy, notwithstanding the passage of the law which had changed the boundaries of the district, and given it a new number. This election was held valid upon the ground that the governor had authority to issue writs for the election from the Constitution of the United States; and the vacancy having occurred in the old district, he had the authority to issue the writ to fill the vacancy in that district. State v. Berg, 76 Mo. 136.

2. When the power to fix the time of an election was conferred upon the governor of a State, and he placed writs of election in the hands of a person, with authority to change the dates in certain contingencies, and the time was so changed, and the election held at a different date from that originally fixed in the writ, it was held that the election was void. McKenzie Case, 2 Cong. El. Cases, 460; McGrafflin Case, 2 Cong. El. Cases, 464.

3. In 1850, Hugh M. Smith presented himself before the House of Representatives with credentials, showing that he had been elected as a delegate from the Territory of New Mexico at a convention held by the people of the Territory, which had been selected by mass meetings of the people. His claim was rejected, — Smith Case, 2 Cong. El. Cases, 101, — as was also an application from another person from the same Territory at the next session, — Messervy's Case, 2 Cong. El. Cases, 148, — and also in the case of an applicant from what is now part of the Territory of Utah. Babbitt's Case, 2 Cong. El. Cases, 116. When the State of Minnesota had been admitted, the question was presented, whether the old delegate should be permitted to serve out his time, or whether a new delegate, elected from that part of the territory not included in the State, was entitled to the seat; but the House determined that the admission of the State operated as a dissolution of the government of the Territory, and that the remainder was without any distinct legally organized government, and the people were not entitled to a delegate, until that right was conferred by statute, — Fuller v. Kingsbury, 2 Cong. El. Cases, 251, — although in the earlier case of Wisconsin, where the State had been formed from a part of the Territory of the same name, the inhabitants of that portion not embraced in the State had held an election in pursuance of a proclamation of the governor, and had sent a delegate who was admitted by a vote of 124 to 62. Sibley's Case, 2 Cong. El. Cases, 102.

This was based upon the idea that the Territory of Wisconsin was not merged in the State, which was created out of a part of it, but the rest of the Territory, not embraced in the State, might be considered

And persons in an unorganized county not attached to any other county for election purposes, cannot hold an election and vote for such delegate.¹

4. *Authority to elect Representatives under the State Law.*— During the period of reconstruction, important questions were presented as to the rights of the Union population in the various districts in the seceded States to elect representatives to Congress, which were settled differently in the various cases.²

5. *Authority to elect Representatives under United States Laws.*— An election for representatives in Congress cannot be held under the authority or laws of any State without authority of a law of the United States.³

as the Territory. *Morton v. Daily*, 2 Cong. El. Cases, 402.

1. *Daily v. Estabrook*, 2 Cong. El. Cases, 299.

2. In 1861, after the State of Tennessee had passed the ordinance of secession, but while the Constitution and laws for the election of representatives in the Congress of the United States remained unrepealed, an election was ordered by the State authorities for delegates to the Confederate Congress.

In one district the Union voters cast their votes for a representative in the Congress of the United States; and upon proof of the returns being made to the House of Representatives, he was admitted to the seat, although the governor of the State had refused him a certificate of election. *Clement's Case*, 2 Cong. El. Cases, 366. But in another case in the same Congress from Virginia, where it was shown that the State convention had passed an ordinance suspending and prohibiting the election of representatives in Congress, and also that the votes were not cast as required by the State law, the applicant was refused the seat. *Upton Case*, 2 Cong. El. Cases, 368.

Where, after the secession of Virginia, a Union convention had been called, and a legislature elected, the convention, which still remained in session, assumed to pass an ordinance for the election of representatives in Congress, and, in accordance with the ordinance, a proclamation calling the election was issued by the Union governor, the claimants under the election were refused seats. In these cases, however, the districts were, with the exception of a single precinct in each district, in the occupation of Confederate forces, so that no notice could be given or election held except in the single precinct occupied by the Union forces. *Beech Case*, 2 Cong. El. Cases, 391; *Segar Case*, 2 Cong. El. Cases, 427; *McKenzie Case*, 2 Cong. El. Cases, 460.

In two cases in Louisiana, after the capture of New Orleans, when two of the

districts were substantially within the Union lines, the military governor issued a proclamation calling an election. The old laws of the State, as to the election of members of Congress, had not been repealed; and there was substantial compliance with the provisions of those laws as to registration and holding the election, and the candidates were admitted to seats. *Flanders & Hahn Cases*, 2 Cong. El. Cases, 438. In the Field case from the same State, there having been no division of the State into districts, after the apportionment giving five representatives instead of four, to which the State had been previously entitled, the election was *held* to be illegal; but there had also been military interference, and the election had not been free, and the applicant was refused the seat. 2 Cong. El. Cases, 580.

In Virginia a proclamation was issued by the department commander, and one in pursuance of that by the military governor of only part of the State; but the election was *held* to be void. *Gould & Wing Cases*, 2 Cong. El. Cases, 455.

3. In 1852 an act was passed by Congress, providing that, until the next apportionment, California should be entitled to two representatives. The census of 1860 showing that the population was sufficient to entitle the State to three representatives, there were three elected in 1861 before there was any apportionment made under the new census. Two members having been admitted, upon application of the third the House determined that there being no law for the election of the third member, he was not entitled to the seat. *Lowe Case*, 2 Cong. El. Cases, 418.

In 1865 the question arose as to what was sufficient authority of law to hold elections for representatives. In Louisiana and Arkansas, under the authority of the presidential proclamation, but without any Congressional legislation, State governments were organized, constitutional conventions were called, new constitutions

6. *Authority to elect Senators of the United States.* — The action of the State legislature in electing a senator, without a law authorizing the election, is of no validity.¹

VI. Notice. — 1. *When Notice required.* — An election held without notice to the voters is void. But the notice may be given by the law itself. Where the time and place of election are fixed in

were framed, and adopted by vote of the people who were not in the districts occupied by the Confederate forces, and under these constitutions State governments were organized.

In Louisiana the State was redistricted by the convention, and elections were directed by it; and in Arkansas the elections were held by legislative authority. Reports in favor of the admission of the elected candidates were presented to the House; but the House refused to take action upon them, and the applicants were not seated. *Bonzano Case*, 3 Cong. El. Cases, 1; *Jack's & Johnson's Cases*, 3 Cong. El. Cases, 17.

When the question as to the proper time for holding an election depended upon the construction of a State constitution, it was held that the decision of the political authorities of the State, made in good faith, would be entitled to great weight in deciding the question, though not absolutely binding in a Congressional case. *Holmes & Wilson's Cases*, 5 Cong. El. Cases, 320.

1. Thus, when there was to be another legislature to be elected, under the law of the State, before the expiration of the term of the senator then in office, an election by the legislature was held to be a nullity; although the same legislature, afterwards, at the same session, changed the date of the election of the next legislature, so as to throw it after the end of the senatorial term. It was held that the word "chosen," in the act of Congress of July 25, 1866, which provides that the legislature of each State, which shall be chosen next preceding the expiration of the term, shall elect the successor, has the meaning of elected only, and not of elected and convened. *Norwood v. Blodgett*, Sen. El. Cases, 331.

One legislature has no authority to pass a resolution that one House of the prior legislature had not been legally organized, and to declare the election void, and elect another senator. This authority resides alone in the Senate of the United States. *Potter v. Robbins*, 1 Cong. El. Cases, 875; Sen. El. Cases, 99.

In June, 1868, credentials were presented, by persons claiming to have been elected shortly before, from Arkansas and Florida, and, at the same time, those of persons claiming under an election held under the

provisional governments of those States nearly two years before.

The credentials of the claimants under the first election were laid upon the table, and the persons elected after the adoption of the reconstruction acts were admitted without a reference to the committee. *Jones & Garland v. McDonald & Rice*, Sen. El. Cases, 282; *Marvin v. Osborn*, id. 283; *Hill & Miller v. Whitely & Farrow*, id. 285.

The question as to the right of the States which had been in rebellion to elect senators of the United States came up in the Senate in 1864, upon the application of persons to be admitted as senators from Louisiana. In the Arkansas case the committee reported against their admission, on the ground that a large portion of the State was occupied by hostile forces, and that the rest was only held in subordination to the laws of the United States by military force. *Fishback & Baxter Case*, 2 Cong. El. Cases, 641; Sen. El. Cases, 240. And in 1865 the committee reported on the Louisiana case, that the State having been declared to be in rebellion, in pursuance of a law passed by both Houses of Congress, it was improper to admit the applicants until there should be some recognition by both Houses of an existing State government acting in harmony with the Government of the United States, and recognizing its authority. *Call & Smith*, 2 Cong. El. Cases, 643; Sen. El. Cases, 248.

In 1868 an act was passed declaring a number of the States entitled to representation; and after Florida had adopted a constitution, and complied with the reconstruction act, but before the passage of the act admitting the State to representation, senators were elected by the legislature; and the Senate resolved, without division, that the subsequent recognition of the State, as entitled to representation under the constitution, in pursuance of which the legislature was elected and organized, related back and made valid its acts from the time of its organization. *Hart v. Gilbert*, Sen. El. Cases, 320; *Reynolds v. Hamilton*, Sen. El. Cases, 323.

This view had been taken by the House of Representatives, when members elected from Minnesota, before the act of admission to the Union, applied for their seats, and they were admitted. *Phelps v. Cavanaugh*, 2 Cong. El. Cases, 246.

the law itself, all the voters must take notice of it; and if any election is held, the failure of nearly all the voters to attend cannot affect the validity of the election.¹

When the time and place of the election are to be fixed by some authority, the failure to give the notice will render the election a nullity.²

Where the time is fixed by law, but other notice is required to be given, if the election is a general one, and the officers are to be elected for the full and regular term, the failure to give the notice will not usually avoid the election.

When the lack of notice is partial, and extends to only a part of the precincts, this lack may, or may not, vitiate the election.³

Where there are vacancies to be filled, and there is a failure to give notice, the authorities are not entirely in harmony.⁴

1. *Com. v. Smith*, 132 Mass. 289; *La Fayette v. State*, 69 Ind. 218; *People v. Brenham*, 3 Cal. 477; *Carson v. McPhetridge*, 15 Ind. 327; *State v. Jones*, 19 Ind. 350; *Jones v. Gridley*, 20 Kan. 584.

2. *Morgan v. Gloucester*, 44 N. J. L. 157; *James v. State*, 1 Kan. 273; *Kenfield v. Erwin*, 52 Cal. 164; *Stevens v. People*, 89 Ill. 337; *Seaford Case*, 3 Lud. (Eng. El. Cases) 35; *Torrey v. Harris (Ky.)*, 3 S. W. Rep. 614; *Simeon on Elect.* 157.

3. If the number of voters in the precinct which had no notice is so great in proportion to the voters of the whole district that it is not clear that the result could not have been different, there can be no doubt that the whole election should be set aside. *Berry v. Lauck*, 5 Coldw. (Tenn.) 588; *Marshall v. Kerns*, 2 Swan. (Tenn.) 68. But when the failure to hold the election only extends to an insignificant part of the district, the whole election should not be set aside, unless the whole vote cast is so close that there is reasonable probability that the result would have been different if elections had been held in those precincts which had no notice. *McCraw v. Haralson*, 4 Coldw. (Tenn.) 334; *Lyon v. Smith*, 1 Cong. El. Cases, 101; *Randolph v. Jennings*, 1 Cong. El. Cases, 240.

4. In such a case, if the number of votes cast is so great as to show that the voters have general knowledge of the vacancy, the election will probably be upheld. Thus, where notice given for an election under an act to establish a new county, omitted the judge from the list of officers to be voted for, but the voters voted for one, it was *held* that the person so voted for was entitled to hold the office as against a person voted for at the next election. *People v. Templeton*, 12 Cal. 394. And where there having been no notice of an election for a member of Congress in one county, yet the people selected election officers, and voted for that office, the lack of notice was not

allowed to invalidate the election in the district or in the county. *Strobach v. Herbert*, 6 Cong. El. Cases, 5.

On the other hand, if there were but few votes cast for the office, and where there are printed tickets, if there are no names on the ticket for this office, so that it appears that the voters at large did not know of the existence of the vacancy, the election ought not to be upheld.

Upon this subject *Judge Cooley* says, "When, however, both the time and place of an election are prescribed by law, every voter has the right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty.

"The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from statute, and not from the official notice; it has therefore been frequently *held* that when a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that the notice of the general election shall also specify the vacancy to be filled, an election at that time and place will be valid, notwithstanding the notice is not given; and such elections cannot be defeated by showing that a small portion only of the electors were actually aware of the vacancy, or cast their votes to fill it." *Const. Lim.* *60.

That some of the cases cited uphold the doctrine laid down in the last clause of the above quotation, is undoubtedly true; but it is equally true that many of the cases are opposed to this doctrine.

In New York, when a vacancy in the office of Justice of the Supreme Court occurred by the death of the incumbent on the 23d day of October, and the time before the election to be held on the 6th day of

November was too short to enable the secretary of state to give the statutory notice, it was *held* that a person receiving the highest number of votes at that election was legally entitled to the office. *People v. Cowles*, 13 N. Y. 350. In Wisconsin it has been held that the omission to give the statutory notice of an election, whether for a full term or a vacancy, does not vitiate the election. *State v. Orvis*, 20 Wis. 235; *State v. Goetze*, 22 Wis. 362. And in Michigan it was *held* that when a city charter provided that notice of the annual city election, and of the offices to be filled, should be given by the city clerk, and that all vacancies occurring during the year should be filled at such elections, such provisions as to notice were directory only, and that the omission of any mention of a vacancy in the notice given by the clerk did not vitiate the election to fill such vacancy. *People v. Hartwell*, 12 Mich. 509. See also *State v. Skeving*, 19 Neb. 497, where it was *held* that if a county commissioner removes from the district, the electors may fill his place, although no notice has been given.

Judge Cooley, in his notes, says, that the case of *Foster v. Scarff*, 15 Ohio St. 532, would seem to be *contra* to the cases cited by him. In this case, upon the death of an incumbent of the office of probate judge, his successor, instead of being commissioned for the unexpired term of his predecessor, as the law required, was commissioned for a full term of three years. At the expiration of the regular term, no notice was given of any election to fill the vacancy; and less than one-fourth of the voters cast their votes for a single candidate, and no votes were cast for any other; and it was *held* that such an attempted election was irregular and void.

The case of *Beal v. Ray*, 17 Ind. 554, is in conflict with that of *People v. Cowles* cited above, and holds that, when the time after the vacancy occurs is too short to give the statutory notice, the election is invalid.

In the case of *McCune v. Weller*, 11 Cal. 49, the question as to the necessity of a proclamation in case of an election to fill a vacancy is fully discussed, and the authorities carefully reviewed; and the conclusion is reached, that there is a very important distinction between general and special election in this respect.

The doctrine is laid down, as above set forth, that the time, place, and manner of general elections being fixed by law, the electors may and must take notice of them; and as to such elections, the statutory requirements as to notice are directory only; but in the case of special elections to fill vacancies, the requirement is mandatory. See also *People v. Porter*, 6 Cal. 26; *People*

v. Martin, 12 Cal. 409; *Westbrook v. Roseborough*, 14 Cal. 180; *People v. Thompson*, 67 Cal. 627.

In a later case in Michigan, it is said that *People v. Hartwell*, 12 Mich. 509, above cited, had been decided upon the mandatory provisions of the statute. In this case, *Secord v. Foutch*, 44 Mich. 89, it is said, "It is a necessary safeguard to popular elections that the people be informed what officers they are to vote for. They may be expected to know what elections are to be made at the regular general elections; and as to those in ordinary cases, it might be dangerous to allow a failure to give notice, to avoid the elections. This would enable the popular will to be defeated by the misconduct of ministerial officers. But there can be no such knowledge assumed concerning vacancies in office; and without some distinct and public notice of some sort, such an election could hardly fail to be capable of becoming a cloak for the worst kind of fraud and trickery.

In Wisconsin, also, in a case later than those above cited, where there was a resignation of an incumbent of an office, but no notice was given to fill the vacancy, and the fact was known to but few of the voters, and but a few votes were cast for any candidate for the office, it was *held* that the election was void. *State v. McKinney*, 25 Wis. 416.

The case of *Foster v. Scarff* was cited with approbation in a later case in Kansas. *Wood v. Bartling*, 16 Kan. 109. In New Jersey, also, where there was a doubt as to whether there was a vacancy in the office of the city judge, and but twenty-six votes were cast for the majority candidate and three for the minority, in the precinct where eight hundred votes were cast for other officers, the voters were allowed to testify that they had no knowledge of the vacancy, or that there were votes being cast for that office, and the election was *held* void. *State v. Goode*, 41 N. J. Law, 296. To the same effect see *Beal v. Morton*, 18 Ind. 346; *People v. Crissey*, 91 N. Y. 616; *Toney v. Harris* (Ky.), 3 S. W. Rep. 614.

In some cases of special elections, however, the presumption of knowledge is such that an election will be upheld where it is not a case of a vacancy to be filled, but the election is for a full term. In a case in Kansas, upon the organization of a new county, a probate judge was elected in September: the next regular general election for probate judge was to be held in the following November. The constitution provided that a judge elected at a special election should hold his office only till the next general election. The sheriff gave no notice for the election of a pro-

2. *By whom Notice must be given.* — Where the giving of notice is merely a ministerial act, done in pursuance of the order of the proper authority, if the time and place of the special election is regularly fixed by that authority, the fact that the notice is signed by the wrong officer will not vitiate the election.¹ But when duty of giving the notice is a part of the duty of fixing the time and place, and of calling the election, then, if the notice is given by the wrong party, or if given by the proper officer, it is given without the authority of the officer whose duty it is to order the notice given, the election will be void.²

3. *Sufficiency of Notice as to Time.* — The time of an election must be fixed in advance;³ and when the length of time of the notice is fixed by statute, a shorter time will not suffice;⁴ but where no time is fixed, if the notice is given a reasonable length of time before the election, it will be sufficient.⁵

4. *Sufficiency of Statement.* — The notice must substantially follow the requirements of the statute, and state with reasonable certainty the purpose for which an election is to be held; and a substantial departure from these requirements will vitiate the election.⁶

bate judge at the November election; but some votes were cast for a candidate for that office, and it was *held* that they must be counted. In Nebraska it is *held* that where the result of the election would not have been different if proper notice had been given, the election would not be set aside at the suit of persons who had participated in it. *State v. School Districts*, 13 Neb. 466; *Ellis v. Karl*, 7 Neb. 381. In Michigan it was *held* that where no notice was required by statute, and an election was held for establishing a county-seat, at the time of the general election without special notice it was valid. *Att'y-Gen'l v. County Commissioners*, 31 N. W. Rep. 539.

1. Thus, it was *held* that the fact that the notice was posted by the town clerk instead of by the trustees, did not invalidate the election. *Jordan v. Haynes*, 36 Iowa, 9. And where, by order of supervisors, the notice was signed by the town clerk instead of the supervisors themselves, it was *held* sufficient. *Lawson v. M. & N. R. Co.*, 30 Wis. 597.

2. Thus, where notice was to be given by the mayor and common council of a municipal corporation, notice given by the mayor alone was not sufficient. *People v. Rafter*, 89 Ill. 337. And where the law required the council to order an election, and fix the time and place of it, the town clerk could not be authorized to give such notice by an informal understanding of the members of the council. *People v. Gocheour*, 54 Ill. 123. And where an ordinance

was required to hold a special election, the failure to pass such an ordinance, or the failure of the proper officers to give the notice under it, was *held* to render the election a nullity. *Jacksonville, etc., R. Co. v. Virden*, 104 Ill. 339.

3. *State v. Young*, 4 Iowa, 561.

4. *Seaford Case*, 3 Lud. (Eng. El. Cases) 35; *Harding v. Rockford, etc., R. Co.*, 65 Ill. 90; *George v. Oxford*, 16 Kan. 72. But see *Athlone Case*, Bar. & Arn. (Eng. El. Cases) 115, where there had been three days' notice given of an election where four were required, and the committee reported that the election ought not to be affected by the irregularity.

5. Where the law did not prescribe the length of the notice, it was *held*, in an early Congressional case, that two days' notice of a vacancy in the office of representative in Congress was sufficient, where the election was to be held on the day of the presidential election, the delay being caused by the time occupied in transporting the writ from the capital of the State to the county. *Hoge Case*, 1 Cong. El. Cases, 135. Where a statute passed Jan. 15 required the notice of the election to be given forthwith that the election was to be held on the 1st of March, and it was not given until Feb. 15, it was *held* not sufficient. *State v. Ripley Co. Comrs.* 9 Ind. 310.

Where the notice fixed a day for the election which was in conflict with the statute, the election was *held* void. *People v. Leale*, 52 Cal. 71 & 620.

6. *Cairo, etc., R. Co. v. Sparta*, 77 Ill.

5. *Sufficiency of Publication.* — Where a publication of the notice of an election for thirty days in a newspaper was required, it was held that a publication in each issue of a weekly paper for that time was sufficient.¹

Where publication in a newspaper was not required by statute, notice given by posting notices in various parts of the county was held sufficient.²

Good faith in selecting places as the most public places in the precinct, is all that can be required.³

6. *Kind of Notice.* — While some kind of notice is required, it has been held that, although the notice is not given as required by law, yet if the voters have actual notice that the election is to

505. Where the law authorizing an election to remove a county-seat, ordered that the notices should direct the voters to place on their ballots their choice for county-seat, and it directed them to place on them the words, "For removal of county-seat," or "Against removal," it was *held* to avoid the election. *People v. Hamilton Co.*, 3 Neb. 244.

When the statute allowed township trustees to submit a proposition to the voters, to allow the expenditure of more money than could be raised under the road law, and to issue bonds for the purchase of toll-roads, or the improvement of any highway, by proclamation which should state the specific purpose for which the money was to be expended, it was *held*, if the notice did not specify the particular highway to be improved, or the toll-road to be purchased, the supervisors could not be compelled to issue the bonds. *McMahon v. Supervisors of San Mateo Co.*, 46 Cal. 214.

When the notice informed the voters that there was a vacancy in an office, and notified them to hold an election to fill it, it was *held* sufficient, although it did not call it a special election. *Tilson v. Ford*, 53 Cal. 701.

A notice calling an election, to elect a president and board of trustees of a village, was *held* sufficient, although the president was required to be elected by the board of trustees from their number. *People v. Fairbury*, 51 Ill. 149.

Where the statute required a notice for municipal aid to a corporation, to state the amount to be voted, and this is omitted, it was *held* that it would vitiate the election. *Crook v. Daviess Co.*, 36 Ind. 320.

Where the vote taken is different from that specified in the notice, the election will be void; thus, where a notice in a school district was for an election to establish a school, and to provide means to pay for the same, it was *held* that it would not warrant a vote to issue bonds to build schoolhouse. *Thatcher v. People*, 93 Ill. 240.

Where a notice called for a city election to elect one councilman from each ward, it was *held* not to authorize the election of a treasurer. *State v. Beck*, 13 Neb. 273.

The notice need not state those things that will be implied. Thus, where the law authorized an election, to determine whether a donation should be made to a corporation, and bonds be issued for the same, it was *held* not to be necessary to include the proposition to levy a tax to pay the bonds. *Prairie v. Lloyd*, 97 Ill. 179.

Where the notice of an election to vote aid to a railroad, gave the name of the company, and stated that it was to be expended in two townships on the west side of a certain river, above a certain creek, it was *held* to be sufficiently definite as to the line of the road. *West v. Whitaker*, 37 Iowa, 598.

Where a notice for an election to issue bonds for a railroad company did not specify the time they were to run, nor the rate of interest they were to bear, but referred to the petition on file in the town records for the details, it was *held* that the omission did not avoid the election. *Chicago, etc., R. Co. v. Pinckney*, 74 Ill. 277.

Where notice was given that an election would be held for the purpose of voting for a schoolhouse site, for a schoolhouse in the district, and for the purpose of voting for or against issuing bonds to erect or purchase a schoolhouse for the district, it was *held* to be sufficiently definite. *People v. Sisson*, 98 Ill. 335.

1. *Scott v. Paulen*, 15 Kan. 162; *Whitaker v. Beech*, 12 Kan. 292.

2. *State v. Commissioners of Sumter Co.*, 19 Fla. 518.

3. *Johnson v. Commissioners of Wilson Co.*, 34 Kan. 670.

Where notices were posted at three different corners of the same cross-roads, at a store and two saloons, it was *held* that it might be shown that these were three of the most public places in the district, although so close together. *People v. Lansing*, 55 Cal. 393.

be held, and they attend and vote, the election should be considered as a *de facto* election, and should not be set aside if regular in other respects.¹

7. *Impossibility of giving Statutory Notice.* — Where an election is ordered by special law, but no provision is made for notice, the provisions of the general law would generally apply; but when it is impossible to give such notice, the election is not avoided for want of the notice.²

VII. Election Officers: Their Qualifications, Powers, Civil and Criminal Liabilities. — 1. *Who is an Election Officer.* — A governor of the State is not an election officer, within the meaning of sect. 22 of the Act of Congress of May 31, 1870, making it a criminal offence for any election officer to fraudulently make any false certificate of the result of any Congressional election;³ but a United States supervisor of elections is an election officer.⁴

2. *Lack of Legal Qualifications.* — The great weight of authority, both in the judicial and legislative cases, is to the effect that a lack of compliance with some of the requirements of the law, in regard to the proper qualification of election officers, will not vitiate the election, in the absence of other grounds for setting it aside, although there are cases holding the opposite doctrine. It may be said that the decided tendency of all the tribunals is to treat all provisions of the statute which are not absolutely prohibitory in form as merely directory, and not to disfranchise the voters, by reason of negligence in the officer, when no harm has resulted, and no fraud is charged.⁵

1. *Dishon v. Smith*, 10 Iowa, 212.

While, in such a case, if so many of the voters attended that the result could not have been changed for want of proper notice, this would be correct; yet, unless this fact is shown, the election ought to be set aside, as no elector is under obligations to attend an election held without legal notice; and in cases of elections for the issuing of municipal bonds, it has been held that the lack of strict compliance with the law, in regard to giving notice, rendered the election illegal. *People v. Santa Anna*, 67 Ill. 65; *People v. Laenna*, 67 Ill. 67.

2. In a case where an election was ordered by law to be held on a certain day, but there was not sufficient time after the law took effect to give the statutory notice before the day of election, it was decided that an election held without the notice was valid. *People v. Jackson Common Council*, 57 Mich. 129.

3. Governor Clayton of Arkansas was indicted under this act, as an election officer, for fraudulently making a false certificate of the result of a Congressional election; but upon a demurrer the indictment was quashed, upon the ground that the governor of the State was not such an

election officer as was contemplated by this act. *U. S. v. Clayton*, 2 Dill. (C. C.) 219.

4. In the *United States v. Fisher*, 8 Fed. Rep. 414, it was held that a supervisor of elections was liable to an indictment as an election officer, under sec. 5515 of the Revised Statutes of the United States, for doing an unauthorized act, with intent to affect an election for representative in Congress.

5. In England it has been held, before the abolition of the oath for the returning officer, that his failure to take it did not affect the return, — *Colchester Case*, 1 Peckw. (Eng. El. Cases) 506, — and this was also so determined by the Assembly of New York, in *Westbrook v. Elmore*, N. Y. Cont. El. Cases, 276.

The later Congressional cases also hold, that, in the absence of fraud, the failure of the officers to be sworn does not vitiate their return. *Blair v. Barrett*, 2 Cong. El. Cases, 313; *Barnes v. Adams*, 3 Cong. El. Cases, 764; *Sheafe v. Tillman*, 3 Cong. El. Cases, 907; *Finley v. Walls*, 4 Cong. El. Cases, 367.

The current of judicial decision is nearly unanimous in the same direction. Before

Some of the earlier Congressional and legislative cases held a much stricter rule than has been adopted by the courts; but the later cases are much more favorable to the validity of the election.¹

3. *Improper Presiding Officer.* — It has been held that an election held by a board of sworn public officers, when the board was presided over by an improper presiding officer, was void;² and in Canada it was held, that, where an election was presided over by a person selected by the electors in the absence of the proper officer, and there was no statutory authority for such selection, that the election was rendered invalid.³

4. *Less than Proper Number acting.* — In the earlier cases in Congress the fact that the proper number of the officers did not act at the election was held to invalidate the return;⁴ but this rule has not been followed by the courts.⁵

5. *Improper Person acting with the Board.* — An examination of the authorities will show that, if a person not entitled to act as an election officer, joins with the legal officers in the conduct of the election, and no fraud is shown, and no action upon the part of the board which would change the result, the vote will be counted; but if there were opportunities for fraud, or for a change of the ballots, the presumption that sworn officers will do their duty, does not apply, and the returns should be rejected.⁶

a return will be rejected on account of the failure of the officers to be sworn, it must appear that the result of the election was affected thereby. *Stimson v. Sweeney*, 17 Nev. 309; *Whipley v. McCune*, 12 Cal. 352; *Sprague v. Norway*, 31 Cal. 173; *Dishon v. Smith*, 10 Iowa, 202; *Taylor v. Taylor*, 10 Minn. 107; *Rounds v. Smart*, 71 Me. 380; *People v. Cook*, 14 Barb. (N. Y.) 259; *Same*, 8 N. Y. 67; *People v. Hilliard*, 29 Ill. 413; *Quinn v. Markoe* (Minn.), 35 N. W. Rep. 263. But see *Walker v. Sandford* (Ga.), 1 S. E. Rep. 424.

1. In the case of *McFarland v. Purviance*, 1 Cong. El. Cases, 131, where the inspectors and clerk had not been sworn, the committee reported in favor of rejecting the vote; but it appeared, however, that this was not through an oversight, but that they had refused to take the oath: and in such a case as this, it would seem as though it should be shown that the election was a fair one, before the votes should be counted. In the cases of *McFarland v. Culpepper*, 1 Cong. El. Cases, 221; *Draper v. Johnson*, 1 Cong. El. Cases, 702; and *Easton v. Scott*, 1 Cong. Cases, 273, this same principle was upheld; and also by the General Assembly of Massachusetts in the *Woborne Case*, *Cushing's El. Cases*, 302, where, in addition to the fact that the officers were not sworn, other circumstances were shown which rendered it probable that frauds were perpetrated, and the returns were rejected. And see *Otero v. Callegos*, 2 Cong.

El. Cases, 177; *Blair v. Barrett*, 2 Cong. El. Cases, 308; *Sheafe v. Tillman*, 3 Cong. El. Cases, 907.

2. *State v. Kirk*, 46 Conn. 378.

3. *Perrault v. Brochee*, 10 Lower Canada, 111.

4. *Draper v. Johnson*, 1 Cong. El. Cases, 702; *Howard v. Cooper*, 2 Cong. El. Cases, 275.

Under the more liberal rules now prevailing in the decision of Congressional Cases, it is hardly probable that these cases would be followed, where the elections were fair and no fraud was charged.

5. The Supreme Court of Wisconsin, in *State v. Stumpf*, 21 Wis. 579, held that a statute requiring that the election should be held by a board of three persons was directory only; and in the New York Assembly it was held that the failure of one of the board to act would not avoid the election in the absence of fraud. *McCabe v. Arcularius*, N. Y. Cont. El. Cases, 333.

6. In the early case of *Jackson v. Wayne*, 1 Cong. El. Cases, 47, where the law required the election to be held by three magistrates, but it was held by three persons, of whom but one was a magistrate, the vote of the precinct was rejected.

In another early case, — *Letcher v. Moore*, 1 Cong. El. Cases, 756, — where there was a *pro tem* judge who acted for a short time, a committee reported in favor of rejecting the votes of the precinct, but the report was not adopted. In the more recent case

6. *Acts of an Election Officer De Facto.* — The general principle that the acts of an officer *de facto* are valid, so far as respects the public and third parties, applies as well to election officers as to others; and the question of the regularity of their appointment ought not to be entered into in an election contest.¹

7. *Effect of Ineligibility of Officer.* — There is quite a conflict of authority in the legislative cases upon the question as to whether the appointment and service of a person ineligible to act as an election officer, will vitiate the election.²

of *Donnelly v. Washburne*, 5 Cong. El. Cases, 466, the statute provided that the county auditor should select two justices of the peace, who, with himself, should form the canvassing board. He selected one justice of the peace and the probate judge; and the vote was counted by them. The majority of the committee strongly insisted upon rejecting the vote of the county, for this reason; but the report was recommended, and no further action taken.

In Parliament it has been held that the fact that improper persons joined with the legal officers in the return, will not be grounds for setting it aside. *Taunton Case*, 1 Peckw. (Eng. El. Cases) 406; and in two cases the committees went so far as to hold that, in the case of the absence of the proper officers, or of their refusal to act, the electors might hold the election before another officer, or a private person; but in two later cases the contrary view was adopted. *Roe on Elections*, 449.

The Supreme Court of California held that the fact that an unsworn person assisted in counting the votes, did not affect the result, — *Sprague v. Norway*, 31 Cal. 173, — and in one case the Assembly of New York decided the question in the same way. *Durland v. Fullerton*, N. Y. Cont. El. Cases, 228. But in *Twombly v. Curry*, id. 471, where a third person was permitted to handle the votes, and the ballots could be readily distinguished, and he had an opportunity to change them, the poll was rejected.

Where a judge *pro tem* was appointed, it was held that he was to be considered as a judge *de facto*, and the vote should be counted. *Eggleston v. Strader*, 3 Cong. El. Cases, 897; *Thompson v. Ewing*, 1 Brews. (Pa.) 108.

1. This principle was repeatedly acknowledged in the English Parliamentary Cases, where the returning officers were usually such by virtue of holding certain other offices; and when such was the case, it was held that the fact that the person held his position only as a *de facto*, and was not a *de jure* officer, would have no effect upon the validity of the election. *Bodwin Case*, 2 Fras. (Eng. El. Cases) 236.

In an early case cited in *Roe on Elections*, 443, from the Journals of the House

of Commons, where the mayor, who had acted as returning officer, was reported to be an intruder, the election was upheld, both by the committee and the House. This principle is also settled in the courts of this country, — *People v. Police Commissioners*, 57 How. Pr. (N. Y.) 445; *Kellar v. Chapman*, 34 Cal. 635; *McCraw v. Haralson*, 4 Coldw. (Tenn.) 34; *People v. Cook*, 8 N. Y. 67, — and also in the Congressional Cases. *Draper v. Johnson*, 1 Cong. El. Cases, 702; *Milliken v. Fuller*, 2 Cong. El. Cases, 176. And it has been held that an allegation in a petition that an informality existed in the appointment of the election officers should not be considered. *Conway Re*, 2 Brews. (Pa.) 134.

A distinction has been made between officers irregularly appointed, and those assuming to act under an appointment from a body having no power to make the appointment. Thus, where the election officers were to be appointed by the probate judge, and in one precinct he refused to appoint any, under the erroneous impression that it was within the bounds of a half-breed reservation, and the people held an election under officers selected by themselves, the House rejected the return, — *Bennett v. Chapman*, 2 Cong. El. Cases, 209, — adopting a minority report made by Alexander H. Stevens.

In another case, where it was the duty of the governor to appoint commissioners of registration, who should appoint the precinct officers, and hold the elections in the county, and he did not do so, and one was appointed by the probate judge, it was held that he was not an officer *de facto*, but a mere usurper, and the election illegal. *Sheaf v. Tillman*, 3 Cong. El. Cases, 907.

Where the statute provided that the election officers should be selected from both political parties, and the appointing officers did not obey this provision, but in many precincts appointed them all from one party, it was held that the statutory provisions were directory only, and that the acts of the officers were valid. *Barnes v. Adams*, 3 Cong. El. Cases, 764.

2. In England, in one Parliamentary case, four of the seven deputy returning officers were minors. The election was set

But in the courts the decisions are very nearly unanimously in the negative.¹

8. *Power of Officer in receiving Votes.* — Inspectors or judges of elections act in a ministerial, or at most in a *quasi* judicial,

aside; but there were also other great irregularities, so that the invalidity of the election did not depend upon this point alone. *Belfast Case*, Bar. & Aust. (Eng. El. Cases) 563. Clerk, in speaking of the case, says, "If the election had been properly conducted in other respects, it may well be doubted whether a committee would hold an election void on account of the minority of any of the officials engaged in it." Clerk on Elect. 363.

In an early case referred to by Clerk, from the Journals of the House, where the returning officer was himself a minor, the setting number was declared to be duly elected. *Clitheroe Case*, in 1693, Clerk on Elect. 359.

In a case in the senate of Ohio, it was held that the fact that one of the clerks in a precinct was a minor would not defeat the election at that precinct. *Grosvenor v. Golden*, Ohio Senate Journal of 1866, appendix, p. 47.

In a case in the New York Assembly, where some aliens acted as inspectors, the election was set aside; but there were also other irregularities upon which the case turned. *White v. Richards*, N. Y. Cont. El. Cases, 31.

In Congress, in the case of *Delano v. Morgan*, 3 Cong. El. Cases, 168, the constitution of the State provided that no person should be elected or appointed to any office, unless he had the qualifications of an elector, of which citizenship of the United States was one. One of the judges in a precinct had forfeited his citizenship by desertion from the army; and, although he had not been convicted, the House held the election in that precinct void.

In the case of *McKee v. Young*, 3 Cong. El. Cases, 422, where the question was as to the validity of the election held by officers who were disqualified from acting on account of having engaged in the Rebellion, in the report which was adopted it was said, "It has long been held that, if the officers of elections are not capable of holding the office, the election has no more validity than would have an election where no officers whatever were appointed. It is otherwise where persons capable of holding the office are appointed, although they may not have complied with the forms of the law."

In the case of *Barnes v. Adams*, 3 Cong. El. Cases, 760, the same question arose, and was determined in the opposite way. Judge *McCrory*, who made the report, having overlooked the case of *McKee v. Young*,

said, "It is worthy of remark that, while some of the decisions of this House seem in conflict with the doctrine of this report, that doctrine itself has never been directly questioned. It may have been ignored, but no report can be found in which it has been denied in express terms, or even seriously doubted."

This language seems strange, when we see that in the case of *Reid v. Julian*, 3 Cong. El. Cases, 822, decided by the same committee, it is said, "We venture to assert that in no case has it ever been held that persons were officers *de facto*, who did not possess the qualifications required for officers *de jure*."

In the earlier case of *Dodge v. Brooks*, 3 Cong. El. Cases, 78, one of the reasons given for the rejection of the vote of one precinct was, that the board of registers, who made the registry, were not competent to act, because they were not residents of the district.

In the case of *Findley v. Walls*, 4 Cong. El. Cases, 367, the committee refused to reject the vote of a precinct, because one of the clerks was not a qualified elector.

In the case of *Yeates v. Martin*, 5 Cong. El. Cases, 384, the law declared that no person who was a candidate should be a register, judge, or inspector of elections; and the committee rejected the vote of the precinct because the contestee had acted for a time as register.

1. In *Georgia* it was held that the votes of two precincts should not be rejected because some of the managers were not freeholders, as required by law. *Collins v. Huff*, 63 Ga. 207.

In *Minnesota* it was held that the provision that no candidate for any office should be a judge of elections, was directory only. *Taylor v. Taylor*, 10 Minn. 107.

In *New York* it was held that as two of the inspectors could act under the law, the fact that the third was a candidate at the election would not invalidate it. *People v. McManus*, 34 Barb. 620.

In *Pennsylvania* and *Arkansas* it was held that the fact that a candidate acted as judge at the election would invalidate so far as he was concerned, but would not have that effect upon the election for other offices. *Boileau's Case*, 2 Pars. 503; *Brightly El. Cases*, 268; *Swepton v. Barton*, 39 Ark. 549.

The same principle has been announced in *New Jersey* in *Farrier v. State*, 48 N. J. 613; s. c., 7 Att. Rep. 881.

capacity, and their acts in the reception of votes can be questioned in a proceeding to contest the election, or in an action to recover damages for the rejection of a legal vote; and in many States, if they wilfully reject a legal vote, or accept an illegal one, they may be prosecuted criminally.¹

1. In an early Congressional case, the committee reported that the acts of the judges of elections in the rejection of votes, were not reviewable by the committee, in the absence of fraud or corruption. *Biddle & Richard v. Wing*, 1 Cong. El. Cases, 504. But this report was not approved by the House; and the doctrine that the House has the right to determine whether a sufficient number of legal votes to change the result were rejected, is so well settled by the unanimous practice, that it is unnecessary in this connection to cite the authorities, which will be found under other heads.

In *New York* it was held that judges of election act ministerially, and have by statute no discretion to reject a vote, except in the cases specified by the statute, which were in that State refusal to take the oaths, or refusal to answer fully questions put to them.

Selden, Justice, in *People v. Pease*, 27 N. Y. 45, says, "Inspectors are required to decide some questions, but they are such as ministerial officers are often required to decide. A county clerk before recording a deed, must decide whether it is legally proved or acknowledged; but his decision is not conclusive. A sheriff must decide whether the one whom he arrests is the person described in his process; but his decision is not judicial, and he acts at his peril. Under the statute, inspectors may be required to decide whether the person offering his vote has or has not refused to answer fully all questions put to him, before they can reject his vote on the ground of such refusal; they must decide whether the voter is a colored man or not, before they determine what oath shall be administered to him; they must decide upon the record of conviction, before rejecting the vote of one challenged on the ground of his conviction of a crime, and if a pardon be produced, must pass upon the genuineness and sufficiency of the pardon; and they may be required to decide what constitutes a bet, or wager, on the result of the election, before receiving or rejecting the vote of one challenged under those sections.

"In these cases, the inspectors may be required to decide important questions, and their decisions for the purpose for which they are made that of determining—whether the votes shall be received or rejected—are final; but I do not think they

are conclusive with regard to the legality of the votes, when the question is presented in an action properly instituted, to try the right of a person elected to office, or defeated by the result of their decisions."

The same doctrine was held in *Indiana*, where it was said, that under the statutes of that State, the board of inspectors had no right to take testimony relative to the right of any person to vote who may offer to take the oath required by statutes. If they refuse to swear him, or to receive his vote if he is sworn, it is at their peril of being able to show that he is not a legal voter, if they are prosecuted for their action. They are justified in receiving the vote, if the oath is taken, unless it can be shown that they acted corruptly, or with knowledge that he was not a legal voter. *State v. Robb*, 17 Ind. 536.

In *Wisconsin*, the inspectors cannot reject a vote, even if they know that the answers to the questions are false, or if they know conclusively that the person has no right to vote: if he insists upon voting, they must tender the oath; and if he takes the oath, they are bound to allow him to vote. *Gillespie v. Palmer*, 20 Wis. 544.

In *Illinois*, when the oath is taken, it is made the duty of the board to receive the vote, unless it should be proved to the satisfaction of a majority of them that the oath was false. Such a provision would seem to vest some judicial discretion in the board, if there was any proof offered of the falsity of the oath. *Spargins v. Houghton*, 2 Scam. (Ill.) 377.

In *Pennsylvania*, when the applicant was not registered, it was held that after he had made the requisite affidavits, the officers were still judges of his qualification, and had power to receive or reject his vote without any responsibility to the disfranchised voter, if they act without malice. *Kneass Case*, 2 Pars. 553.

In *California* the rule is held to be different from that in *Wisconsin*. In that State, the administration of the oath was held to be a matter within the discretion of the judges: if the challenged person, upon being questioned, admits such a state of facts as disqualify him, they might properly decline to administer the oath. When, however, the oath has been administered and taken, the right to vote is complete, and the judges have no right to deny it. They have no right to ask for evidence, such as the production of the certificate of

9. *Cannot try Question of Forfeiture for Crime.*— Election officers cannot be authorized to try questions of fact and law, which are necessary to determine whether a person has forfeited his right of suffrage by the commission of crime. The question is a judicial one, and it must be tried by the proper courts, and cannot be passed upon, incidentally, by the officers of election.¹

Where, however, there has been a conviction of a crime which disfranchises a person, they may examine the record, and reject the vote upon such evidence.²

10. *Power over Vote after Reception.*— After the reception of the vote, all the power of the officers is at an end, so far as the right to reject or throw it out for want of qualification of the voter is concerned; so that as soon as the vote is deposited in the box, all control of the officer over it ceases, and he has no further power in the matter.³

11. *Cannot recount Votes.*— When the election officers have completed the count of the votes, prepared the tally sheets, and declared the result, the board is *functus officio*, and any attempt of the whole or any part of the board to re-assemble and recount the votes, and give a different statement, is illegal, and the statement so given will not be permitted to stand, as against the one regularly made.⁴

naturalization. *People v. Gordon*, 5 Cal. 235.

1. *State v. Symonds*, 57 Me. 148; *Gotcheus v. Mathewson*, 58 Barb. (N. Y.) 152; *Huber v. Reilly*, 53 Pa. St. 112. Nor can they refuse to receive the vote by reason of the refusal of the party to take a test oath that he had not committed a crime, unless such oath was prescribed by the constitution. *Burkett v. McCarty*, 10 Bush (Ky.), 758. But in Louisiana, where the constitution disfranchises persons who have fought duels, it was *held* that officers might reject the vote, where the parties refused to take an oath, required by law, that they had not fought a duel. *Dwight v. Rice*, 5 La. Ann. 580.

In *Wisconsin* it was *held* that the inspectors were authorized to determine whether a person had a wager depending on the result of the election, and could not be held criminally liable for an error of judgment or an honest mistake, though it was an obvious one. *Byron v. State*, 12 Wis. 519.

2. *People v. Pease*, 27 N. Y. 45.

3. *Hartr v. Harvey*, 32 Barb. (N. Y.) 55. Even where the voter himself discovered that he had voted in the wrong precinct, which made the vote illegal, it was *held* that the officer had no power to permit it to be withdrawn. *Harbough v. Cicott*, 33 Mich. 241. Where the voting was *viva voce*, and after the voting was closed and the result declared, the returning officer

received an affidavit from an elector, that his vote had been recorded for one candidate by mistake, when it should have been for the other, and upon this changed the poll-book, it was *held* that he had no power to change the book after the close of the poll. *Reg. v. Donaghue*, 15 Up. Can. Q. B. 454.

In some States it is provided that ballots with certain distinguishing marks shall not be received or counted. In such a case it would be the duty of the officers, where the marks could not be seen until the ballots were opened, to reject them when the marks were discovered. *Oglesby v. Sigman*, 58 Miss. 502. But where the statute merely declared that such votes should not be received, but they had been received without question, it was *held* that they must be counted. Opinion of the Justices, 70 Me. 560.

4. *State v. Doniworth*, 21 Ohio St. 216.

In *Louisiana*, when the election was contested upon the ground, that, after the commissioners had made their report, they proceeded to recount the votes, and found there was a difference which changed the result, it was *held* that as it did not appear that the mistake was in the first, rather than the second, count, full effect must be given to the original returns. *Ramsey v. Calloway*, 15 La. Ann. 464.

The official count will be presumed to be correct, and will not be set aside in a contest, upon evidence of a difference

12. *When Authority ceases.* — When an election district is divided, the effect of such provision is to vacate the offices of inspectors or judges of election. By such division the old district is wiped out of existence, and the powers of its officers are at an end.¹

13. *Criminal Liability of Election Officers.* — An election officer is not criminally liable for receiving or rejecting votes improperly, under a mistake of judgment only, unless there is a wilful disregard of duty;² but they are generally liable to indictment for knowingly receiving votes of persons not voters,³ or for wilfully rejecting those of a qualified elector.⁴

14. *Civil Liability of Election Officers.* — It is now well settled, that when an officer of election maliciously rejects the vote of a qualified elector who offers the proof required by law, or that required by the officers, he is liable to an action for damages, at the suit of the agreed party.⁵

If the plaintiff is not entitled to vote, the motive for rejecting the vote is immaterial. The plaintiff must show, either that the defendant knew of the facts which rendered him a qualified voter, or that he offered him such evidence as was demanded by the officers, or such as was required by law, to show that he was qualified.⁶

shown by a subsequent unofficial count made by the election officers, unless the evidence is clear that the boxes had not been tampered with; and, also, unless the subsequent count was made under circumstances which showed clearly that the official count was not correct. *Gooding v. Wilson*, 4 Cong. El. Cases, 79.

1. *North White Hall v. South White Hall*, 3 S. & R. (Pa.) 121; *Reid v. Julian*, 4 Cong. El. Cases, 822.

2. *State v. Twybill*, 26 Ind. 264; *Com. v. Lee*, 1 Brews. (Pa.) 273.

3. *Com. v. Gray*, 2 Duv. (Ky.) 373; *State v. Small*, 10 Me. 109; *State v. McDonald*, 4 Harr. (Del.) 551; *State v. Porter*, 4 Harr. (Del.) 556; *State v. Miller*, 18 N. H. 91.

4. *State v. Daniels*, 44 N. H. 383; *People v. Boas*, 36 Hun (N. Y.), 377; *U. S. v. Foster*, 4 Hughes (C. C.), 514.

Where a whole issue of naturalization certificates had been pronounced fraudulent by two judges of the Supreme Court, and a third judge had ascertained that forgeries of the seal of a court had been committed, and that a counterfeit die was in existence, it was held that election officers could not be convicted for refusing the votes of persons claiming the right to vote under papers of that issue. *Com. v. Sheriff*, 7 Phila. 84.

In order to convict an inspector of wilfully refusing a vote, the refusal must be shown to be pursuant to a decided intention, designedly and purposely, to exclude the vote. *People v. Boas*, 36 Hun, 337.

In the absence of a guilty or an improper

motive, a failure of inspectors to canvass the vote in the precise manner required by statute is not a criminal offence, nor for the inspector to deliver the keys of the ballot-box, on the morning of the election, to the policeman assigned by the city authorities to do duty at the poll on the election day, especially where it was the custom to do so in the city, and was apparently warranted by the police law. *U. S. v. Hayden*, 52 How. Pr. (N. Y.) 147.

5. The leading case on this subject was *Ashley v. White*, 2 Ld. Raym. 938, where the House of Lords declared, that by the known laws of the kingdom, every freeholder or other person having a right to give his vote at the election to serve in Parliament, and being wilfully denied, or hindered so to do, by the officers who ought to receive the same, may maintain an action in the queen's court against such officer to assert his right, and to recover damages for the injured, — *Bro. Parl. Case 49*, — reversing the lower court in which a motion in arrest of judgment had been sustained by three judges against the opinion of *Lord Chief Justice Holt*.

The plaintiff must show that he was a legal voter when the vote was refused, — *Byler v. Asher*, 47 Ill. 101, — but he need not show that the law under which the election was held was valid, as the officer will not be permitted, when his act was malicious, to assail the validity of the election. *Bernier v. Russell*, 89 Ill. 60.

6. *Blanchard v. Stearns*, 5 Met. (Mass.)

Where the action was shown to be corrupt, as well as wilful, exemplary damages may be recovered;¹ but an honest mistake of law may be shown in mitigation of damages, where it is not necessary to show malice.²

The weight of authority seems to be decidedly upon the side of the opinion, that when there is a wrongful refusal to receive the ballot of a qualified elector, but the officer upon the evidence offered uses his best judgment, and makes an honest mistake, no action will lie for such refusal;³ but in a number of States it is held that a wrongful refusal of the vote of a qualified elector is actionable without regard to the motives which lead to the rejection.⁴

But in such cases where no malice, wilful acts, or corrupt motives are alleged, only nominal damages will be allowed.⁵

15. *Evidence to show Malice.*—Every fact and circumstance connected with the case, the admission of which does not violate the cardinal rules of evidence, may be admitted to show that the

298; *Lombard v. Olliver*, 7 Allen (Mass.), 155.

1. *Elbin v. Wilson*, 33 Md. 135.

2. *Long v. Long*, 57 Iowa, 497.

3. This was so held in England in the early cases of *Drew v. Coulton*, 2 Lud. (Eng. El. Cases) 245; *Cullen v. Norris*, 2 Stark. 577, and in the later case of *Tozer v. Childs*, 7 El. & Bl. 377; but in a case since the later statute, requiring the votes of all the registered voters to be received, the case of *Pickering v. James*, 42 Law Journal, N. S. C. P. 217, would seem to hold the contrary doctrine, and that if the act was one which it was his duty to do, and the refusal was wrongful, it need not be shown to be wilful or malicious; and where an officer improperly refuses to canvass a vote which had been received, it was held that he was liable to an action for damages. *McGowan v. Sedly*, 8 Irish Com. L. 342.

The early English rule was adopted in an early New York case, — *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114, — which has been generally followed in this country. *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693; *Miller v. Rucker*, 1 Bush (Ky.), 135; *Bridge v. Okey*, 2 La. Ann. 968; *Patterson v. D'Auterive*, 6 La. Ann. 467; *Dwight v. Rice*, 5 La. Ann. 580; *Bevard v. Hoffman*, 18 Md. 479; *Anderson v. Baker*, 23 Md. 531; *Friend v. Hammill*, 34 Md. 298; *Wheeler v. Patterson*, 1 N. H. 88; *Peavy v. Robbins*, 3 Jones (N. Car.), 339; *Rail v. Potts*, 8 Humph. (Tenn.) 225; *Wickery v. Guyer*, 11 S. & R. (Pa.) 35; *Moran v. Rennard*, 3 Brews. (Pa.) 601; *Carter v. Harrison*, 5 Blackf. (Ind.) 138; *Gordon v. Farrer*, 2 Dougl. (Mich.) 411.

But where the vote is knowingly rejected contrary to law, it will be presumed that the action was malicious, — *Chrisman v. Bruce*, 1 Duv. (Ky.) 63, — and where a person has an absolute right to vote, when his name was on the register, it was held in Connecticut, as in England, that the rejection of the vote is actionable. *Hyde v. Brush*, 34 Conn. 455.

In *Maine* the action will lie if the rejection is unreasonable, — *Saunders v. Getchell*, 76 Me. 158, — and in that State it was also held that it was unreasonable to refuse a vote because another person had falsely personated the voter, — *Pierce v. Getchell*, 76 Me. 216, — but in New York the contrary was held. *People v. Boas*, N. Y. Sup. Ct. 23 N. Y. Reg. 641.

4. *Killian v. Ward*, 2 Mass. 236; *Oaks v. Hill*, 10 Pick. (Mass.) 333; *Keath v. Howard*, 24 Pick. (Mass.) 292; *Bacon v. Benchly*, 2 Cush. (Mass.) 100; *Lincoln v. Hapgood*, 11 Mass. 350; *Blanchard v. Stearns*, 5 Met. (Mass.) 298; *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *Gates v. Niel*, 23 Pick. (Mass.) 308; *Capen v. Foster*, 12 Pick. (Mass.) 485; *Jeffries v. Ankeney*, 11 Ohio, 373; *Anderson v. Milliken*, 9 Ohio St. 568; *Gillespie v. Palmer*, 20 Wis. 544; *State v. Robb*, 17 Ind. 536.

5. *Lincoln v. Hapgood*, 11 Mass. 357.

The same principle as to the proof of malice applies as well to registering officers and assessors, where assessment is required as a condition of voting, as in cases of judges of election. *Rice v. Magoun*, 44 Mo. 491; *Griffin v. Rising*, 11 Met. (Mass.) 339; *Larned v. Wheeler*, 140 Mass. 390; *Perry v. Reynolds*, 53 Conn. 527.

A refusal to permit a voter to deposit his ballot in the box will not uphold an

rejection was wilful and malicious,¹ or, on the other hand, was the result of honest mistake.²

Where the law is plain, and there is no reasonable excuse, this would warrant a finding of bad motives. The presumption will be in favor of the good faith of the officer, if the rejection is caused by mistake of law.³

16. *Liabilities under United States Law.* — Under the act of Congress relating to the federal elections, §§ 2005 to 2008 provide that, when any thing is required by any State to be done as a prerequisite to the right of voting, that every citizen shall have equal opportunity to perform the act; and if he is denied this, that his attempt to perform the act shall be held to be equivalent to its performance; and if any officer shall deny a citizen such right to qualify himself for voting, or if any election officers shall refuse to receive and count the votes, upon affidavit being made of the offer and refusal, the officer refusing to permit the act, or the election officer refusing the vote, shall forfeit to the aggrieved party the sum of five hundred dollars, with costs and council fees; and it was also provided that they should be liable to criminal prosecution.⁴

17. *Liability of returning Officers for False Returns.* — It was held by the English courts, that no action lay at common law for a false, or even a malicious, return by an election officer in an election for Member of Parliament, upon the grounds that the officer might be punished by the House of Commons for a breach of their privileges.⁵

In Indiana, it has been held that a board of canvassers being merely ministerial officers, they are liable to a person injured by their wrongful act, even if it was unintentional.⁶

VIII. Canvassing Boards: Their Powers, Duties, and Liabilities. —

1. *Canvassers Ministerial Officers.* — In nearly all the States, the boards of canvassing officers are held to be ministerial officers

action, if the officer himself offered to receive the ballot and place it in the box. *Gates v. Niel*, 23 Pick. (Mass.) 308.

1. *Friend v. Hammill*, 34 Md. 298. It may be shown that the officer knew that the voter was of a different political sentiment, and that others against whom the same objection was made had been permitted to vote. *Elbin v. Wilson*, 33 Md. 135.

2. *Chrisman v. Bruce*, 1 Duv. (Ky.) 69. But where the rejection had been caused by mistake, into which the officer had been led by the conduct of the plaintiff, no recovery could be had, — *Humphrey v. Kingman*, 5 Met. (Mass.) 162, — nor unless the plaintiff had offered proof sufficient to entitle him to vote. *Blanchard v. Stearns*, 5 Met. (Mass.) 298; *Lombard v. Olliver*, 7 Allen (Mass.), 155.

3. Where an inspector rejected the votes of persons upon the ground that they were

deserters from the army of the United States, and had lost their citizenship by virtue of the act of Congress, it was held that, although the law should be construed to apply to those only who had been convicted of desertion, an action would not lie without proof of malice. *Gotcheus v. Matthewson*, 5 Lans. (N. Y.) 214.

4. These statutes were held to be constitutional by the circuit court of the United States for the eastern district of Virginia. *Brown v. Mumford*, 16 Fed. Rep. 175; *United States v. Mumford*, 16 Fed. Rep. 223.

5. *Ousley v. Ripley*, Vent. 337; *Prideaux Case*, 2 Salk. 502; *Bernardiston v. Soame*, 2 Lev. 114. But this doctrine was strongly assailed by *Chief Justice Wills*, in the case of *Wynne v. Middleton*, 1 Wils. 125, in the exchequer chamber.

6. *Moore v. Kessler*, 59 Ind. 152.

only, whose duty it is to receive the returns from the various precincts or counties, as the case may be, and declare the results, as shown by the face of the returns.¹

They have no right to reject any returns because they believe there was an illegal and fraudulent vote behind.²

2. *Must determine whether Returns are Genuine.* — The duty of

1. *People v. Kilduff*, 15 Ill. 492; *People v. Wayne County Canvassers*, 12 Abb. (N. Y.) 77; *Kortz v. Green County Canvassers*, 12 Abb. N. Cas. (N. Y.) 84; *Leigh v. State*, 69 Ala. 281; *Bull v. Southwick*, 2 N. Mex. 321; *State v. Peacock*, 15 Neb. 442; *Patton v. Coates*, 41 Ark. 111.

2. *Chumasero v. Potts*, 2 Montana, 242; *State v. Townley*, 56 Mo. 107; *State v. Ramsey*, 8 Neb. 291; *State v. Stearns*, 11 Neb. 106.

In *Indiana* it is held that the board cannot consider any questions as to the validity of the election, but are to cast up the votes given from the proper documents, and to declare those elected who appear from the face of the documents to have the highest number of votes. *Brown v. O'Brien*, 2 Ind. 423; *Kisler v. Cameron*, 39 Ind. 488; *Moore v. Kisler*, 59 Ind. 152.

Where notices of an election to fill a vacancy were regular, the canvassers have no right to consider whether a vacancy in fact existed. *State v. Stevens*, 25 Kan. 302. And in that State, it is the duty of a secretary to issue the certificate of the election to those declared elected by the board of canvassers. *State v. Lawrence*, 3 Kan. 95.

In some of the States where the returns are informal, the board should require them to be corrected. *People v. Hilliard*, 29 Ill. 413.

In *Maine*, the county commissioners are not authorized to go behind the returns, — *Bacon v. York County Canvassers*, 26 Me. 491, — nor have the governor and council the right to reject the returns for informality. *Prince v. Skillen*, 71 Me. 361.

In *Michigan*, the statements of the inspectors are the only evidence upon which the county canvassers can act. *People v. Tisdale*, 1 Dougl. (Mich.) 59; *People v. Cicott*, 16 Mich. 283.

In *Minnesota*, the canvassers cannot question the legality of votes, and can only determine from the returns for whom votes were intended. *O'Ferrel v. Colby*, 2 Minn. 180; *Taylor v. Taylor*, 10 Minn. 107.

In *Missouri*, the county board cannot go behind the certificates of the judges, — *State v. Trigg*, 72 Mo. 365, — nor correct those certificates by the poll-books or tally-sheets; and the duties of the secretary of State as the State canvassing officer, are of the same character. *State v. Rodman*, 43 Mo. 256; *State v. Steers*, 44 Mo. 224. And

see *Myer v. Freeland*, 10 Mo. 629; and *State v. Harrison*, 38 Mo. 540.

In *New Hampshire*, the governor and council have no right to reject the returns because the candidate is ineligible, or because he has been called by another name than the one on the ballots, or because some ballots do not contain the full name of the candidate. Opinion of the Judges, 58 N. H. 62.

In *Florida*, the law made it the duty of the State canvassers to canvass the votes of the election, as shown by the returns; and provides that if any such returns should be shown or appear to be so irregular, false, or fraudulent that the board shall be unable to determine the true vote for any officer or member, they shall so certify, and shall not include such return in their determination or declaration. It was held that this did not give authority to determine whether an election was legally held, or the vote legally cast; that by the phrase "the true vote" was meant the vote actually cast, as distinguished from the legal vote; but where the return was so irregular, false, or fraudulent that the board was not able to determine what was the actual vote cast, they should reject it. *State v. McLin*, 16 Fla. 17. Upon the general doctrine of this section see also *Lewis v. Commissioners of Marshall County*, 16 Kan. 102; *People v. Warfield*, 20 Ill. 159; *Phelps v. Schroeder*, 26 Ohio St. 549; *State v. Wright*, 10 Heisk. (Tenn.) 237; *State v. State Canvassers*, 17 Fla. 295; *Atty.-Gen'l v. Barstow*, 4 Wis. 567; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 77; *State v. Charlestown*, 1 S. Car. 30; *State v. Hayne*, 8 S. Car. 367; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *Howard v. McDiarmid*, 26 Ark. 100; *Thompson v. Ewing*, 1 Brews. (Pa.) 77; *Com. v. Tree*, 4 Phila. 362; *Heath Ex. p.* 3 Hill. (N. Y.) 47; *State v. Governor*, 25 N. J. L. 33; *People v. Cook*, 8 N. Y. 67; *Felt's Case*, 11 Abb. Pr. N. S. (N. Y.) 203; *Kane v. People*, 4 Neb. 509; *Hagge v. State*, 10 Neb. 51; *State v. Hill*, 10 Neb. 58; *Moore v. Jones*, 76 N. Car. 182; *Clark v. McKenzie*, 7 Bush (Ky.), 523; *Pacheco v. Beck*, 52 Cal. 3; *Switzler v. Anderson*, 3 Cong. El. Cases, 374; *Switzler v. Dyer*, 3 Cong. El. Cases, 777; *Sheafe v. Tillman*, 3 Cong. El. Cases, 907; *Shields v. Vanhorn*, 3 Cong. El. Cases, 922; *Finley v. Walls*, 4 Cong. El. Cases, 371; *Gatling v. Brown* (N. Car.), 3 S. E. Rep. 392.

canvassing the returns requires the canvassers to determine whether the paper before them is a return or not; whether it is genuine, regular, and sufficiently authenticated; and, if it lacks these requisites, it should either be corrected where the law permits a correction, or should be rejected.¹

In this matter, however, they cannot act arbitrarily, but must be governed by legal principles.²

Where there is no doubt as to the genuineness of the return, a lack of compliance with some of the directory provisions of the law — such as sealing up, marking, fastening together, or directing — will not authorize rejections.³

3. *Authority to correct Errors.* — The canvassing board has the power to correct any plain clerical error in computation which appears on the face of the returns; and they may compute the tallies for this purpose.⁴

Where votes are cast, as shown by the returns, for persons by their full names, and also by their initial, or without the middle initial, or with a different middle initial, the weight of authority seems to be in favor of the view that they cannot be counted for the same person by the canvassers if the middle initial is different, and in conflict with the other points; but there is no doubt that the canvassers have no authority to hear extrinsic evidence, to determine whether the votes were intended for the same person.⁵

1. *Peebles v. Davis County Comrs.*, 82 N. Car. 385; *O'Farrell v. Colby*, 2 Minn. 180; *Hudmon v. Slaughter*, 70 Ala. 346; *Patton v. Coates*, 41 Ark. 111.

2. Thus, where returns were forwarded by judges regularly appointed, and others claiming to have been elected by the people, it was *held* that the returns from the legally appointed officers were to be presumed to be true, and the clerk had no power to certify to the other returns. *Howard v. McDiarmid*, 26 Ark. 100.

3. *Long v. State*, 17 Neb. 60.

But when returns are neither signed nor sworn to by the proper officers, nor authenticated by them, they have no validity. *People v. Nordheim*, 99 Ill. 553; *Opinion of Justices*, 68 Me. 587; *Simon v. Durham*, 10 Oregon, 52.

Where the law provides that the county canvassers shall not decide upon the validity of the returns, it was *held*, that, where a return was received from the proper officers, and was substantially according to law on its face, it must be counted, even though it appears from the face of the returns that there was gross fraud in the returns as made to the clerk. *Dalton v. State*, 43 Ohio St. 652; *State v. Judge*, 7 Iowa, 187.

Where it appeared that returns, regular in form, and properly signed, had been tampered with by other parties as to one

candidate, it was *held* that the returns should be received, and counted for the other officers. *Lewis v. Comrs. of Marshall County*, 16 Kan. 102.

In Mississippi it was *held* that where the ballots, which were required to accompany the returns, showed upon their face that they were illegal, the county canvassers might reject them in the count. *Oglesby v. Sigman*, 58 Miss. 502.

4. *Simon v. Durham*, 10 Oregon, 52; *Esker v. McCoy*, Ross Co. Ohio Com. Pleas, 6 Am. L. Rec. 694; *Dalton v. State*, 43 Ohio St. 652.

5. In Maine it was *held* that in canvassing the votes returned to the secretary of state, the governor and council could not count votes returned for W. H. Smith, or W. Smith, as votes for William H. Smith. *Opinion of Justices*, 64 Me. 588, 596.

In Massachusetts it was decided that the board should not receive extrinsic evidence outside of the returns, and that it could not be compelled to count ballots with the initials only of the Christian name of a candidate with other votes containing his name in full. *Clark v. Hampden County Examiners*, 126 Mass. 382.

And in New York that they could not count votes for Andrew C. Getty which were cast for Andrew H. Getty, nor take proof upon the question, and that the legal proposition that the middle was no part of

4. *Recount or Amendment of Canvass.* — The same rule against the recount of the vote applies to canvassers as to election officers,¹ although the cases are not entirely in harmony in the House of Representatives.²

5. *May count Votes received after Proper Time.* — If returns are received by the canvassing board during the progress of the canvass, although after the time prescribed by law, they may include them in the canvass.³

the name did not apply in such a case. *Kortz v. Canvassers of Green Co.*, 12 Abb. N. Cas. (N. Y.) 84.

In the case of *People v. Pease*, 27 N. Y. 64, it was held that the board of canvassers erred in refusing to allow to Moses M. Smith, votes given for Moses Smith and M. M. Smith.

In a recent case in Ohio, — *State v. Foster*, 38 Ohio St. 599, — when the votes for representative in Congress from one county were returned for H. L. Morey, and from the rest of the districts for Henry L. Morey, and the State board of canvassers were about to count them all for the same person, it was held that they would not be compelled to canvass them as for different persons without an allegation that they were cast for different persons; *White, J.*, in the opinion, says, "The statute required the defendants to ascertain the number of votes given for the different persons for the office, and the certificate was to be given to the 'person so elected.'"

"We fully concede that the duties of the defendants in the respect in question were ministerial in their nature. But the performance of ministerial duties requires the exercise of intelligence, sense, and judgment. Ministerial duties must be performed correctly; and the fact that a ministerial officer performed his duties according to his judgment, is of no avail if the duties are not correctly performed.

"It is true that defendants, as a canvassing board, were required to ascertain the number of votes given for the different persons for the office, and the certificate of election was to issue to the person so elected. The person so elected was to be determined from the return before the board. The 'returns' are only evidence of the will of the electors expressed by their ballot. If this evidence is such as to produce reasonable conviction of what that will is, it should be allowed to have its legitimate effect. *Strong, Petitioner*, 20 Pick. (Mass.) 494.

"If the persons receiving the certificate did not receive the plurality of votes as shown by the returns, fairly and reasonably understood, the defendants have not performed the duty enjoined upon them. If H. L. Morey and Henry L. Morey designate the same person as appears from the

returns, read in the light of such facts of public notoriety connected with the election as every one takes notice of, the defendants have performed their duty properly in giving the certificate to Henry L. Morey.

"The relator relies upon the case of *Clark v. Board of Examiners of Hampden Co.*, 126 Mass. 283, in which it was held that *mandamus* would not lie 'to compel the board to count certain votes, containing the initial letter only of the Christian name of a candidate, with other votes containing his name in full.'

"But it does not follow, that had the board determined to count the votes instead of to exclude them, they would have been compelled by *mandamus* not to count them." *State v. Foster*, 38 Ohio St. 599.

1. In Missouri, where a county clerk had made a count of the votes, and had given a certificate, it was held that he had no authority to recount them, and give a new certificate, and that if he did so the last count would be a nullity. *Bowen v. Hixon*, 45 Mo. 340. And see *Opinion of Justices*, 70 Me. 560; *Hadley v. Albany*, 33 N. Y. 603; *Hart v. Harvey*, 32 Barb. (N. Y.) 552; *Morgan v. Quackenbush*, 22 Barb. 73; *Light v. State*, 14 Kan. 489.

Where the statute authorizes a recount of the votes, there is no authority to make more than one, — *Chenoweth v. Comrs.*, 26 W. Va. 230; — and if, at the first recount, it was only asked that a part of the precincts should be recounted, and this was done, and the result announced, it was held that the rest could not be recounted. *Opinion of Justices*, 117 Mass. 599.

2. In several cases in the House of Representatives, the House allowed parties certified to be elected upon a recount to hold the seat pending the contest. Thus, in *Butler v. Lehman*, 2 Cong. El. Cases, 353, where proof was made to the governor of Pennsylvania that the returns from one county counted by the canvassers was a forgery, he issued his proclamation declaring the other candidate elected, and this last person was admitted to the seat pending the contest. See also *Sleeper v. Rice*, 2 Cong. El. Cases, 472, and *Morton v. Daly*, 2 Cong. El. Cases, 402.

3. *Cresap v. Gray*, 10 Oregon, 345; *Dalton v. State*, 43 Ohio St. 652.

6. *May not hold Secret Sessions.* — Canvassing boards have no right to prevent candidates, or their authorized agents, from being present when the precinct returns are being counted.¹

7. *Civil Liability.* — It was held in Iowa, that a canvassing board was not liable to an action for damages for a failure to canvass the votes.²

In Arkansas it was held that a canvassing officer making a false abstract would be liable in a suit on his bond for actual damages, and that good faith and honest intentions constituted no defence.³

8. *Judicial Powers in Some States.* — A few of the States have statutes authorizing the county or State returning boards to reject the votes of precincts, for reasons given in the statutes, and making their action final, unless appealed from within a certain length of time. Such a statute, however, would not be binding upon the House of Representatives, in a contest for a seat in that body.⁴

9. *Power of Congress in counting Electoral Votes.* — One of the most important questions ever presented for decision before any American tribunal arose in 1877, as to the power of either House of Congress, or both of them assembled in joint convention, to go behind the returns, in determining the question of the election of electors of President and Vice-President, from the States of Florida, Louisiana, Oregon, and South Carolina; and, there being a wide difference of opinion between the majority in the Senate and that of the House of Representatives, a law was passed, referring the decision of all the questions to the electoral commission, — a special tribunal consisting of five senators, of whom three were to be of the party of the majority, and two of the minority in that body; five members of the House of Representatives, selected in the same manner; four justices of the Supreme Court, of whom two were chosen from each political party; and a fifth justice, selected by the other four, — and all questions were to be decided by a majority vote.

By this act it was provided that, when there were two certificates from any State, and objections were presented in writing to the counting of the votes, in either or both of them; and when all such objections so made to any certificate, vote, or paper, from

1. *State v. Ramp*, Hamilton Co., Ohio, Ct. Com. Pleas, 8 Weekly Law Bulletin, 192; *State v. Harwood* (Kan.), 13 Pac. Rep. 212.

In the case of *Burns v. Young*, 4 Cong. El. Cases, 179, upon proof that the county board refused to allow other persons present during the count, the committee counted the precinct returns instead of the county abstract, saying, that although the witness, who was not permitted to be present, stated that the members of the board were men of integrity and veracity, they considered the practice "reprehensible and dangerous."

2. *Jayne v. Drorbaugh*, 63 Iowa, 711.

3. *Thomas v. Hinkle*, 35 Ark. 450.

4. *Norris v. Handley*, 4 Cong. El. Cases, 73.

In the absence of proof to the contrary, it will be presumed that the State board had done all things properly. *Clark Case*, 4 Cong. El. Cases, 6. But where the facts upon which the board acted showed that they were not sufficient to warrant the rejection as a matter of law, the House will not be bound by the decision. *Giddings v. Clark*, 4 Cong. El. Cases, 91.

any State, should have been received and read, — all such certificates, votes, and papers accompanying the same, together with such objections, should be forthwith submitted to said commission, which should proceed to consider the same, *with the same powers, if any*, now possessed for that purpose by the two Houses, acting separately or together; and by a majority vote decide any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons were duly appointed electors in such State; and they might therein take into view such petitions, depositions, and other papers, if any, as shall, by the Constitution and now existing laws, be competent and pertinent in such consideration.

The constitutional provisions bearing upon the question are found in sect. 1 of art. 2, which provides that, "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to a whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding any office of trust or profit under the United States, shall be appointed an elector."

The first section of art. 12 provides for the casting of the ballots, and the transmission of the list of persons voted for, to the president of the Senate, and that the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and that the votes shall then be counted; but there is no constitutional provision prescribing the evidence of the appointment of the electors.

The act of Congress of 1792 provided that it should be the duty of the executive of each State to cause three lists of the names of the electors of such State to be made and certified, and to be delivered to the electors, on or before the day on which they are required to meet.

It was not claimed that this provision was binding on the executive of the States; but it was conceded that it could only be considered in the light of a request that this should be done, for the convenience of Congress in determining the question as to whether the persons voting were the electors.

The most important question before the commission in these cases was, What were the powers of the commission, in the reception of evidence, upon the question who were appointed electors from those States? the commission having the same authority as either House of Congress acting separately, or both acting together.

The points decided by the commission were, that the commission, acting with the same powers as those possessed by Congress, could receive no evidence of the facts preceding the canvass of the votes and the final determination of the result of the election, by the proper canvassing officers of the State; and that, where the

certificate of election signed by the governor was regular in form, and was based upon the canvass as made by the proper officers of the State, no evidence could be received to show that the action of such canvassing boards was fraudulent or illegal.

It was further held, however, that where the certificate was not regular in form, but showed that the governor had determined other questions than the number of votes received by the candidates, the commission should determine the question by the official abstract, showing the number of votes received by each body, according to the determination of the State canvassing board, or officer.¹

1. In the Florida case the Republican claimants had the certificate of the governor of the State, who was in office at the time of the election, of the canvass of the vote, and when the vote was cast for electors; which was admitted to make a *prima facie* case, and this was based upon a canvass of the votes made by the regular canvassing board, at the proper time and place, and in regular form.

The Democratic claimants had one certificate signed by one of the State officers, who was an *ex-officio* member of the board of canvassers, which stated that, by the authentic returns of the votes cast,—which returns were on file in the office of the secretary of state, and had been seen and considered by him,—the Democratic claimants were chosen electors, and stating that there was no law by which those returns could be certified to the executive of the State.

There was also a second certificate signed by the governor of the State, who had succeeded the one who had made the certificate in favor of the Republican claimants, in which was recited the passage of an act of the newly elected legislature of the State, which provided for a recanvass of the votes by a new board of State officers, and that, under this act, a recanvass had been made, the Democratic claimants declared elected, and an act subsequently passed by the legislature to confirm their title. To this certificate were attached certified copies of the abstract of the new board of State canvassers, giving the result by counties, with an abstract showing the total number of votes cast in the State, and certified copies of the two acts of the legislature.

When the matter came before the commission, the counsel for the Democratic claimants offered evidence to show, 1st, the fact of the meeting, and casting of the votes by both rival bodies, on the proper day, and that the certificate of the Tilden electors was signed by the attorney-general, and those of the Hayes electors by the governor, these facts being shown by the record itself; 2d, that a *quo warranto* pro-

ceeding was commenced in the circuit court of Florida on Dec. 6, 1876, against the Hayes electors, before they had cast their votes, and that a judgment was rendered on the twenty-fifth day of January, 1877, declaring that the Tilden electors had been elected; 3d, the record of a judgment of the Supreme Court of the State, in a case of *mandamus* between the State, on the relation of the then governor of the State, against the canvassing board, for the purpose of showing the true construction of the statutes of the State; 4th, the legislative acts, and the canvass above referred to; and 5th, that the State canvassing board acted on erroneous principles, and rejected the votes of certain counties, and parts of counties, in making up their canvass; and they also offered evidence to show that one of the Hayes electors held an office of trust or profit under the United States. Rep. El. Com. 79; 5 Cong. Rec. pt. 4, 18.

The principal discussion was as to the power of the commission acting with the same authority as the two Houses of Congress possessed, to receive this formal evidence, and also a large amount of testimony, which had been taken by the committee of the House, which was claimed to be before the commission by reason of a reference to it in one of the objections to the Hayes certificate.

It was claimed by objectors, and counsel for the Tilden electors, that the commission possessed powers equal to those of a court in a *quo warranto* proceeding, but with the power to cut off the inquiry at any point when it deemed it necessary. Argument of Mr. Field, Rep. El. Com. 43; 5 Cong. Rec. pt. 4, p. 7; Argument of Mr. O'Connor, Rep. El. Com. 129; Brief of Counsel, Rep. El. Com. 744.

This view was controverted by the other side; and it was urged, that, when the certificate of the executive was based upon the canvass of the proper officers, it was not in the power of Congress nor the commission to impeach it, and that the evidence offered was not competent.

The minority of the commission were in favor of admitting the evidence; Senator Thurman holding, that, in throwing out the returns from some of the counties, the State board exceeded its jurisdiction, and, therefore, the certificate based upon their canvass could be attacked.

He was also in favor of admitting evidence of the *quo warranto* proceeding, although he says that he was not prepared to admit that presidential electors were officers at all. Remarks, Rep. El. Com. 835; 5 Cong. Rec. pt. 4, p. 200.

On the other hand, Justices Miller and Bradley denied the power of a State court to interfere in such a way with the election of President and Vice-President; and in the case of *State v. Bowen*, 8 S. C. 400, the court held that a State court had no jurisdiction in *quo warranto* proceedings to determine the title to the office of elector of President and Vice-President, because the functions and privileges of the office arise under the Constitution of the United States, and not under the State constitution, although they are appointed by the State.

Mr. Commissioner Hoar, in his remarks upon this question, said, "Upon the whole matter, therefore, I am of the opinion that the appointment of electors, and the ascertaining who has been appointed, is the sole and exclusive prerogative of the State.

"The State acts by such agencies as it selects. The powers conferred by the State upon those agencies cannot be exercised by Congress. To usurp them for the power of righting alleged wrongs, would be for this commission, which has only the power of Congress, to commit the very wrong which is imputed to the returning boards in some of the States.

"When the agencies which the State has selected have acted, the State has acted; no power can reverse its action for mistake in law or fact, for fraud, or for any other cause whatever, unless it be a power higher than the State, on whom the constitution has expressly conferred such authority; but there is for this purpose no such power higher than the State, and the president of the Senate and Congress are but the mere servants of the State's will, and registers of its action, with power only to open the certificates and count the votes of the electors whom the State authority has appointed and certified." Remarks, 5 Cong. Rec. pt. 4, p. 240.

In speaking of the subsequent acts of the legislature, and of the *quo warranto* proceedings, Mr. Justice Strong says, "In my judgment, it follows inevitably that what was done after the 6th of December is immaterial; neither the action of the legislature, nor a *post hoc* decision of a court, can affect an act rightfully done when it was

done and completed before the legislature, and the court attempted to annul the authority for it.

"There must be a finality in ascertaining the results of an election, and when the election is a mode of appointment of persons to cast a vote for a State on an appointed day, the finality must be on or before that day, else nothing can be settled." Remarks, 5 Cong. Rec. pt. 4, p. 253.

Louisiana Case.—In the Louisiana case, offers were made to show that the State canvassing board had acted without jurisdiction and fraudulently in rejecting votes from various parishes in the State; but the same doctrine was held by the commission, that, inasmuch as the canvass had been made by the legally constituted authority of the State, the commission or Congress had no power to go back of their canvass, or determine whether such action was fraudulent or not.

Florida Case.—In the Florida case, the grounds of the decision, as stated in the report of the commission, were, "That it is not competent under the constitution and law as it existed at the passage of this act, to go into evidence *aliunde* the papers opened by the president of the Senate, in the presence of the two Houses, to prove that other persons than those regularly certified to by the governor of the State of Florida, in and according to the determination and declaration of appointment by the board of canvassers of said State, prior to the time required for the performance of their duties, had been appointed electors, or, by the counter-proof, that all proceedings of the courts, or acts of the legislature or of the executive of Florida, subsequent to the casting of the votes of the electors on the prescribed day, are inadmissible for any such purpose."

Louisiana Case.—In the Louisiana case, after the statement similar to the first part of the above, the report proceeds, "or that the determination of the said returning officers was not in accordance with the truth and the facts, the commission, by a majority of votes, being of the opinion that it is not within the jurisdiction of the two Houses of Congress assembled to count the votes for President and Vice-President, to enter upon a trial of such question."

Oregon Case.—In the Oregon case, the Hayes electors presented a certified abstract from the secretary of state, with a list of the votes, as made up by him, showing that they had received the highest number of votes, and an affidavit that they had applied to the governor and secretary of state for a certificate of their election, and that it had been refused to them, but had been given to one E. A. Cronin; that they had applied to him for the certificate, and that he had refused to deliver it.

IX. Time and Place of holding Elections.— 1. *Must be held at Proper Time.*— The time of holding an election is a matter of substance; and when an election is held at a time not fixed by the law itself, or by some person authorized by law to fix the time, it will be void;¹ and, except in cases of doubt or mistake as to the correct time of the election, there seems to be no doubt that an election held by the consent of all the voters will be considered as illegal;² and much less can a majority change the time of an election against the will of the minority;³ but in a num-

The Tilden electors presented a certificate of the governor that one of them and two of the Hayes electors had received a certain number of votes, being the highest number of votes cast, for persons, *eligible under the Constitution of the United States*, to be appointed electors of President and Vice-President, and that they were declared duly elected electors, as aforesaid, for the State of Oregon; and also a certificate of one of them that the other two persons named in the certificate had refused to act with him, and that he thereupon appointed the other two persons who had voted to act in their places, and that they had cast the vote as electors.

In the discussions in the commission, it was not claimed that vote of the Cronin College should be counted, nor were there any votes in favor of counting it, although it was strongly claimed by the minority, that, if the precedents set in the Florida and Louisiana cases were followed, such would be the result.

This was denied by the majority, upon the ground that the secretary of state was the proper canvassing officer, and that his abstract showed the fact, that, upon the canvass by him, the Hayes electors were shown to have been elected. The ground of the decision in the report of the commission was as follows, 5 Cong. Rec. pt. 4, p. 178:—

"That, by the laws of the State of Oregon, the duty of canvassing the returns of all the votes given at an election for electors for President and Vice-President, was imposed upon the secretary of state, and upon no one else; that the secretary of state did canvass the returns in the case before us, and thereby ascertained that J. C. Courtwright, W. H. Odell, and J. W. Watts had a majority of all the votes given for electors, and had the highest number of votes for that office; and by the expressed language of the statute, those persons are 'deemed elected.'

"That, in obedience to his duty, the secretary made a canvass and tabulated statement of the votes, showing the result, which, according to law, he placed on file in his office on the fourth day of September,

1876. All this appears by an official certificate under the seal of the State, and signed by him, and delivered to the electors, and forwarded by them to the president of the Senate with their votes.

"That the refusal or failure of the governor of Oregon to sign the certificate of election of the person so elected, does not have the effect of defeating their appointment as electors.

"That the act of the governor of Oregon in giving to E. A. Cronin a certificate of his election, though he received a thousand votes less than Watts, on the ground that the latter was ineligible, was without authority of law, and therefore void."

South Carolina Case.— In the South Carolina case, the commission held that it must take notice that there was a government in the State, Republican in form, since its constitution provides for such a government; and the State is, and was, on the day of appointing electors, so recognized by the executive and by both branches of the legislative department of the Government of the United States.

They also decided, that, the certificate being regular, the presumption was, that it was based on the action of the State canvassers, and that there existed no power in Congress to inquire into the circumstances under which the primary vote for electors is given, and stated that "the power of the Congress of the United States, in its legislative capacity, to inquire into the matter alleged, and to act upon the information so obtained, is a very different one from its power in the matter of counting the electoral votes. The votes to be counted are those to be presented by the States; and when ascertained and presented by the proper authorities of the State, they must be counted.

1. *Dickey v. Hurlburt*, 5 Cal. 343; *Satterlee v. San Francisco*, 23 Cal. 314; *Bourland v. Hildreth*, 26 Cal. 161.

2. *State v. Collins*, 2 Nev. 351. See *De Armond v. State*, 40 Ind. 469.

3. Thus, where, upon the day fixed for an election of a school trustee, a majority of the voters organized, and, against the will of the minority, adjourned the election

ber of cases where the proper time for an election was doubtful, and it was held at a certain time by order of the proper authorities, and was held by the general consent of the voters, the elections were allowed to stand.¹

2. *Time must be fixed in Advance.* — The time of holding an election must be fixed in advance; and, when no special length of time is required, it must be a reasonable time.²

3. *Time under Certain Statutes.* — Where a law provides that the election of certain officers shall take place at the general election, without fixing any time, and the time of the general election is changed, the election of such officer must be held at the time fixed by the new law.³

But where the date of the election is fixed, and that date is upon the day of general election, changing the date of the general election will not change that of the special election, which was held at the former date.⁴

By sect. 25 of the Revised Statutes of the United States, the Tuesday after the first Monday of November, in every alternate even numbered year, is fixed as the day for the election of repre-

to a future day, an organization and election by the voters remaining was *held* legal, — *People v. Brewer*, 20 Ill. 474, — and also that, where a majority attempt to adjourn an election without day, the minority may organize on the proper day, and hold the election.

1. In Congressional elections, the House will incline to uphold the construction given by the State authority, though not absolutely bound by such construction. *Tennessee Delegation Case*, 4 Cong. El. Cases, 3; *Holmes v. Wilson*, 5 Cong. El. Cases, 322.

Where, however, the construction is not settled, the House will consider the question of the legal time, and give the seat to the person having a majority at the legal election, although it was uncontested, and his vote was much less than that which he received at a prior election, at which he was also a candidate, and although the whole vote cast at the proper time was less than one-seventh that cast at the first election. *Patterson v. Belford*, 5 Cong. El. Cases, 52.

In New Jersey, where an election for officers of a municipal corporation was held on the wrong day by mistake, and without objection, and the mistake was not discovered by any person interested, either as voter, candidate, or election officer, until after the election had been held, and there was no fraud or corrupt motive on the part of any one concerned, and the election was largely attended, it was *held* that the court may properly refuse to allow an information in *quo warranto* to be filed against an officer elected at such election. *State v. Tolan*, 33 N. J. L. 195.

There seems to be another exception to the rule that the election must be held on the statutory day; and that is, where the election must be called, and preparations made for it, by persons who are incumbents of the offices to be filled, and who, either through neglect or design, fail to call the election, or prepare for the same, on the proper day. In such cases where an election can be held upon giving a certain notice, the officers may give the notice for an election upon a subsequent day; and they may be compelled to do so, and cannot claim the right to hold over for failure to elect their successors. *People v. Fairbury*, 51 Ill. 149; *Lynch v. Lafland*, 4 Coldw. (Tenn.) 96. And in one case where the charter of a town provided for holding the first election on a certain day, it was *held* that this provision was directory merely, and that the failure to hold the election on the prescribed day did not prevent an organization under the charter. *Coles Co. v. Allison*, 23 Ill. 437.

2. *Kenfield v. Irwin*, 52 Cal. 164; *State v. Young*, 4 Iowa, 561; *Hoge Case*, 1 Cong. El. Cases, 135.

3. *Sawyer v. Hayden*, 1 Nev. 75; *West Va. Cases*, 4 Cong. El. Cases, 108.

4. *People v. Shaw*, 14 Ill. 476. In this case the law provided that certain commissioners should be elected at the next general election, to be held on the first Monday of August, and every year thereafter, and the time of the general election was afterwards changed to November; and it was *held* that this did not change the time of the election of the commissioners.

sentatives and delegates in Congress; but by the act of March 3, 1875, those States were excepted from the provisions of this section whose constitutions would require to be amended in order to hold the elections at that time.

4. *Time of Senatorial Elections.* — By the act of Congress of July 21, 1866, Rev. Stat. sect. 14, it is provided that "the legislature of each State, which is chosen next preceding the expiration of the time for which any senator was elected to represent such a State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress;" and no other legislature can make such an election.¹

It is not necessary, where there are senators to be elected for different terms, that the election of both terms shall be commenced on the day fixed: if there are vacancies to be filled, and the legislature organizes for the election of senators, and continues to ballot each day for a senator, and takes its first vote to fill one of the terms, as soon as it has filled the other terms, it will be sufficient.²

5. *Time of changing Precincts.* — As to whether a provision that precincts shall be changed at a certain time is to be considered mandatory or directory, the authorities are not entirely in harmony.³

6. *Time must be fixed by Proper Authority.* — Where the constitution of a State fixed the time for holding an election for representative in Congress, it was held that this was sufficient, there being no State law or act of Congress fixing a different time.⁴

7. *Opening at Proper Time.* — It is not a sufficient cause to

1. *Blodgett v. Norwood*, Sen. El. Cases, 331.

2. *Hunt v. Gilbert*, Sen. El. Cases, 320.

3. In a case in Congress the State law provided that the county commissioners should establish voting precincts at the regular meetings of the board, and several precincts were established at a special meeting; and the committee held that the election at all the precincts was illegal; but, as this did not change the result, the matter was not passed upon by the House; and it may be considered doubtful whether the case will be followed. *Cox v. Strait*, 4 Cong. El. Cases, 428.

In a case in the New York Assembly, where the law provided, that, in case of the division of an election precinct, it should not take effect until after the next general election, the first election was held at the new voting-places, and it was held that the votes should be counted. *Thomas v. Wood*, N. Y. Cont. El. Cases, 462.

In the absence of a statute fixing the time at which precincts should be changed, the change should be made a reasonable time before the election; but a short time

will suffice if the voters have actual notice. Thus, two days were held sufficient where there was no illegal voting, and no legal voter was prevented from casting his vote by the change. *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

4. *Shiell v. Thayer*, 2 Cong. El. Cases, 349.

In this case the committee went farther, and held that the legislature could not change the time when it was fixed by the constitution; but this was not necessary to the decision of the case, and the position was strongly assailed in the debate.

In another case, it was held, that, where a legislature had been elected under a constitution, but the convention remaining in session had fixed the time for the Congressional election, that the election held under such authority was void. *Beech Case*, 2 Cong. El. Cases, 391. And where the State statute required the writ to fix the time for the election, and the writ directed to the special commissioner fixed the time for a certain day, "or such other day as you may appoint," and a different day was fixed, it was held the election was void. *McKenzie Case*, 2 Cong. El. Cases, 460.

set aside the election, if there is a few minutes' delay in opening the polls; in such a case, the maxim, *De minimis lex non curat*, may well be applied: but, if there is a great delay, it may be well doubted whether the election ought to stand, unless it is affirmatively shown that the delay did not prevent enough persons from casting their votes to change the result; and, if it is shown that any considerable number had been prevented from voting by the delay, it should unquestionably be ground for setting aside the election.¹

8. *Closing the Polls too soon*. — A slight deviation from the proper hour in closing the polls, too soon will not avoid the election, without proof that voters were prevented from voting;² but, if the hours of voting are greatly shortened, the proof should be made that there were no persons who were deprived of the privilege of voting.³

9. *Holding Open too long*. — As all votes not cast within the proper hour are illegal, there is more liability to vitiate the elec-

1. Thus where the law required the polls to be opened between six and seven o'clock in the morning, and they were not open till two in the afternoon, it was *held* that the returns should be rejected, if the injurious effect to the contestant had been sufficiently alleged and proved. *Melvin's Case*, 68 Pa. St. 333.

In a recent Congressional case, it was shown that at three precincts there had been delays of from three to five hours in opening the polls; "that numbers of the voters had left without voting, and that a light vote had been polled: and this was *held* to be sufficient to cause the rejection of the vote of the precinct." *Yeates v. Martin*, 5 Cong. El. Cases, 387.

In another case, however, where the opening had been delayed until half-past nine, it was *held*, that, in the absence of fraud, the election would not be set aside; but in the same case, where the polls had been open one hour before the proper time, with only one of the legal officers present, the rest having been chosen by the persons present, and there having been many votes cast before the proper hour, it was *held* that the returns should be rejected. *Finley v. Walls*, 4 Cong. El. Cases, 378.

In a case in the Massachusetts legislature, where the voters were present at the voting-place at the proper hour, and the selectmen failed to open the polls for two hours after the proper time, and the voters went away, and, afterward, the meeting was opened, and an election held, it was determined that the election was not avoided; but this case does not seem to be upheld by other authorities. *Standish Case*, *Cush. El. Cases*, 68.

In a case in Kentucky, where two votes were received by the clerk and one judge

before the judges were sworn, but the acts were ratified by the full board after it was organized, and the parties were legal voters, the votes were *held* valid. *Anderson v. Winfree*, 4 S. W. Rep. 351.

2. *Cleland v. Porter*, 74 Ill. 76.

In an English Parliamentary case, where the law required the polls to be open at nine, and kept open till five, and nearly every day of the election they were not opened until ten, and were closed at four, in the absence of any evidence from which the committee could see that the result of the election had been affected, it was *held* that the returns would not be set aside. *Limerick Case*, C. & R. (Eng. El. Cases) 548. But in a later case, where the polls were closed too soon, it was *held* the election would be set aside, unless the successful candidate showed that the result was not affected. *Harwich Case*, 1 P. R. & D. (Eng. El. Cases) 314.

3. Thus, where the proper time for closing the polls was at 4 P.M., and after the voting was commenced, it was announced that they would be closed at 12.30, and they were closed at 1.15, it was *held* that the election was avoided. *Gloucester Case*, *Cush. El. Cases*, 189, and see *Penna. Dist. El. 2 Pars.* (Pa.) 526; *State v. Wollem*, 37 Iowa, 131.

Where the statute required the polls to be kept open all day, it was *held* by a district court in Ohio that an adjournment for an hour for dinner vitiated the election. *State v. Ritt*, 16 Am. L. Reg. 88. The Supreme Court in a later case, however, held the opposite view. *Fry v. Booth*, 19 Ohio St. 25. And this opinion also prevails in the Congressional cases. *Delano v. Morgan*, 2 Cong. El. Cases, 168; *Finley v. Walls*, 4 Cong. El. Cases, 378; *Cox v. Straight*, 4 Cong. El. Cases, 434.

tion by holding open the poll at improper hours, than by closing too soon.¹

Some of the cases hold that a statute, in fixing the hours of opening and closing the polls, is directory only; and where it did not appear that the votes of any person not a legal voter had been received, the election should not be set aside.²

Where there is such a system that the ballots cast after the proper time can be identified, only those cast during the proper hour should be rejected.³

The general principle applying to all irregularities ought to govern in case of a deviation from statutory hours in opening or closing an election. If the deviation is small, and no fraud is shown, the election should not be set aside, unless an uncertainty is created thereby; but where the deviation is great, the presumption will be that it has affected the result, and the burden will be upon those seeking to uphold the election to show affirmatively that it has not.⁴

If the polls are kept open after the proper hours to permit legal voters to vote, when there was not time enough to receive all the votes within the proper hours, and no illegal votes are taken, it would seem as though all the votes should be counted; and it has been held that the requirement to close at sunset is directory only.⁵

10. *Power to adjourn Elections.*—In some of the States, where the system of voting at town-meeting prevails, it seems that the electors may adjourn from time to time.⁶

11. *Time of Return.*—It is well settled that the law requiring the returns to be made within a certain time, is directory only; and the failure to make them within that time is no ground for rejecting them in a contest.⁷

1. *Ramsey v. Hall*, N. Y. Cong. El. Cases, 22; *Gribbin v. Kirker*, 7 Ir. Rep. C. L. C. P. 30; *Myers v. Moffatt*, 3 Cong. El. Cases, 564; *Varney v. Justice* (Ky.), 6 S. W. Rep. 457.

2. *People v. Cook*, 8 N. Y. 67; *Adams Case*, Cush. El. Cases, 391.

3. *Bassett v. Bailey*, 1 Cong. El. Cases, 254; *Draper v. Johnson*, 1 Cong. El. Cases, 702. See *Piatt v. People*, 29 Ill. 54.

4. Am. Law of Elections, sec. 142; *Locust Ward Elections*, 4 Penn. L. J. Rep. 341.

5. *Swepton v. Barton*, 39 Ark. 549.

Where the law required the polls to be kept open till sunset, it is doubtful whether this is to be construed as a direction to close at that time; but if they have been closed, and they are again re-opened, and votes again received, they will be rejected. *Hogan v. Pile*, 3 Cong. El. Cases, 281.

Where the law provided that the polls should be open at eight o'clock, and that, in the absence of the regular officer, others might be chosen by the electors present,

and two sets of officers were selected, both before the proper hour for opening, it was held that the officers last selected, having been elected nearest to the proper time, were the proper ones to hold the elections. *Kirkpatrick v. Vickers*, 24 Kan. 314.

6. Thus, in Massachusetts, when a town-meeting for the election of officers had been adjourned from the day it was called in March to a day in April, and in the mean time a law had been passed for the election of new officers, at the annual town-meeting for the election of town officers it was held that a person might properly be elected to the new office at the adjourned meeting. *Com. v. Hubbard*, 23 Pick. (Mass.) 98. But when the statute fixed a day for the second town-meeting, on a certain day, for the election of a representative, it was held that it could not be adjourned to another day. *Opinion of Judges*, 23 Pick. (Mass.) 98. And this is, no doubt, the general rule as to elections.

7. *Richards Case*, 1 Cong. El. Cases, 95; *Bond Case*, 1 Cong. El. Cases, 116; *Draper*

12. *Election must be held at Proper Place.* — There is less latitude allowed in changing the place at which an election is held than in varying the time of opening or closing it; and it is a rule to which there are very few exceptions, that an election held at an improper place will be held absolutely void, without proof of any fraud or injury.¹

Where the change is a necessary one, and the distance is small, and the voters are notified of it, and a fair and full election is held, it will not be ground for avoiding the election;² and where there has been a custom acquiesced in for years, to hold the election at a place different from the one fixed by law, and the people supposed that the place where it was held was the correct one, this would not be sufficient to avoid the election.³

v. Johnson, 1 Cong. El. Cases, 702; *Brockenbrough v. Cabell*, 2 Cong. El. Cases, 79; *Weber v. Wilton*, 29 La. Ann. 610; *Cresap v. Gray*, 10 Oregon, 52; *Powell v. Holman* (Ark.), 6 S. W. 505.

1. *White v. Richards*, N. Y. Cont. El. Cases, 31; *Howard v. Cooper*, 2 Cong. El. Cases, 275; *Acklen v. Darrell*, 5 Cong. El. Cases, 131; *Knowles v. Yeates*, 31 Cal. 82; *Melvin's Case*, 68 Pa. St. 333; *Chamberlain v. Dover*, 13 Me. 466; *Walker v. Sanford* (Ga.), 1 S. E. Rep. 424.

In Michigan, however, where it was shown that the election was changed by the township officers, and had resulted in no harm, and the new place was more convenient to the people than the old, the election was sustained. *Farrington v. Turner*, 53 Mich. 27.

But in Pennsylvania, where, on account of the tumult which had arisen, the election officers adjourned to another place, but a part of the voters remained, and, without sending for the other officers who were authorized to act in the place of those who had gone away, they chose other persons to act, it was held that neither election was valid, as one was held without proper officers, and the other at the wrong place, — *Com. v. County Com'rs*, 5 Rawle (Pa.), 75, — and in such a case a majority have no right to hold another election under different officers. *Juker v. Com.*, 20 Pa. St. 484; *Miller v. English*, 21 N. J. L. 317.

The fact that the election officers improperly refused to receive the votes of a certain class of voters, will not render valid another election held by that class at another place, although it might be ground for setting aside the regular election. *Gause v. Hodges*, 4 Cong. El. Cases, 291.

In New Brunswick, at all elections for parish officers, a nomination is required to be made before proceeding to take the vote.

The place of nomination and election was fixed by the proper authorities at a

schoolhouse, but the poll-clerk gave notice that it should be held at a house which was seventeen rods from the schoolhouse; and the nominations were made there, after which the election was adjourned to the schoolhouse, where the voting was done.

It was held that the nomination was by law a necessary part of the election; and having been made at a place different from that required by law, the election was void, and there was a vacancy in the office. *Robinson Ex. p. 3 Pugsley*, 389.

2. Thus, where an election was removed because the owner of the building in which it had been ordered, refused to permit its use, and no fraud was shown, and the removal was for a short distance, the election was held to be legal. *Dale v. Irwin*, 78 Ill. 170; *Preston v. Culbertson*, 58 Cal. 198.

Where it had been the custom to hold the school election in a district at one of the two school-buildings, and the usual notice was given, but the clerk, for the comfort of the voters, resolved to hold it at the other building, and a person stationed at the usual place notified the voters of the change, the election was held to be valid. *Wakefield v. Patterson*, 25 Kan. 709.

When the building, where the election had been held for years, by common consent was removed three-quarters of a mile from its original location, an election held in it upon its new site was held valid. *Steele v. Calhoun*, 61 Miss. 556.

3. Thus, in a Congressional case, it appeared that the city of Mount Vernon, Ohio, had been incorporated in 1845, by a special act of the legislature, and under this act the city, and the township in which it was located, were authorized to hold all State, county, and national elections together; and this had been done for eighteen years, although in 1852 an act had been passed to provide for the organization of cities and villages, which made each ward an election district. No voting-places had ever been

13. *Place of canvassing Returns.*—It would seem that the provision of law that the votes shall be canvassed at a certain place, is directory only; and a canvass made at a different place, for a sufficient reason, will not affect the return.¹

14. *Place must be fixed by Proper Authority.*—Where the place of an election is fixed by persons having no authority to do so, it has been held that an election held at such a place was illegal.²

15. *Voting-places too few in Number.*—The question has arisen in one or two cases as to the effect of there being too few voting-places to accommodate the voters; and it seems that where the voting-places are fixed by the officers, with a fraudulent intent to deprive the voters in a particular locality of the right to vote, this should be ground for setting aside the election; but that, in the absence of fraud, if the voting-places are not sufficiently numerous to enable all the voters to cast their ballots, the election will not be set aside for this reason;³ and where the polling-places are

fixed under the act; and the city and the township had continued to hold their elections together, as the authorities supposed that the law did not apply to that city. The committee held that the act applied to the city, but that, as eighteen different elections had been held since the act of 1852, including four national and fifteen State elections, without objection, the vote of the precinct should not be rejected because this election was held in pursuance of a construction so long sanctioned by the State authority. *Delano v. Morgan*, 3 Cong. El. Cases, 168.

1. Thus, in Pennsylvania, where the returning officers met at an unusual place to count the returns, the fact that at the usual place they were interfered with by a disorderly crowd to such an extent that they could not properly perform their duties, it was held to be a sufficient excuse for changing the place. *Hulseman v. Rems*, 41 Pa. St. 396. And where the court-house, where the votes should have been canvassed, was occupied for other purposes, it was held, that, in the absence of fraud, a canvass of the returns made at a private house was a sufficient compliance with the statute. *McCraw v. Harralson*, 4 Coldw. (Tenn.) 34.

2. Thus, in the Congressional case of *Miller v. Thompson*, 2 Cong. El. Cases, 118, the disputed precinct was in an unorganized county, and was supposed to be attached to Monroe County for election purposes, but was in reality attached to Makaska County. The county commissioners of Monroe County, supposing they had the authority, established a voting-place, and the election was held there, and the votes returned with those of Makaska County. It was held, that, the act of the commissioners not being legal, there was

no legal voting-place at this precinct, and that the votes must be rejected.

In Illinois, where it is the duty of the county board to provide additional voting-places in towns when necessary, an election held at one fixed by the town clerk will be void. *Williams v. Potter*, 114 Ill. 628.

But where the proper authorities neglected to fix the place for an election, but the voters by common consent met and held the election at the place where such elections had usually been held, the election was held to be valid. *Steele v. Calhoun*, 61 Miss 556.

3. In the case of *Hogan v. Pile*, 3 Cong. El. Cases, 285, the charge was made that the voting-places were so arranged that the votes could not all be received; but it was shown that there was delay, caused by the fact that the register was not alphabetized, and there were many German voters whose names were difficult to identify by the sound. It was held, that, the law of the State having imposed the duty of establishing the voting-places upon the county-court, that court had the right to fix the number in its own discretion, and that the exercise of that discretion could not be reviewed; but that if the court should fraudulently refuse to establish voting-places, in such a manner as to disfranchise the citizens for partisan purposes, it might be necessary to set aside the whole election.

Judge McCrary, Law of Elections, § 101, commenting upon this case, says, "No doubt, the true rule is here indicated, and it is this: if a board or officer having the power to fix the voting-places, shall fraudulently so arrange them as to disfranchise a portion of the voters, and thus defeat the will of the electors, it would become necessary to set aside the election."

fixed by the legislature, and they will not accommodate the voters, there seems to be no remedy.¹

X. Conduct of Elections. — Irregularities, etc. — 1. *Directory and Mandatory Provisions.* — Constitutional and statutory provisions for the conduct of elections are either mandatory or directory, and a violation of mandatory provisions will avoid the election, without regard to the motive of the persons guilty of the violation, and without any inquiry into the effect of the result of the election; but in case of directory provisions the election will not be set aside, unless the disregard of the provisions has been such as to show a fraudulent intent, or uncertainty has been produced in the result of the election. When the election is fair and honest, courts will not disfranchise the voters, unless compelled to do so by the peremptory requirements of the law.²

Directory provisions are such as are not of the essence of the election, but are enacted as a guide to the officers of the elections. As to what requirements are mandatory and what merely directory, the cases are not all in agreement, and it may be difficult in some cases to determine from the authorities into which class a provision falls; but it may be said that the tendency of the courts, and also of legislative bodies, is not to hold a provision mandatory, unless it is clearly of such a character that its violation will tend to prevent a correct determination of the result of the election, unless it is declared in the law that its violation shall render the election void. This is true even if the language is prohibitory as to the officers, or even if its violation may subject the offending officer to penal liability.

2. *Irregularities in Preliminary Proceedings.* — In cases where certain officers have the authority to call special elections for particular purposes, upon certain conditions, it seems to be held that the performance of such conditions are jurisdictional in their

This would seem to be correct; but in the later case of *Lawrence v. Sypher*, 4 Cong. El. Cases, 340, the parish was a hundred and thirty miles long, and had 3,180 registered voters. Just before the election, all but five of the voting-places were taken up, and those left were so arranged that there were none within thirty-eight miles of the north boundary, and that part of the parish where the votes of the party of the sitting member resided was virtually disfranchised, and but 1,454 votes were cast. This was done by the register, *at the request of the contestant*; and yet the committee reported in favor of seating the contestant whose personal frauds had procured him a majority, by disfranchising more of his opponents than would have overcome his majority.

1. *Broadhead v. Milwaukee*, 19 Wis. 624.

2. Thus, in the case of *Daly v. Petroff*,

10 Phila. 389, it was said, the power to throw out the returns from a precinct is one which a court should only exercise as a last resort, and only under circumstances which demonstrate that the disregard of the law has been so fundamental and continuous, that it is impossible to determine what votes were lawful and what unlawful, or arrive at any certain result; or unless the whole proceedings are shown, either by the face of the papers, or *aliunde*, to be so tarnished by the fraudulent or criminally negligent conduct of the officers, as to be altogether unreliable. *Barber R.*, 10 Phila. 579.

Courts will not set aside an election unless it is clearly illegal, but will give effect to it if possible. *State v. Board of Freeholders*, 35 N. J. L. 269; *Territory v. Mohave Co.* (Arizona), 12 Pac. Rep. 730; *Fowler v. State* (Tex.), 3 S. W. Rep. 255; *Tarbox v. Sughrue*, 36 Kan. 225.

character, and that the records, or *quasi* records of the officers, must show that such conditions were performed, in order to give any authority to call the election.¹

Under the heading of "Notice" the effect of lack of notice and irregularities in the notice have been discussed.

3. *Regularity of Acts will be presumed.* — It is well settled that the presumption is always in favor of the regularity of the acts of public officers acting within the scope of their authority, and the burden of proof is upon the party alleging any irregularity; and this extends so far as to require proof of the irregularity, and also that the result was affected thereby;² but where actual fraud, or irregularities so gross as to raise a presumption of fraud, are shown, the burden of proof will be upon the person seeking to uphold the election, to show that the fraud or irregularities did not affect the result.

4. *Discretion of Officers.* — Where a discretion is reposed in an officer of election, it will be presumed that it was properly exercised.³ But where this discretion can only be exercised in certain contingencies, the acts of the officer will not be presumed regular in the absence of those contingencies.⁴

1. Thus, a petition for the call of an election must be signed by the proper persons; and, where it was required to be signed by ten legal voters of the town, proof that it was signed by ten citizens was *held* not to be sufficient. *People v. Old Town*, 88 Ill. 302.

It must also set forth the facts upon which the authority depends. Thus, where the statute authorized an election to be called upon the question of the sale of liquor, upon a filing of a petition stating that, in the opinion of the petitioner, the public good will be promoted by the prohibition, it was *held* that the lack of such an averment in the petition rendered the whole proceedings void. *Tally v. Grider*, 66 Ala. 119.

Where notices are required, the law must be strictly followed. Thus in Texas, where there were only three notices posted for an election under the local option law, when five were required, it was *held* that the law might be declared void in a *habeas corpus* proceeding. *Cramer Ex p.* 19 Tex. App. 124.

In the same State it was *held*, that to warrant a conviction under the local option law, every fact necessary to constitute a legal election must appear; that it must be shown that a petition signed by the requisite number of legal voters was presented; that the order was made calling the election; and that the notices were legally given before a conviction could be had. *Stallworth v. State*, 18 Tex. App. 378; *Smith v. State*, 19 Tex. App. 444.

But in *Kentucky* it was *held* that, when the order to hold such an election and a certificate of the result were shown, it could not be proved that the notices were not posted as required by law. *Young v. Com.*, 14 Bush (Ky.), 161. And in Maryland it was also *held* that, until the election had been declared void by competent authority, it could not be shown in a case for its violation that there were irregularities in the preliminary proceedings. *Crouse v. State*, 57 Md. 327.

2. *Whipley v. McCune*, 12 Cal. 352; *Goggin v. Gilmer*, 2 Cong. El. Cases, 70; *Littell v. Robins*, 2 Cong. El. Cases, 138; *Thompson v. Ewing*, 1 Brews. (Pa.) 67; *Mann's Case*, 2 Phila. 320; *Myers v. Mofatt*, 3 Cong. El. Cases, 364; *Blair v. Barrett*, 2 Cong. El. Cases, 308.

3. Thus, when a statute gave the sheriff power to adjourn the election in case of rain, in his discretion, it was *held* that, if there was any rain, the officers could not be controlled in their discretion; that they were judges for themselves, and, unless fraud appears, their decision was final. *Trigg v. Preston*, 1 Cong. El. Cases, 78; *Goggin v. Gilmer*, 2 Cong. El. Cases, 70; *Loyall v. Newton*, 1 Cong. El. Cases, 520.

4. Thus, where a sheriff had the power to adjourn an election to the second day, if there was not time enough for the electors to vote the first day, and there had been plenty of time during the day, but at the hour of closing on the first day there were four voters present who had not voted, but who might have voted before that time,

5. *Manner of voting Mandatory.* — Where the law requires the election to be by ballot, votes given *viva voce* should be rejected.¹

6. *Improper Ballot-boxes.* — The failure to comply with the statutory provision in regard to the ballot-boxes, is not, according to the weight of authority, cause for rejecting the return.²

the votes received the next day were rejected. *Bassett v. Bayley*, 1 Cong. El. Cases, 254.

1. *Easton v. Scott*, 1 Cong. El. Cases, 272.

In one case, when the law required the election to be by ballot, the president of the election at one precinct took the ballots and opened them as they were received, read them, and cried them out; and the number of the vote and the registry of the voter was then made, after which the ticket was doubled and placed in the box. It was *held* that this proceeding amounted to a *viva voce* election, and invalidated the election. *Otero v. Gallegos*, 2 Cong. El. Cases, 177.

In an English case, however, where it was shown that, where there was no ground for thinking that the electors had been prevented from voting as they wished, and the election was substantially won by ballot, it was *held* it would not be invalidated, because there may have been mistake or misconduct in the use of the machinery of the ballot-act; but that, in order to have this effect, the non-observance of the forms of the act must be so great as to amount to conducting the election contrary to the principle of an election by ballot, and be such that it did affect, or might have affected, the result. *Woodward v. Parsons*, 44 L. Jour. (N. S.) C. P. 293.

In California the law provided that it should be unlawful to unfold or read a ballot within one hundred feet of the polls. At an election for member of Congress at one precinct, this law was violated during the whole day; but the committee decided, that, while the persons offending were liable to be punished, it was not intended that such a violation should invalidate the election. *Wigginton v. Pacheco*, 5 Cong. El. Cases, 1.

2. *Weil v. Calhoun*, 25 Fed. Rep. 865.

In a Congressional case in North Carolina, *Judge McCrary* in the report said, "There seems to be some doubt as to the true construction of the statute of North Carolina; but, assuming that the construction contended for by contestants is correct, we are of the opinion that the statute is directory only, and that the failure to provide two ballot-boxes, and the deposit of all the ballots in one box, did not render the election void in the absence of fraud. If the ballots were freely cast, if they were honestly counted and correctly returned, we should be unwilling to hold that a mere

mistake of the election officers as to whether the ballots should go into one box or two, should be allowed to defeat the will of the majority. *Boyden v. Shober*, 3 Cong. El. Cases, 904.

At an election for representative in Congress in Virginia, a constitutional amendment was also submitted. It was provided by the State statute that the officers should *open a poll* to take the sense of the qualified voters, and that each person who should have proved the amendments should deposit a ticket, etc. In one county but one ballot-box was used, and the words "Against the Constitutional Amendments" were printed on the same ticket as the names of the representatives. The canvassing board rejected the tickets having on them the words "Against the Constitutional Amendments;" but the whole committee agreed that they should be received. *Platt v. Goode*, 4 Cong. El. Cases, 650.

In a case from Texas there were two ballot-boxes for the voters, — one for white, and the other for colored, men; they were both in the same room, but at different windows, and were presided over by the same officers. The State board rejected the returns from one of the boxes, and counted the other. The committee *held*, however, that both should be received, or both rejected; and the result in either case being the same, they would not decide which was proper. *Giddings v. Clark*, 4 Cong. El. Cases, 91.

In a case from Georgia, where there were four ballot-boxes used at the four sides of the court-house in a city, presided over by four distinct sets of managers, it was *held* that it was clearly in violation of the letter and spirit of the law; but that, as the result was not changed thereby, they would permit the vote to be counted. *Sloane v. Rawles*, 4 Cong. El. Cases, 144.

In an early case, where the votes were deposited in a gourd and tied up with a handkerchief, instead of in a ballot-box, but in other respects the election was legal, it was *held* proper to count the vote. *Arnold v. Lea*, 1 Cong. El. Cases, 601. And in a recent case where the proper officers refused to furnish ballot-boxes, and to appoint managers to hold an election, and the electors organized appointed officers, and deposited the ballots in a cigar-box, it was *held* that the votes should be counted. *Smith v. Shelley*, 6 Cong. El. Cases, 18. But in the same case, where the voters of

Although there are some authorities to the contrary.¹

7. *Failure to Use Check-list.*—While, as we have seen in the chapter on "Registration," that the failure to make a registry when one is required by law invalidates the election, yet in a number of cases it has been held, that a failure to use check or registry list at the election, or using it informally, did not invalidate the election.²

8. *Erroneous Rule of Action.*—When the election officers adopt and announce an erroneous rule as to the reception of votes, even in good faith, and enough voters thereby prevented from voting to change the result, it would seem that the election should be set aside, if the rule had been announced officially, and the report of the ruling had circulated through the precinct, so as to prevent persons of the class whom the officers had determined to reject from offering their votes and making the proper proof, if the number of members of such a class was sufficient to change the result of the election; but in order to entitle them to have their votes counted for either party, it would be necessary that they should be tendered, and the proper proof offered.³

9. *Time and Place of counting the Vote.*—A failure to count

another precinct did not organize and vote by ballot, but made a *viva voce* list, it was held not to be sufficient, although the officers refused to act.

1. Where the law required the ballots for member of assembly to be placed in a separate box, and the election officers refused to carry out this provision, or to receive such ballots when printed on a separate piece of paper, the Assembly of New York held the election to be illegal. *Johnson v. Moss*, N. Y. Cont. El. Cases, 206.

2. Thus, in Louisiana, where the officers of a municipal corporation failed to furnish the check-list, as required by law, an election to determine whether a subscription to a private corporation should be made, was upheld. *New Orleans v. Cordeviolle*, 10 La. Ann. 732; *New Orleans v. St. Rones*, 9 La. Ann. 573. See also *Sudbury v. Heard*, 103 Mass. 543; *Westborough Case*, Cush. El. Cases, 392; *Wheelock's Case*, 82 Pa. St. 297; *Edson v. Child*, 18 Minn. 64; *Hogan v. Pile*, 3 Cong. El. Cases, 281; *Reg. v. Gray*, 15 Up. Can. Q. B. 257.

In these cases it was not shown that any illegal votes were received; but if this failure to use the lists had resulted in the reception of enough illegal votes to affect the result, undoubtedly the decision would have been different.

3. In the *Scranton Borough Case*,—*Brightly's El. Cases*, 455,—the presiding justice said, "If it appeared that an erroneous rule was adopted, which did improperly keep otherwise legal voters, tendering their

votes, from voting; or which, when made known as the decision of the board, prevented other voters, similarly situated, from offering their votes, it would be an undue election; more clearly, however, to be set aside by the court, if, under the evidence, it be rendered reasonably probable, that, if such votes had been offered and received, the result of the election would have been different, or have been left in doubt.

"We now find, upon considering the evidence, that such an erroneous rule was adopted and promulgated; and that the reverse of this rule, or rather the true rule, if allowed, might have produced a different state of the polls. In this respect, then, the election was *undue*, and the returns *false*, as an election of the citizens, though not intentionally so upon the part of the officers. The rule thus wrongfully adopted was, upon an alleged principle, operating upon a large number of voters. In such case it cannot be considered necessary to prove that each individual so affected tendered his vote to the board and was refused, or how they would have voted, if admitted. If they were legal voters, they had the right, without the supervision of this court, or of any other persons, to vote by ballot, and not to make their votes known to any one, unless they chose so to do. As a general rule, it affected a class; and it was not required that each one of that class should have his vote formally rejected. Virtually, it was so in all cases of the same kind, by the special decision made."

the votes at the time or the place fixed by the law, will not necessarily vitiate the election.¹

Where, however, this failure gives a chance for fraud in counting the votes, or tampering with the ballots, and the proof is not reasonably clear that the canvass was honest and correct, the returns should be rejected.²

10. *Absence of Presiding Officer.* — Where the law requires a certain officer to preside over an election, and he is absent a large part of the time, the election will be void; ³ but absence for a brief period will not have that effect, if the election is conducted by other sworn officers.⁴

11. *By what Law governed.* — When an election is provided for, and there is no provision made in the law for the conduct of the election, it will be governed by the law for the conduct of other elections in the district in which it is to be held.⁵

12. *Admission of Votes without Proper Proof.* — An important question has been considerably discussed in election cases, as to the effect to be given to votes, where the name of the voter is not on the registry list, and his vote is received by the election officers without challenge, or without requiring him to make the statutory

1. *People v. Luckett*, 14 Mich. 320.

In one Congressional case from Arkansas, there was an allegation that the ballot-boxes of one county had been taken from the county to Memphis, in Tennessee, and that there were opportunities to tamper with them; but, as it was admitted that the vote was returned as actually cast, the returns were received. *Gause v. Hodges*, 4 Cong. El. Cases, 291.

2. In a case from Louisiana, the law required the votes to be counted by the commissioners of election, at the place of the election, immediately upon the closing of the polls, and in the presence of the voters; and required the returns to be made within twenty-four hours after the close of the polls, and that tally-lists and lists of parties voted for should be kept. At the close of the election, the officers of one precinct locked up the ballot-boxes, and went with them to the county-seat fifteen miles away, took them to the court-house, counted a while that night, and adjourned till the next day. They completed the work on that day, but did not make the returns until the second day after the election. They were assisted by three persons in keeping the tally-lists, which were kept under their supervision. The returns were rejected, on account of the opportunity for fraud which such conduct afforded. *Spencer v. Morey*, 4 Cong. El. Cases, 437.

3. *Franklin v. Kaufman*, 65 Ga. 260.

This case held that, where the law requires a justice of the peace to preside at

an election for constable, and the justice presided only half the day, the election was void.

4. In an early Congressional case from Kentucky, the law required the sheriff or his deputy to preside. The sheriff was called away by sickness in his family; and, before the arrival of his deputy, a few votes were received by the other officers from persons who were admitted to be legal voters; and a portion of the time, while some legal votes were cast, one of the judges was absent. Although the committee reported in favor of rejecting the votes, the report was not adopted. *Letcher v. Moore*, 1 Cong. El. Cases, 843.

In Alabama, it was held that the absence of one of the inspectors a part of the time did not avoid the election, — *Lee v. State*, 49 Ala. 43, — and the same view was taken in the Congressional case of *Delano v. Morgan*, 3 Cong. El. Cases, 172.

5. Where an election was required to be held in a town, to determine whether a municipal corporation should subscribe for stock in a railroad company, it was held that it must be presided over by the town officer, as in the case of other elections; and that an election carried on as a town-meeting, and presided over by a moderator, was invalid. *Chicago, etc., R. Co. v. Mal-lory*, 101 Ill. 583.

Where the district is a town, and no registry is required at the elections for town officers, none will be required at the special elections. *People v. Dutcher*, 56 Ill. 144; *Dunavan v. Green*, 57 Ill. 63.

proof, and there have been three classes of decisions. When the law does not permit any person to vote unless his name is on the register, the provision is mandatory.¹

When it is provided that no person whose name is not on the register shall be allowed to vote without furnishing certain proofs, it is held that this prohibition is mandatory, and that all votes received in violation of the provision should be rejected.² In other cases, it has been held that such votes are *prima facie* illegal, but that proof of their legality may be made on the trial; but that if no proof is offered, they must be rejected.³

1. *People v. Kopplekorn*, 16 Mich. 342; *Caverhill v. Ryan*, 18 Lower Canada Juris. 323.

2. *State v. Hillmantel*, 21 Wis. 566.

3. In some cases in Pennsylvania, where the statute required that every person whose name is not on the list shall be examined by the election officers, and make proof of his residence in the district by affidavit, it was held that votes received without such proof were *prima facie* illegal; but that they might be counted at the trial, by making proof that the persons casting them were legal voters. *Kneass Case*, 2 Pars. (Pa.) 553; *Gillen v. Armstrong*, 12 Phila. 666.

But in another *nisi prius* case, — *Gibbons v. Shepherd*, 2 Brews. (Pa.) 129, — and in a later case of *McDonough Re*, 105 Pa. St. 488, a much stricter rule was held; it being decided that votes were not only presumed to be illegal, but that the presumption could not be rebutted by any evidence upon the trial.

In the Congressional case of *Wright v. Fuller*, 2 Cong. El. Cases, 152, the committee reported in favor of rejecting the vote, in the absence of any proof; but the report was laid upon the table.

In the case of *Myers v. Moffatt*, 3 Cong. El. Cases, 564, the committee reported in favor of the rejecting of such votes; but there had been great amount of fraudulent voting, and challenges had been disregarded, and in *Covode v. Foster*, 3 Cong. El. Cases, 600, and *Taylor v. Reading*, 3 Cong. El. Cases, 661, where the same facts were alleged and proved, the votes of the parties were rejected. A somewhat similar question arose in Florida, where the constitution provided that, when a person who had declared his intentions to become a citizen offered to vote, he must present a certified copy of his declaration to the election officers, and that naturalized citizens must present their certificates in order to entitle them to vote. In the case of *Finley v. Bisbee*, 5 Cong. El. Cases, 74, where the evidence showed that the persons whose votes were questioned, for want of such proof, before the election officers, were legal

voters, the votes were counted, but they were rejected when this proof was not made. In another case from that State, — *Finley v. Walls*, 4 Cong. El. Cases, 367, — where the statute requiring registration was imperative, but provided that, if a person's name had been on the register, and had been improperly erased, he might vote, upon proving his right to vote and making affidavit that his name had been improperly stricken off; when voters had voted without this last oath, they were held to vote illegally.

In such a case, if the demand had been made by the election officers for such proof, and the voters had refused to furnish it, and then their votes had been received, the strictest rule, absolutely excluding their votes, might well have been enforced, as it was by the Court of Common Pleas of Upper Canada, in the case of *Reg. v. McNeil*, 5 Up. Can. C. P. 137. Where the votes of persons who had refused to take the oath had been received, the court excluded the votes, not because the voters were shown to be disqualified, but because they had refused to take the required oaths of qualification; but where the voter has not been challenged, it may well be doubted whether, in the absence of any showing of fraud, the omission of the officers to require the voter to produce the statutory proof rebuts the presumption that a vote received is legal. The report adopted in the case of *Curtin v. Yocum*, 5 Cong. El. Cases, 466, held that the provisions requiring the officers of election to demand the proof of an unregistered voter, is directory only. The report says, "But to allow a non-registered voter to vote, without requiring him to comply with the law, if he is otherwise qualified, is quite a different question. If he refuses to comply, upon being requested, then it is clearly the duty of the officers to refuse his vote, because he refuses to obey a reasonable regulation prescribed by the legislature, and he has no one but himself to blame; but if he is allowed to vote, without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one. The officers

13. *Effect of Mistake.* — A mistake of the officers in counting the vote and declaring the result, will not be ground for setting aside the election, if there is any data by which the mistake can be corrected. In such cases, a mistake will be corrected, and the person declared elected who received the highest number of votes.¹

Where different ballot-boxes are used for various offices, the question has arisen whether the ballots for one officer, which were placed in the wrong box, could be counted for the officer for whom they were intended, and upon this question the authorities are not entirely in harmony.²

14. *Method of Election.* — The only way to defeat the election

of election have simply failed to take and preserve the evidence which the law requires of them; but the failure on their part to take and preserve this evidence, does not reach the qualification of the voter.

This same view was taken in the case of *Lowe v. Wheeler*, 6 Cong. El. Cases, 61, and in *Campbell v. Weaver*, 49 Cong. H. Rep. 1622.

In the case of *Bisbee v. Finley*, 6 Cong. El. Cases, 172, the strictest rule was held, and the votes of foreign-born persons who had voted without producing a certificate were rejected, and no proof allowed as to their legality. From these cases it may be seen that the question is an open one in Congress, and there is the same conflict in the decision of the courts.

In Illinois it was held that, where the voter was not challenged, the fact of his having voted without having made the proper affidavits did not rebut the presumption of the legality of the vote, which arose from its reception by the election officers. *Dale v. Irwin*, 78 Ill. 170; *Kuykendall v. Harker*, 89 Ill. 126; *Clark v. Robinson*, 88 Ill. 504.

And in a recent case in Iowa, it was held that, when a person was in fact a legal voter, his vote would be counted if he took an informal oath, or even if he was not sworn at all. *State v. O'Day*, 28 N. W. Rep. 642.

The same conflict appears in the views of the writers upon the subject of elections. Mr. Brightly, in a note to the case of *People v. Cook*, El. Cases, 453, declares in favor of the strictest rule, that, if the voter's right to vote is not properly proven when the vote is cast, it should be regarded as *ipso facto* illegal; while *Judge McCrary* in his "Law of Elections," upholds the view, that the vote is *prima facie* illegal; but that it may be counted, upon proof that the person was a qualified voter.

1. *State v. Judge*, 9 Ala. 338.

2. In Michigan an election for city and State officers was held at the same time, with different ballot-boxes. It was pre-

sided over by the same officers, and the boxes were setting side by side. Ballots for city officers were found in the box for the State officers, and the number of such ballots when added to those in the proper box, was less than the number of names on the poll-books.

In this case it was held that the voters should not be deprived of their votes, either by the mistake or fraud of the officer in depositing the ballot in the wrong box, if the intention of the voter could be determined with reasonable certainty, and that the ballots should be counted for the city officers. *People v. Bates*, 11 Mich. 362. And see *Bovee v. Sheldon*, N. Y. Cont. El. Cases, 53; *Bostwick v. Evans*, id. 76; *McGlashan v. Bryan*, id. 66.

In the case of *Washburn v. Ripley*, 1 Cong. El. Cases, 679, it was shown, that at the election, one of the electors deposited in the Congressional box a ballot containing the names of two persons, who were candidates for State senators, and the mistake was immediately discovered by him, and he asked leave to have it withdrawn. If this ballot was not counted, one of the candidates had a majority over all, as required by the law of the State; but if counted, there was a tie.

It was held that these ballots should be counted, and that neither the voters nor the election officers could withdraw the ballot after it had been deposited in the box, upon the ground that it was a mistake.

Where the voting was *viva voce*, it was held that a person, whose vote had been recorded for one candidate, could not change it and give it to another upon the ground that he had made a mistake, — *Draper v. Johnson*, 1 Cong. El. Cases, 702, — and in the case of *Washburn v. Ripley*, the voter having put the ballot in the box himself, it was held that this same view prevailed. In the case of *Newland v. Graham*, 2 Cong. El. Cases, 5, the committee reported that such a mistake should be corrected, if the vote had been deposited by the officers.

of a candidate at an election where the number of electors is indefinite, or where the law does not require a majority of all the members of a body having a definite number as opposed to a majority of those voting, is by voting for another candidate; and the fact that a majority enters a protest against the minority candidate voted for at a regularly called election, will not defeat the election, if no other candidate is voted for.¹

This rule does not apply to cases where the elective body consists of a definite number, and a majority of the members is required for an election. In such a case a refusal to vote, or a blank vote by a majority, will defeat an election.²

By section 15 of the Revised Statutes of the United States, it is provided that all votes for senators shall be by *viva voce* vote of members of the legislature; and by section 37, that all votes for representatives in Congress must be by written or printed ballots, and that all votes received or recorded contrary to such action shall be of no effect.

It has been held that, where there is no provision of law making a plurality sufficient for an election, that a majority of the votes cast must be for a candidate in order to elect him.³

15. *Election by Two Bodies*.—Where a statute which devolved an election on two bodies required them to meet separately, and make separate nominations, and then meet together and compare them, and in the case of disagreement, to proceed to an election by joint ballot, it was held that unless both bodies agreed to a joint ballot, and actually attended the election, the election was not valid.⁴

But when a joint session was held for other business, and a majority of those present determined to proceed to an election, it was held that an election by a majority of both bodies was valid, although all the members of one body withdrew, and refused to vote.⁵ The decisions of the United States Senate upon this question are not entirely in harmony.

1. *Hendrickson v. Decaw*, 1 Saxton (N. J.), Eq. 577.

2. In the absence of any act of Congress upon the subject, a State may pass a law, or a joint or concurrent resolution of the legislature, requiring a majority of all the members elected to both branches of the legislature to elect a senator of the United States; and in such a case, where twenty-nine votes were given for one candidate, and twenty-nine blank votes were given, it was held that this did not constitute an election. *Yulee v. Mallory*, 2 Cong. El. Cases, 608; Sen. El. Cases, 146.

In 1866 in the Stockton case in New Jersey, — Sen. El. Cases, 264, — it appeared that there was no law in the State regulating the elections of senators, and there had been a practice of regulating the election of all officers by resolution of the con-

vention; and at the convention for the election of senators in 1865, a resolution was adopted that a plurality of the members present might elect. The judiciary committee, reporting through Senator Trumbull, decided in favor of the validity of the election, but the resolution was amended by the close vote of 22 to 21, and the candidate was declared not elected. It was claimed by some of the senators, that the Parliamentary law required a majority to elect, and that this could only be changed by a law or a resolution of the Houses acting in their legislative capacity.

3. *State v. Fagan*, 42 Cong. 35.

4. *People v. Whiteside*, 23 Wend. (N. Y.) 9; *People v. Whiteside*, 26 Wend. (N. Y.) 634.

5. By the statute of Iowa, it was provided, that, at the proper time for an election

16. *Authority of the United States Supervisors.* — United States supervisors of elections have the right to be present at elections for members of Congress, and to take the ballots in their hands long enough to scrutinize them with care, notwithstanding the provisions of the State law.¹ And a refusal on the part of the

for senator of the United States, upon a resolution of either House concurred by the other, the members of both Houses should meet in convention, in the hall of the House of Representatives; that after the time had been designated, and before the time of meeting, each House should appoint a teller; that the secretary of the Senate and the clerk of the House, should keep a record of the proceedings; that the clerk of the House should act as secretary of the convention; that the names of all the members of the General Assembly should be arranged in alphabetical order, and that they should vote as their names were called; the president of the Senate, and in his absence the speaker of the House, was to preside. It was further provided, that when the convention was organized, the members present should proceed to choose a senator by *viva voce* vote, and that upon a failure to elect upon the first poll, a second might be taken, until some candidate should receive a majority of the votes of the members present. If the election was not completed that day, the president was to adjourn the convention to such time as a majority of the members present should determine.

Pursuant to this law, a resolution was passed by both Houses, fixing the time for the election of a senator; and the convention was regularly organized, and adjourned four times, having taken several ineffectual votes. Upon the day appointed for the fifth meeting, the Senate as a body had adjourned, but fifteen members met as members of the convention, — sixteen being absent, — and with the members of the House, there were more than a majority of both Houses present; and a vote having been taken, one candidate, having received a majority of the votes of all members present, and a majority of all the members of both Houses, was declared elected.

The judiciary committee of the Senate, held that the candidate was not entitled to the seat, and he was not admitted. Harlan Case, 2 Cong. El. Cases, 621; Sen. El. Cases, 155.

At the next session of the Senate, however, there was a decision which was in direct opposition to that in the Harlan Case.

In Indiana, there was no law for the organization of a joint convention, and one could not be formed except by the action of the two Houses, acting without any con-

stitutional or statutory obligation. A meeting of the House, with the president and a minority of the Senate, was held for the purpose of witnessing the counting of the votes for governor and lieutenant-governor, and for no other purpose. After that was done, a senator present without any vote, declared the convention adjourned to a future day; and the Senate, before the day fixed for the adjourned meeting, passed a resolution protesting against the proceedings of the so-called convention, and disclaimed all connection therewith, and protested against the election of a United States senator, or any other officer thereby.

On the day appointed, a minority of the senators went to the hall of the House, and with a majority, but less than a quorum, of the members of the House, voted for senators, and two candidates were declared elected. In the Senate, the claimants were admitted to the seat, an amendment offered by Mr. Trumbull to the resolution, "That in the opinion of the Senate, no election of a member of this body made by the legislature of a State, consisting of two branches, was valid, when made in a meeting of individual members of both, unless such meeting for that purpose was prescribed by law, or had been previously agreed to by each House acting separately in its organized capacity, or is participated in by a majority of the members of each House, or is subsequently ratified in some form by each House in its organized capacity," having been rejected. Fitch & Bright Cases, 2 Cong. El. Cases, 629; Sen. El. Cases, 164.

In 1877 the same question arose in the Eustis Case, — Sen. El. Cases, 505, — under the act of 1866, sec. 15 of the Revised Statutes of the United States. In that case the Senate, as a body, refused to go into an election for senator; but twelve members of the Senate met with the members of the House, and, constituting with the House a majority of all the members of the legislature, voted for a senator. The committee on privileges and election reported, that although the Senate refused to take part in the election, and only a minority of its members participated in it, there was a substantial compliance with the act, the constitutionality of which had been repeatedly affirmed by the action of the Senate, and the claimant was admitted.

1. United States v. Clark, 22 Fed. Rep. 387.

election officers to permit the supervisors to perform their duties, will be ground for the rejection of the returns from the precinct.¹

17. *Tie Vote at Congressional Elections.* — The provision of the United States Constitution, that representatives in Congress shall be elected by the people of the States, invalidates a State statute, which provides for the determination of an election by lot in case of a tie vote, as in such a case there is no election by the people.² In one case where the election had resulted in a tie vote, both candidates notified the governor that they relinquished all claim to the seat, and a new election was held. A number of citizens petitioned against the admission of the person chosen at the second election, upon the ground that the other person had been chosen at the first election. It was held, however, that if he had any claim he had relinquished it by his acts.³

18. *General Principles.* — The general principle drawn from the authorities is, that honest mistake or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain.⁴

But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, where they are matters of substance, and render the result uncertain, and where they are fraudulent, and the result is rendered uncertain thereby, the returns should be set aside, and the persons required to prove the legal votes cast for them.⁵

Where the incompetency, inefficiency, and reckless disregard of the essential requirements of the law prevail to such an extent that the acts of the officers must be deemed unreliable, this will, of necessity, have the same effect as fraudulent action, and be ground for rejecting the returns.⁶

XI. Returns. — Effects of Irregularities or Frauds. — 1. Classification of Irregularities. — Irregularities which might affect the validity of the returns may be divided into three general classes; the first

1. *Smith v. Shelley*, 6 Cong. El. Cases, 18.

2. *Reed v. Cosden*, 1 Cong. El. Cases, 353.

3. *Sergeants' Case*, 1 Cong. El. Cases, 18.

judge McCrary suggests that it is doubtful whether this relinquishment was binding or legal, as the constituents were not consulted. *Am. Law of El.* sec. 169, note d.

4. *McKinnie v. O'Conner*, 26 Tex. 5; *Jones v. State*, 1 Kan. 279; *Gilliland v. Schuyler*, 9 Kan. 569; *Morris v. Van Laningham*, 11 Kan. 269; *Jones v. Caldwell*, 21 Kan. 186; *Gass v. State*, 34 Ind. 425; *Dobyns v. Wheaton*, 50 Ind. 298; *Lee v. State*, 49 Ala. 43; *Dupage Co. v. People*, 65 Ill. 360; *People v. Cook*, 8 N. Y. 67;

Weaver v. Given, 1 Brews. (Pa.), 140; *Barnes v. Supervisors*, 51 Miss. 305; *Arnold v. Lea*, 1 Cong. El. Cases, 601; *McHenry v. Yeamen*, 2 Cong. El. Cases, 550; *Burns v. Young*, 4 Cong. El. Cases, 179; *Trustees Common School v. Garvey*, 80 Ky. 159; *Burton v. Hicks*, 27 La. Ann. 514; *Trimmer v. Bannor*, 20 S. Car. 354.

5. *Batturs v. Megary*, 1 Brews. (Pa.) 162; *Thompson v. Ewing*, 1 Brews. (Pa.) 107; *Howard v. Cooper*, 2 Cong. El. Cases, 281; *Blair v. Barrett*, 2 Cong. El. Cases, 308; *Myers v. Moffatt*, 3 Cong. El. Cases, 564; *Reid v. Julian*, 3 Cong. El. Cases, 822; *Lemoyne v. Farwell*, 4 Cong. El. Cases, 406; *Spencer v. Morey*, 4 Cong. El. Cases, 437; *Mann's Case*, 2 Phila. 320.

6. *Duffy R.*, 4 Brews. (Pa.) 531.

has reference to the execution of the return, its form, authentication, and signature; the second refers to the time in which they should be made, and the effect of the delay. The third will refer to the manner of forwarding of the returns, and the effect of improperly sending them to the canvassing officers.

2. *Returns as Evidence.*—The returns, when regular and properly authenticated, are not only conclusive upon the board of canvassing officers, as we have seen, but are also *prima facie* evidence of the number of votes cast in a proceeding to contest the election, and the burden of proof is upon the person who assails their correctness.¹

And if they are irregular in stating facts not required by the statutes, such statements will be treated as surplusage, and will not affect the returns.²

Where the ballots are preserved properly, so that they may be recounted by the order of court, they will govern when there is a difference between them and the returns.³ But this should never be allowed, unless the recount is made under such circumstances that it will be presumed to be more accurate than the official count, or where the ballots have been so kept that there is no danger that they have been tampered with.⁴

1. *People v. Minck*, 21 N. Y. 539.

In one case, — *Kane v. People*, 5 Neb. 509, — the court went further, and in a *quo warranto* proceeding, which usually opens up all the election, the precinct returns were held conclusive. In this case, by the poll-books and precinct returns, it appeared that the relator had a majority of the votes cast in the county, which were less than two hundred in number, but the board of county canvassers without authority of law, had opened the ballots which accompanied the returns, recounted them, and found that they gave a small majority for the respondent, who qualified and took possession of the office. The court, affirming the decision of the lower court, held that the action of the county board was illegal, although the respondent offered to produce the ballots, to show that he had received a majority of the votes, and also offered the testimony of the voters, who had voted for him for the same purpose, holding that this evidence was immaterial and inadmissible. But this case is not sustained by the weight of authority.

2. *Heath Ex p. 3 Hill* (N. Y.) 42.

3. *State v. Judge*, 13 Ala. 805; *Hudson v. Solomon*, 19 Kan. 177; *Reynolds v. State*, 61 Ind. 392; *Duson v. Thompson*, 32 La. Ann. 861.

4. *People v. Cicott*, 16 Mich. 283; *Kingery v. Berry*, 94 Ill. 515; *Owens v. State*, 64 Tex. 500; *Newton v. Newell*, 26 Minn. 529; *People v. Livingston*, 79 N. Y. 279.

In California, a nice question arose in

People v. Holden, 28 Cal. 123, where the final result depended on the question, of whether the ballots or the official returns should govern, where the law provided for the preservation of the ballots, and there was no evidence of their having been tampered with. It appeared that the name of one of the candidates had been torn off from two of the ballots, which decreased his vote two from that shown by the returns. The court held, affirming the decision of the lower court, that the ballots should govern. The law required the ballots to be strung, and returned to the clerk with the poll-list and the returns, and the county canvassers were authorized to recount them, upon demand of any person who had reason to believe that the returns were not correct; and they were required to be kept safely by the clerk for six months. In delivering the opinion, Chief Justice Sanderson said, "Being, as we hold, competent, it is clear that the ballots are primary evidence of the number of votes cast, and for whom, rather than the tally list made from them by the officers of the election. We must presume that the officers of the election honestly performed their duty in the premises; that they did not mutilate any of the ballots, but, on the contrary, strung them, in the condition in which they were found in the ballot-box, on the thread, and sent them in that condition to the clerk's office; the same presumption exists in relation to their custody by the clerk. In other words, in the absence of any evi-

3. *Returns not signed by Proper Officers.*—Where the statute requires the election to be presided over by one or more officers, and the return is not signed by them, or any of them, they will be rejected;¹ but it is held in some cases, that, where they are

dence, showing that the ballots in question were mutilated subsequently to their being deposited in the ballot-box, we are bound to presume that they were in the same condition, when produced on the trial, from the proper office and by the proper officer, in which they were deposited in a ballot-box; any subsequent alteration or mutilation, by any one intrusted by law with their custody, would be a public crime of great enormity; and the commission of a crime cannot be presumed. *United States v. Amedy*, 11 Wheat. 408. If they were mutilated while in the clerk's office, it was the duty of the defendant to make proof of that fact; not having been in the custody of the relator, but in that of the proper public functionary, *he* was not called upon to explain when and how the name of the defendant was torn off. The presumption, as we have already seen, was that his name was torn off by the voters themselves: upon this presumption the relator could rely, and the labor of overthrowing it rested upon the defendant, who made no effort in that direction. There is no force in the argument that the ballots were liable to become mutilated, and ought, therefore, to be considered of less weight, as evidence, than the tally list.

"The officers were required to string them upon a cord or thread and seal them up in a package, and deliver or cause them to be delivered, to the county clerk, whose duty it is to safely keep them for at least six months; and the presumption is that he has done so."

Mr. Brightly—*El. Cases*, 473, note—severely criticises this decision; but the reasoning of the court seems to be entitled to greater weight than that of its critic.

In the case of *Gooding v. Wilson*, 4 Cong. *El. Cases*, 79, the committee reported against the recount, and the report said, "On examination of the precedents, it does not appear that this House favors the setting aside of official and formal counts, made with all the safeguards required by law, on evidence only of subsequent informal and unofficial counts, without such safeguards."

No instance was cited at the hearing, where the person entitled by the official count was deprived of his seat by subsequent unofficial count. In the cases of *Butler v. Lehman*, 2 Cong. *El. Cases*, 353; and *Kline v. Verree*, 2 Cong. *El. Cases*, 381, where the ballot-boxes had been kept in an insecure position, the House preferred the returns to the evidence of the

ballots; but in the earlier case of *Archer v. Allen*, 2 Cong. *El. Cases*, 169, where there was evidence upon a subsequent count, that there had been a mistake in favor of the sitting member, the seat was declared vacant.

In the later case of *Acklen v. Darrell*, 5 Cong. *El. Cases*, 125, where a recount had been made by order of the court, under the State law, it was *held* by the House, that the result as shown by the recount should prevail against the return, although there were suspicious circumstances connected with the keeping of the ballots; at the same session, however, where there had been recount of the ballots of a ward by the alderman, upon a petition of the voters, and the result was changed thereby, the committee reported against the recount, and seated the contestant. *Dean v. Field*, 5 Cong. *El. Cases*, 190.

It was, however, reserved for the Forty-eighth Congress to give effect to the most informal recount of the vote of the whole Congressional district probably ever made.

In the case of *English v. Peelle*, 48 Cong. H. R. 1547, there had been a commission of three persons, appointed by a court of the State, to recount the ballots for sheriff; and one of the commissioners, having no authority to count the votes for representative, at the request of the father of the contestant, who agreed to pay him for so doing, commenced to count the votes for representative a day or two after the count for sheriff began.

He made the count secretly for a day or two, when one of the other commissioners discovering it, they kept count jointly in the rest of the district; and in the part of the district where the recount was joint, there was a gain for the sitting member of a hundred and twenty-seven; but the man who counted alone, swore that his count decreased the majority of the sitting member ninety-nine.

He produced no memoranda of his figures, and could give no figures as to the votes, or the mistake in any precinct, nor as to the vote for either candidate in the aggregate. This report, which was at first rejected by the House, and was only adopted upon a reconsideration by a strict party vote, is not worthy to be considered as of any value as a precedent, and the minority might well say, "It seems to us that no just-minded person will permit an election to be overturned upon so flimsy a pretence."

1. Where an election was required to be

signed by a majority of the board, they would not be rejected because all did not join.¹

Where the return is signed by the proper officer, the signatures of other persons will not vitiate it.²

4. *Presumption of Official Character from Acts.*—Where the statute authorizes the selection of presiding officers by the voters, in case of the absence of the regular officer, and no certificate of any other officer is required to show their appointment, and the poll-books are signed by persons other than the regular officers, and they are shown by the returns to have been sworn and acted, they will be presumed to have been properly appointed by the voters.³

But if a certificate is required to show their appointment, a return signed by persons pretending to act, not accompanied by such certificate, will not be received.⁴

5. *Lack of Certificate or Signature.*—The weight of authority is to the effect, that the law requiring returns to be certified to, or signed or attested by the officers making it, is mandatory; and that a return not thus authenticated cannot be received in a contest, or by the canvassers.⁵

It is sufficient in such case, if the officers signed by their mark.⁶

6. *Informality of Certificate.*—While the lack of a certificate may vitiate the return, the wording is not material if it can be

presided over by three magistrates, and the return was signed by but one magistrate and by two other persons, it was rejected, —*Jackson v. Wayne*, 1 Cong. El. Cases, 247, —as it was also when the county return was signed by a judge only, when the statute required it to be signed by the county judge, the circuit clerk, and a justice of the peace, —*Niblack v. Walls*, 4 Cong. El. Cases, 103, —and also where the returns, in the place of being sent to the probate judge, and canvassed by him, were sent directly by the precinct officers to the secretary of state. *Daily v. Estabrook*, 2 Cong. El. Cases, 299.

1. *McCabe v. Arcularious*, N. Y. Cont. El. Cases, 333; *Opinion of Justices*, 70 Me. 560; *State v. State Canvassers*, 17 Fla. 29.

But when only a minority sign it, it has been held insufficient. *Perry v. Whitaker*, 71 N. Car. 475.

2. *Taunton Case*, 1 Peckw. (Eng. El. Cases) 406. Where there was an election held in a county, and the law provided that the inspector and judges, or any two of them from each precinct, should meet with the county auditor, and canvass the vote of the precinct, the inspectors of all the precincts met with the auditor, and canvassed the votes of the whole county, and joined in the returns. It was held this was the same as though an inspector from each

precinct had met the auditor alone, and made the canvass, and that, as this would have made a quorum of the board from each precinct, the action was legal. *Mustard v. Hoppess*, 69 Ind. 224.

3. *Patton v. Coates*, 41 Ark. 111.

4. *McKinney v. O'Connor*, 26 Tex. 5.

5. *Opinion of Justices*, 68 Me. 81; *Opinion of Justices*, 70 Me. 560; *People v. Nordheim*, 99 Ill. 553; *Simon v. Durham*, 10 Oregon, 52; *Lawrence Co. v. Schmaulhausen* (Ill.), 4 N. E. Rep. 255; *Chrisman v. Anderson*, 2 Cong. El. Cases, 334; *Barnes v. Adams*, 3 Cong. El. Cases, 769; *Bisbee v. Finley*, 6 Cong. El. Cases, 190. But in the case of *Butler v. Lehman*, 2 Cong. El. Cases, 353, the committee refused to reject the returns because not signed by the judge as required by law; and the New York Assembly, in the case of *Haywood v. Beers*, N. Y. Cont. El. Cases, 180, held that the statute requiring the poll-book to be signed is directory only, and that the return would not be rejected for the want of the signature, in the absence of proof of error; and in Nevada it was held that where there was no question as to the correctness of the returns, or of the qualifications of the officers or voters, the return will not be rejected for lack of a certificate. *Stimson v. Sweeny*, 17 Nev. 309.

6. *Smith v. Shelly*, 6 Cong. El. Cases, 18.

understood; and a statute providing that the certificate should be in a certain form, is only directory; and if, from the whole return, the aggregate of the votes, and the number cast for each candidate, can be understood, the lack of formality will not be ground for rejecting the returns.¹

And where the return itself is proper, but it is accompanied with other informal documents, this will not be ground to treat the whole returns as informal.²

7. *Uncertainty in the Returns.* — A return may be so uncertain as to be of no validity; as, if it failed to show for what office votes given for an individual were cast.³

1. *Mallory v. Merrill*, 1 Cong. El. Cases, 328; *Clark v. Hall*, 2 Cong. El. Cases, 215.

Where the law required poll-books of elections held in a company, in the military service, to designate the company and regiment in which the election was held, it was decided that it was not necessary to specify the arm of the service to which the regiment belonged, nor that it was a regiment belonging to the State, as that would be presumed, and the defect in failing to state the arm of the service was not one of substance. *Lehman v. McBride*, 15 Ohio St. 573.

When the returns did not show the town in which the election for a removal of the county-seat was held, but they were accompanied by poll-books in which the caption showed that fact, it was *held* that the informality did affect the returns. *Dishon v. Smith*, 10 Iowa, 212.

When the certificate of the ward officers did not give the majorities of the different candidates, but they attached the district returns, and referred to them for that purpose, this informality did not vitiate the returns. *Heath Ex p. 3 Hill* (N. Y.), 42. And in another such case, where the tally-sheets, which were a part of the returns, showed the number of votes, it was *held* that it was competent to count the votes, as shown by the two documents. *People v. Rayle*, 91 Ill. 525.

Where, after showing the number of ballots for the various officers to be elected, the returns stated that the same number were cast for a certain place for county-seat, it was *held* to be sufficiently definite to show that all the votes were cast for the place. *State v. Bailey*, 7 Iowa, 390.

Setting down the number of votes for each candidate in figures will be sufficient, although the law required them to be in writing. *Easton v. Scott*, 1 Cong. El. Cases, 273.

When the law required the county commissioners to make out and certify the county returns, and that their certificate should be attested by the clerk, and, instead

of attesting a certificate of the commissioners, he added a formal certificate of his own over his official seal, it was *held* that this did not justify the rejection of the return. *Platt v. Goode*, 4 Cong. El. Cases, 650.

When, by law, duplicate returns were to be made, of which one was to be sent to the judge, and the other to the clerk, and there was a slight immaterial variation, it was *held* not to be sufficient to warrant a board of canvassers in rejecting the vote. — *State v. Alachua Co. Canvassers*, 17 Fla. 9, — nor is the fact that the heading of the poll-book is not filled up, or that the blank in the certificate, showing the aggregate number of votes, was not filled, — *State v. Sillon*, 24 Kan. 13, — nor that the judges and clerks made out the returns on separate pieces of paper and forwarded them, without attaching them together in any manner, — *Previtt v. Stevens*, 25 Kan. 275, — nor that the returns were partially made out upon blanks made for reports to a party political organization. *Dalton v. People*, 43 Ohio St. 652.

2. *Follett v. Delano*, 3 Cong. El. Cases, 113; *Howard v. Shields*, 16 Ohio St. 184. In these cases it was *held*, where the county officers were to make out the county abstracts from the tally-sheets of the precincts, and the poll-books were shown to be informal, that this would not warrant the inference that the tally-sheets were informal, or the returns based upon them incorrect.

On the other hand, a mere statement from a town-meeting that showed that certain persons were elected without showing that they received a majority of the votes, or that the voting was by ballot, was not sufficient, — *Hall v. Manchester*, 39 N. H. 295, — nor is one signed by an individual without showing his official position, or, in case of a town-meeting, that it was a copy of the town records. *Luce v. Mayhew*, 13 Gray (Mass.), 83.

3. *Moore v. Kessler*, 59 Ind. 152.

Where the number of votes cast for the candidate whose name appears first on

But if, from all the documents required by law to be sent to the board, the number of votes for each candidate can be determined, the returns should not be rejected.¹

8. *Failure to send Required Documents.* — The fact that all the documents required by law to be sent to the canvassing board do not accompany the returns, will not vitiate them, if those which are sent are sufficiently definite to enable the board to ascertain the results.²

9. *Returns made from Improper Data.* — Where the certificate shows that the returns or abstracts are not based upon the proper precinct returns, the votes and returns of the county should be rejected.³

10. *Part of Precincts not counted.* — The return from a county or district is not to be rejected upon proof that the officers of some of the precincts sent in no returns; but in such a case, the return will stand, and proof of other votes from the other precincts be allowed, if no fraud is shown.⁴

11. *Returns made in Obedience to Writ of Mandamus.* — The fact that a return has been made, in obedience to orders of the court in a *mandamus* proceeding, does not affect its validity; and this is true, regardless of the question of the jurisdiction of the court making the order requiring the canvass. The tribunal, how-

the returns is shown, and ditto-marks are placed opposite the next name, this will warrant the canvassing board in giving them the same number of votes as the first name; and where a few votes were given for a number of different persons, but if all added together and deducted from the highest candidate would not change the result, the fact that such a number is given in the return as "scattering" will not authorize the rejection of the return. Opinion of Justices, 70 Me. 560; Prince v. Skillen, 71 Me. 361.

1. When the tally-sheets did not show what offices the votes were cast for, but by law the ballots were required to be sent up with the returns, and this was done, it was held not to be proper to reject the returns, since this defect could be cured by an inspection of the ballots. Lynch v. Chalmers, 6 Cong. El. Cases, 338.

2. Day v. Kent, 1 Oregon, 123; State v. State Canvassers, 17 Fla. 29; Beardstown v. Virginia, 76 Ill. 34; Lynch v. Chalmers, 6 Cong. El. Cases, 338.

3. Thus, when the certificate showed that the county abstract was based upon affidavits from the officers of a part of the precincts, and that the returns, poll-books, tally-sheets, and ballots had been stolen from his office, it was held that such certificate gave no evidence of its correctness. Gause v. Hodges, 4 Cong. El. Cases, 299. And where the State law required the county canvassers to forward to the State board

the returns, poll-lists, and all papers relating to the election at the various precincts, and they merely sent a statement of the result, and the State board acted upon this only, it was held that the certificate was worthless, and that the party relying upon the vote must prove it *aliunde*. Smalls v. Tillman, 6 Cong. El. Cases, 432.

In a case where the ballot-boxes, tally-sheets, and returns from a precinct had never been in the custody of the clerk of the court, who was their proper custodian, a return produced from one of the precinct officers was held not entitled to be counted. Spencer v. Morey, 4 Cong. El. Cases, 437.

4. Bisbee v. Hull, 5 Cong. El. Cases, 315; Heath *Ex p.* 3 Hill (N. Y.), 42; Myers Case, N. Y. Cont. El. Cases, 14. But in one case, where the county canvassers had rejected the votes of three of the five precincts of the county, and had returned the votes from one of the other precincts incorrectly, this was held to be such evidence of fraud as to render the county return worthless. Niblack v. Walls, 4 Cong. El. Cases, 102.

The votes, however, when ascertained from the missing precincts, will be counted wherever a valid election was held. Mal-lory v. Merrill, 1 Cong. El. Cases, 328; Borland v. Hildreth, 26 Cal. 161. See People v. Kilduff, 15 Ill. 492; Reid *Ex p.* 50 Ala. 439; Governor v. Jackson, 32 Ark. 553.

ever, before which the contest is pending, can examine the returns and the reason for rejecting them, and decide on the evidence presented before it.¹

12. *Informalities corrected.* — While the returns are yet in the hands of the returning officer, he may correct them.²

But after they have passed from his hands, and especially after the time for making the return has expired, he cannot send in another return.³

In many of the States, it is made the duty of any canvassing board to permit informalities in the execution of returns, or certificates to be corrected; and in some States they are required to send for the precinct officers, and compel them to make the proper corrections, where the irregularity is such that they cannot otherwise be counted.⁴

13. *Returns corrected by Tribunal trying Contest.* — When, as we have seen, canvassing boards have no power to correct the substance of a return, any tribunal trying the contest has the authority to correct any errors, or to supply any defects, in the return by any competent evidence.⁵

Where the error is merely in the footings, the mistake may be proved by the other documents; but where they are of another character, the vote of the precinct will be counted, if it can be proved.⁶

14. *Time of making Returns directory.* — We have already seen that even the canvassing board may count a return received during

1. Thus, where the sole ground for the rejection of the vote of the county was, that no return had been received from one of its precincts by the county board, and the Supreme Court of the State had compelled a canvass of the vote, the committee in a Congressional case, without determining the question of the jurisdiction of the court, *held* that the reason alleged by the board was insufficient, and counted the votes; and when there were unassailable returns before the committee, which the county board had at first refused to count, but had been compelled to canvass by *mandamus*, it was *held*, that, as they were unassailed before the committee, they must be counted. *Bisbee v. Hull*, 5 Cong. El. Cases, 315.

2. *Bedfordshire Case*, 1 *Luders Eng. El. Cases*, 355.

3. *Gause v. Hodges*, 4 Cong. El. Cases, 303. But in Massachusetts, where the election officers have ten days in which to make up the returns of an election for representative in Congress, it was *held*, that, if they had made an erroneous return, they might amend the return if the error was discovered within that time. *Com. v. Mayor*, etc., *Thach. Cr. Cas.* 298. But in Missouri it was *held*, that, although the mistake might be seen by the canvassing

officer by comparing the certificates with the tally-sheets and poll-books from the precincts, he must certify the results from the certificates alone, and cannot correct the mistake by the other documents. *State v. Trigg*, 72 Mo. 365.

4. *State v. Baker*, 38 Wis. 71; *Platt v. Goode*, 4 Cong. El. Cases, 650; *People v. Nordheim*, 99 Ill. 553; *Rounds v. Smart*, 71 Me. 380; *Opinion of Justices*, 70 Me. 560.

5. There have been a great number of cases where mistakes in the name of the candidates have occurred in the return, and they have uniformly been permitted to be corrected, by showing the facts. See *Root v. Adams*, 1 Cong. El. Cases, 271; *Guyon v. Sage*, 1 Cong. El. Cases, 348; *Camp v. Huntington*, N. Y. Cont. El. Cases, 444; *Todd v. Billinber*, id. 45; *Phelps v. Eason*, id. 47; *Fouks v. Tabor*, id. 62; *Livingston v. Bay*, id. 49; *Lynde v. Clarke*, id. 51; *Breese v. Parker*, id. 73; *Secor v. Wheeler*, id. 111.

6. *Mallory v. Merrill*, 1 Cong. El. Cases, 328; *Bisbee v. Hull*, 5 Cong. El. Cases, 315; *Lynch v. Chalmers*, 6 Cong. El. Cases, 338. In one case where the inspectors fraudulently substituted a false box for the true one, but the true vote was proved, it was counted. *Smith v. Shelley*, 6 Cong. El. Cases, 18.

the canvass, although after the time it should have been received under the law; and this is true in cases of contest.¹

15. *Irregularities in forwarding the Returns.*—There is much greater conflict in the cases upon the question as to the effect of irregularities in forwarding the returns. It may be said, however, that, when the returns have been carried by the proper person to the officer authorized to receive them, a mere informality in the method of enclosing them will not of itself destroy their effect as *prima facie* evidence, and that when such informality occurs, without proof of any suspicious circumstances, the returns should be received and counted. There would seem to be no doubt that the principle, that only things which are of the essence of the matter are mandatory, and that other provisions are to be considered as directory only, applies to forwarding the returns. And the authorities seem to bear out this doctrine, though there are some cases which seem to be at least partially opposed to it.²

1. Thus, in the Richards Case in Congress, 1 Cong. El. Cases, 95, where a return was sent after a statutory time, it was *held* good, if not defective in form. In the Bond Case, 1 Cong. El. Cases, 116, a return which should have been made in October or November was not made till the following May: it was *held* that the delay did not vitiate either the election or the return. See also Draper v. Johnson, 1 Cong. El. Cases, 702; Brockenbrough v. Cabell, 2 Cong. El. Cases, 79; Garrison v. Mayo, 48 Cong. H. R. 954.

In Pennsylvania, when the return judges met on a day different from that fixed by law, it was *held* not to avoid the return. Hulseman v. Rems, 41 Pa. St. 396.

When there were two lists sent to the canvassing board from the same town, both duly certified, it was *held* that the one first received at the office was to be acted upon. Opinion of Justices, 70 Me. 560.

2. Thus, in a Congressional case, it was *held*, that although the law required the returns to be sent sealed up, in the absence of any proof or suspicion that they had been tampered with, returns sent unsealed should be counted. Mallory v. Merrill, 1 Cong. El. Cases, 328. In a more recent case, — Platt v. Goode, 4 Cong. El. Cases, 650, — the majority of the committee approved of the principle of the above case; but a minority report, which was adopted by the House, was in favor of rejecting returns, because they had been sent unsealed to the county officers.

In a case in Ohio, the statute provided that the returns of an election should be signed, sealed, and delivered by the clerks to the county auditor, and that the auditor, in the presence of the clerk of the court of common pleas and the probate judge, should open, count them, and declare the

result. A number of the returns had been sent to the auditor by mail, in letters which he had opened in private, without any knowledge of their contents; and he having excluded them from the canvass, a writ of *mandamus* was petitioned for to compel him to count them. The case seemed to turn in some measure upon other points; but upon this question the court said, "We think it is the evident design of the statute that the returns should be sealed up, and so remain until opened in the presence of the officers named; and it seems to us that the returns should be delivered to the auditor by the clerk in person. But without determining the legal effect of the counting of the returns received by mail unsealed, if he had assumed to count them, we are of the opinion that it was not his clear duty to count them in that manner and condition, and under the circumstances of this case he ought not to be commanded to proceed with the count." State v. Randolph, 35 Ohio St. 64.

While it may be considered doubtful whether forwarding return in a different way from that prescribed by statute, will *ipso facto* cause them to be rejected as evidence, there is no doubt that if, by such illegal method of transmission, the returns have been exposed in any way to alteration, their value as evidence is destroyed; and it is probable that the fact of illegal transmission is sufficient to cast the burden of proof, that they have not been tampered with, upon the person seeking to uphold them. See Chaves v. Clever, 3 Cong. El. Cases, 469.

In the case of Niblack v. Walls, 4 Cong. El. Cases, 101, the returns from one county were not sent by mail, addressed to the secretary of state and governor as required by law, but were sent in an envelope to

XII. Ballots.—1. *Definition of.*—Cushing, Leg. Assemb. sect. 103, defines a ballot as “a piece of paper, or suitable material, with the name written or printed upon it, of the person to be voted for;” which definition is adopted by Judge Cooley.¹ And the Supreme Court of California thus defines it: “A ballot or ticket is a single piece of paper, containing the names of the candidates and the offices for which they are running.”²

contestant, and were delivered to a third person, who opened them, and delivered them to the board. In this case the committee refused to consider the returns—which had been rejected by the State board—as evidence; but two of the canvassing officers having identified a copy of the rejected returns as correct, the committee held that the evidence was sufficient to show that they had not been tampered with.

In the case of *Yeates v. Martin*, 5 Cong. El. Cases, 584, a return from one of the precincts had been taken to the county canvassers by the wrong person, and for this reason it had been rejected by them; but it being admitted that the majority was correctly given, it was counted by the committee.

In Massachusetts the law provided, that, after the ballots had been counted, they should be enclosed in an envelope, which should be sealed and indorsed by the inspectors, with the date of the election, and for what officer and office the ballots were cast, and that the envelope contained all the ballots so given and no other, and that the presiding officer should forthwith transmit the ballots, so sealed, to the city clerk, by the constable in attendance at the election, or by one of the ward officers, other than the clerk, and that the clerk should retain the custody of the seal.

In the case of *Abbott v. Frost*, 4 Cong. El. Cases, 602, the committee found, that, at one ward, the returns were not transmitted to the city clerk forthwith, but after having been sealed they had been placed in the hands of a policeman, and were delivered by him to the night-watchman, in whose hands they remained till the next morning, when they were returned to the policeman, who, in company with the ward clerk, took them to the city clerk's office, where they were counted by the aldermen, and embodied in the return to the governor and council. There being no evidence in support of the returns, the committee rejected them, saying, “We are clearly of the opinion, that the provisions of the statute, which have been totally and unblushingly disregarded in this case, are not merely formal and directory, but vital and essential, in order to render the election fair, and free from fraud, or the suspicion of fraud; for we hold it to be the duty of election

officers to so conduct the election, and every thing thereto appertaining, as to carefully guard against suspicion of, and opportunity for, fraud, as fraud itself. Nothing short of this will satisfy the spirit or letter of a statute, made and enacted to protect and maintain the purity of elections, as was the unquestioned purpose of the law under consideration.”

They further say, that, “When votes and returns are out of the proper custody, it must be proven, that, while illegally held, they were not tampered with.” And this was undoubtedly the correct rule.

In the case of *Daily v. Estabrook*, 2 Cong. El. Cases, 302, where the law provided that the county abstracts of the votes should be sent to the governor by the probate judge, but, in the case of one precinct, they were sent by the officers directly to the governor, and were opened by his private secretary, who returned them to the clerk of the county, the committee said, “The law of the Territory, as also of all the States, has pointed out a particular method of making election returns, and has designated particular officers who shall open and inspect them. If they are opened and inspected by any others, they are thereby vitiated; for, if such a practice were tolerated, innumerable frauds might be perpetrated, and the popular will defeated.”

1. Const. Lim. *761.

2. *People v. Holden*, 28 Cal. 123.

As elections may be held by ballot, for other purposes than the election of officers, it is evident that these definitions are hardly broad enough. The term originally signified a little ball used for voting, by depositing it in a box or urn, and indicating an affirmative or negative of a proposition submitted to the voters by its shape or color; and a ballot, as now used in England and Canada, contains the names of all the candidates, and the voter indicates his choice by making a cross opposite the name of the person for whom he desires to vote.

A ballot, as now used in voting, may therefore be defined as “a paper ticket, upon which the voter expresses his preference upon the question submitted at the election, by printing, writing, or signs, or a combination of these methods of expression.”

2. *Secrecy implied.* — It was unquestionably the design of voting by ballot to provide a method by which the elector might be able to vote in secret, so as to be freed from all intimidation; and even in the absence of the statute, all devices by which party managers are enabled to distinguish ballots, and determine whether an elector is voting for particular persons, are opposed to the spirit of the constitution. The system of ballot-voting rests upon the idea that every elector is to be perfectly free to vote as he pleases, and that no one should be placed in a position to be called to account for his action at any time.¹

3. *Informalities in Ballots.* — While every ballot should be perfect and complete, it is found there are many deviations from technical accuracy, and questions of importance arise as to how far such deviations may go without rendering the ballot void.

The principle governing such cases is, that the intention of the voter shall prevail; and when the ballot itself, upon examination, leaves no reasonable doubt of the intention, this intention should be carried out by counting it. The ballot should properly designate the office voted for, and a mistake in this respect cannot be corrected by the testimony of a person, that he cast a defective ballot, and intended it for a certain person for a certain office.²

In cases of election of officers, this is done by writing or printing the name of the candidate under the designation of the office for which each is selected; and in case other matters are submitted, a brief statement of the proposition is printed or written, with an affirmative or negative.

1. Cooley Const. Lim. *763.

In the case of the *People v. Pease*, 27 N. Y. 81, Chief Justice Denio says, "The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station might be supposed to exercise. This object would be accomplished but very imperfectly if the privacy supposed to be secured was limited to the moment of depositing the ballot.

"The spirit of the system requires that the elector should be secured then, and at all times thereafter, against reproach or an animadversion, or any other prejudice on account of having voted according to his own unbiassed judgment, and that security is made to consist in shutting up in the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage."

In the case of *Temple v. Meade*, 4 Vt. 541, the court says, "In this country, and indeed in every country where officers are elected, different modes have been adopted for the electors to signify their choice. The most common modes have been either by voting *viva voce*; that is, by the elector

openly naming the person he designates for the office; or by ballot, which is by depositing in a box provided for the purpose a paper on which is the name of the person he intends for the office. The principal object of this last mode is to enable the elector to express his opinion secretly, without being subject to being overawed, or to any ill-will or persecution on account of his vote for either of the candidates who may be before the public."

In a number of the States there are statutes which provide for placing numbers on the poll-book, opposite the name of the voter, and a corresponding number on the back of the ballot before it is deposited. The Supreme Court of Indiana in *Williams v. Stein*, 38 Ind. 89, held such a statute unconstitutional, as violating that secrecy implied in the constitutional provisions that the votes should be by ballot, saying that, "That secrecy which is esteemed by all authority to be essential to the free exercise of suffrage is as much violated by this law as if it had declared that the election should be *viva voce*." And this same view was taken in *Brisbin v. Cleary*, 26 Minn. 107; *Hastings' Case*, *Hodgins* (Canada El. Cases), 764; *Woodward v. Sarsons*, L. R. 10 C. P. 753.

2. *People v. Seaman*, 5 Den. (N. Y.) 409; *Clark v. Montgomery Co. Comrs.*, 33 Kan. 202; *State v. Mechem*, 31 Kan. 435.

In the Congressional case of *Wigginton v. Pacheco*, 5 Cong. El. Cases, 17, there was found a Democratic ticket upon which

Where there is no ambiguity, the fact that the designation of the office is not technically accurate or formal will not defeat the vote.¹

all the names, except that of candidate for supervisor, had been erased, and also the names of all the offices, except presidential electors and representatives of Congress; and the name of the Republican candidate for Congress was written on the top, at the right-hand side, opposite the names of the presidential electors which had been erased. The judges counted this vote for presidential elector, and not for representative; and the committee refused to count the vote for that office, although the voter had been called, identified the ballot, and testified that he intended to vote for representative in Congress. But in the Forty-eighth Congress, in the case of *Campbell v. Morey*, H. Rep. 1845, the name of the contestant was written under the words "For Sheriff," and on another ballot the name of candidate for sheriff was written under contestant's name. The committee counted the votes for the contestant upon both ballots, holding that the ballots explained themselves when taken in connection with the fact that there was a candidate for sheriff by the name of the person appearing upon the ballot. These two cases are in direct conflict, but the last one is undoubtedly based upon more equitable principles than the first.

1. Thus, where in the Third Congressional District in Massachusetts, votes were cast for a candidate as representative in Congress, Fourth District, it was *held* that the words "Fourth District" did not constitute a part of the legal designation of the office, and that the votes should be counted. *Dean v. Field*, 5 Cong. El. Cases, 190. And where there were a number of ballots which designated the office, "For Representative, Sixth District," and there was no other sixth district, of which the town, where the ballots were cast, was a part, except the Congressional one, it was *held* sufficient. *Boynton v. Loring*, 5 Cong. El. Cases, 351.

Votes cast for "Police Justice" were counted where the statutory name was "Police Magistrate,"—*People v. Matteson*, 17 Ill. 167,—and those written for "Trustees of Public Schools," when trustees of common schools were to be elected. *People v. McManus*, 34 Barb. (N. Y.) 620.

And the ticket "For Congress, Second District, short term," was *held* to be sufficient to indicate that it was for representative in Congress. *State v. Berg*, 76 Mo. 136. A ballot headed to fill vacancy, where the office was filled by an appointee, was *held* sufficient. *State v. Mechem*, 31 Kan. 435. Where a town was popularly known by a name different from its legal name, at an

election for county-seat, votes cast for it by the popular name were counted with those cast by the legal name. *State v. Cavers*, 22 Iowa, 343. And where the place was designated by the sectional numbers in the place of the name of the town, it was *held* to be sufficient. *State v. Dinsmore*, 5 Neb. 145. And when there was a township and a settlement in it of the same name, a ballot at an election for county-seat was counted for the settlement. *Att'y-Gen'l v. County Comm'rs (Mich.)*, 31 N. W. 539.

The omission of the word "for" in the heading of an office is immaterial. *People v. Cicott*, 16 Mich. 283.

Tickets with the words "Ninth District" in the place of "Ninth Senatorial District," "For Assemblyman" instead of "Member of Assembly," and for "Superior Judge" instead of "Judge of the Superior Court," were *held* sufficient,—*Coffee v. Edwards*, 58 Cal. 521,—as were tickets for "Asy.," "Assemb.," "Assem.," "Memb.," "as Mem.," were *held* to be sufficient for member of Assembly when there were no other officers to be elected. *Riggs v. Keep*, N. Y. Cont. El. Cases, 113. And a ballot for "Circuit Clerk and Recorder," was *held* to indicate the office of clerk of the circuit court, who was *ex-officio* recorder. *Applegate v. Egan*, 74 Mo. 258. And a printer's mistake of Second District instead of First, when it could not have misled, did not avoid the ballots. *Inglis v. Shepherd*, 67 Cal. 469.

When the law required that the tickets should designate on the outside the office or officers voted for, and on the inside the name or names of the persons voted for, it was *held* that though the designation did not enumerate the several offices, it was sufficient, if it contained enough to refer the election officers with convenient certainty to the officers enumerated in the law which authorized the election. *Election of Prothonotary*, 1 Pa. L. J. Rep. 469.

When the elections are held for other purposes than choosing officers, the same principle prevails, that neither a lack of absolute precision nor the use of surplusage will vitiate the vote if the meaning can be ascertained. *Hawes v. Miller*, 56 Iowa, 395; *State v. Elwood*, 12 Wis. 551; *Detroit, etc., R. Co. v. Beairs*, 39 Ind. 598; *State v. Bissel*, 4 Green (Iowa), 328; *State v. Metzger*, 26 Kan. 395; *Catlett v. Lowry*, 45 Iowa, 478; *Strong Petitioner*, 20 Pick. (Mass.) 484.

But in such a case, although the statute prescribes no form of ballot, it is necessary that the ballots should show that the specific question authorized to be submitted was

But when there is more than one office to be filled, or different terms of the same office, a failure to designate for which office the vote is intended will be fatal.¹

Where a person places more names on his ticket than there are officers to be elected, the ballot cannot be counted for any of them for that office.² But this does not affect the rest of the ticket.³

voted on. *People v. Township Board*, 14 Mich. 28.

Where the constitution provides that all ballots should be fairly written, the term "written" means expressed by means of letters, and printed ballots come within this definition. *Temple v. Meade*, 4 Vt. 541; *Henshaw v. Foster*, 9 Pick. (Mass.) 312.

1. Where there are more officers than one to be voted for, ballots making no designation of the office will be insufficient. *State v. Griffy*, 5 Neb. 161.

Where there were two councilmen to be elected for different terms, ballots which did not designate the terms were rejected. *Miller v. Milligan*, 12 Phila. 605; *Milligan's Appeal*, 96 Pa. St. 222. And see *Gilliland R.*, 96 Pa. St. 224.

Where the cumulative system of voting prevails, a ticket giving "two votes" for a person is sufficient to indicate the intent of the voter. *Com. v. Shoener*, 1 Leg. Chron. (Pa.) 177.

In one case, where a superintendent for the schools of the State, and one for the county, were to be elected at the same time, it was *held* that ballots, like other writings, were to be construed in the light of the surrounding facts, in view of which the votes were cast; and that, when a ballot was cast applicable to two or more offices, parol evidence is admissible to show which office was intended. *Phelps v. Goldthwaite*, 16 Wis. 146.

2. Of course no person is required to vote for candidates for all the offices, nor to vote for as many candidates for any one office as there are places to be filled; and in one case where by law there were two officers to be elected, but both political parties supposed that the law permitted the election of one only, and the voters voted for the one, it was *held* that the person receiving the lesser number of votes was not elected. *People v. Kent Co. Comm'rs*, 11 Mich. 111.

When the law permitted the election of either one, two, or three candidates, but indicated no way of specifying the number voted for, and two hundred and thirty-eight votes were cast, of which one hundred and sixty-three were for one person, and had the words "one candidate" on them, it was *held* that the person receiving the next highest number could not claim the office. *State v. Andover*, 43 N. J. L. 595.

On the other hand, where, under one

office, there are more names than persons to be elected for that office, the ballot cannot be counted for any of them. *People v. Loomis*, 8 Wend. (N. Y.) 396; *People v. Ames*, 19 How. Pr. (N. Y.) 551; *Election of School Directors*, 6 Phila. 437; *People v. Cook*, 8 N. Y. 67; *State v. Ely*, 4 Wis. 420; *Blockly Election*, 2 Pars. (Pa.) 534; *State v. Griffy*, 5 Neb. 161; *State v. Tierney*, 23 Wis. 430; *People v. Scaman*, 5 Denio (N. Y.), 409.

The repetition of the name of one candidate will not vitiate the vote, but it will be treated as a single vote for the person named. *People v. Holden*, 28 Cal. 123; *State v. Pierce*, 35 Wis. 93; *Ashfield Case*, Cush. El. Cases, 583; *Att'y-Gen'l v. Wentworth* (Mass.), 12 N. E. Rep. 845.

Where a strip of paper was pasted on the ballot, and did not cover up any part of the name printed on it, it was *held* in Michigan to avoid the vote,—*People v. Cicott*, 16 Mich. 283,—but if it was so pasted as to partially obliterate the other name, that the slip should be counted. *People v. Robertson*, 27 Mich. 116.

Where there appears to be a doubt whether the person intended to vote for two persons, or to substitute one name for the other, it becomes a question of fact, to be determined by the court from the circumstances of the case and the appearance of the ballot. *People v. Love*, 63 Barb. (N. Y.) 535.

Thus, if a line is drawn through a name, even though it is left legible, it will be considered as obliterated. *Adams v. Wilson*, 1 Cong. El. Cases, 373.

Where there is a printed name upon a ballot, and a name written under it, without erasing the printed name, it will be presumed that there was a failure to erase the printed name by inadvertence; and in the absence of a statute requiring the vote to be rejected it will be counted as a vote for the written name,—*People v. Saxton*, 22 N. Y. 309; *Wallace v. McKinley*, 48 Cong. H. R. No. 1548; *Campbell v. Morey*, 48 Cong. H. R. No. 1845,—but the Supreme Court of Minnesota, where the statute required such a vote to be treated as void, *held* that neither name could be counted. *Newton v. Newell*, 26 Minn. 529.

3. *Att'y-Gen'l v. Ely*, 4 Wis. 420; *Perkins v. Caraway*, 59 Miss. 322. But in North Carolina it was *held* that under the statute of that State, the whole ballot must

4. *Imperfection in Names of Candidates.*—A large number of cases have arisen, in which the name of a candidate was not correctly spelled in the ballot; in some cases the initial only of the Christian name being given; in others, no middle initial, or an incorrect one, being given; suffixes such as Jr. being left off; sometimes only the family name is given, and that misspelled; frequently the Christian name is wrong, or a wrong initial is used; and while there were a few early cases holding the other view, it may be said that the decided tendency of the later cases, as well as the weight of authority, both in the courts and legislative bodies, is not to reject any vote for ambiguity, if from the ballot *and the circumstances surrounding the election*, the intention of the voter can be determined.¹

be rejected. *Deloatch v. Rogers*, 86 N. C. 357.

1. *People v. Cook*, 8 N. Y. 67.

In an early case in the New York Assembly, votes for Jonathan Stanley were not allowed to be counted for Jonathan Stanley, jun., there being a Jonathan Stanley in the district, although he was an old man unfit for business, but little known, and was not a candidate. *Forman v. Stanley*, N. Y. Cont. El. Cases, 24. But in *Turner v. Bayliss*, 1 Cong. El. Cases, 234; and *Wright v. Fisher*, 1 Cong. El. Cases, 518, the House of Representatives announced the opposite rule.

In the New York Assembly, it was *held* that a mistake in the initial of the middle name was no ground to reject a vote, upon the familiar principle that the middle name of a person is no part of his legal name. *Montanye v. Hasbruck*, N. Y. Cont. El. Cases, 183; *Miller's Case*, id. 142; and to the same effect are *Miller v. Thompson*, 2 Cong. El. Cases, 135; *Clark v. Robinson*, 88 Ill. 498.

In England, where the statute required the Christian and family name of the candidate to be upon the ballot, it was *held* that ballots for a candidate by the initials of his first name could not be counted. *Page v. Bradley*, 30 L. J. (N. S.) Q. B. 180.

This was also so *held* in Michigan, in *People v. Tisdale*, 1 Dougl. (Mich.) 65, and re-affirmed in *People v. Cicott*, 16 Mich. 286, upon the ground that it was *res judicata* in that State, although it was admitted that the principle was erroneous; and it may now be considered as well settled, that tribunals trying cases of contested elections will count votes for a candidate by his initials, upon slight evidence, and that it is not necessary to prove the intention of the voters by their testimony. *McKenzie v. Braxton*, 4 Cong. El. Cases, 19; *Gunter v. Wiltshire*, 4 Cong. El. Cases, 234; *Lee v. Rainey*, 4 Cong. El. Cases, 589; *People v. Seaman*, 5 Denio (N. Y.), 409; *People*

v. Ferguson, 8 Cow. (N. Y.) 102; *Att'y-Gen'l v. Ely*, 4 Wis. 420; *Bovee v. Sheldon*, N. Y. Cont. El. Cases, 53; *Bostwick v. Evans*, id. 76; *Jones v. Treadwell*, id. 93; *Champney Case*, Mass. House of Rep. 3 Am. L. Rev. 142.

In New York it was *held* that an elector might be asked for whom he intended to vote, as a circumstance in the case,—*People v. Ferguson*, 8 Cow. 102; *People v. Pease*, 27 N. Y. 45,—but in Wisconsin it was *held* that this was going too far; but that the facts and circumstances of the case might be shown to prove the intent. *Att'y-Gen'l v. Ely*, 4 Wis. 420.

It was said in the case of the *People v. Stevens*, 5 Hill (N. Y.), 616, that, where there was only the surname of a candidate on the ballot, it should not be counted by the canvassers; but this is frequently done by the courts or legislative bodies upon the trial of contested cases, when there is no claim that there is more than one candidate of the same name. *Reifsnnyder v. Musser*, 12 Weekly Notes of Cases (Pa.), 155; *Att'y-Gen'l v. Ely*, 4 Wis. 420; *Clark v. Robinson*, 88 Ill. 498; *Talkington v. Turner*, 71 Ill. 234; *Chapman v. Ferguson*, 2 Cong. El. Cases, 267; *McKenzie v. Braxton*, 4 Cong. El. Cases, 19; *Gunter v. Wiltshire*, 4 Cong. El. Cases, 234; *Campbell v. Morey*, 48 Cong. H. R. 1845.

A misnomer will not vitiate a ballot, if it be shown that the candidate is as well known by the one name as the other. *Marburger Ex p. 5 W. N. of C. (Pa.) 397*.

There is some conflict in the authorities upon the question as to how great a deviation from a correct name will be permitted to be corrected by evidence. In Minnesota it was *held*, that when the spelling was such that the word sounded something like the correct name, the vote might be counted; but when it was not similar, but made another name, it could not be allowed. *Newton v. Newell*, 26 Minn. 525. And in Alabama, where the name of a candidate was

Even where the strictest rule prevails it has been held that bad spelling will not vitiate a ballot, when the name on the ballot is *idem sonans* with the name of the candidate.¹

In those States where initials are held to be insufficient, it has been held that, where the Christian name of a candidate is indicated by abbreviations, which are in common use, the ballot will be counted.²

5. *Numbering the Ballots.* — While, as we have seen, the courts of some of the States have held that statutes provided for numbering the ballots are unconstitutional, as impairing the secrecy of the ballot, yet where the ballots are not read, it has been held that the fact that they are numbered will not avoid the election, unless fraud is charged, or it is shown that some of the voters were intimidated and deterred from voting.³

Spence, it was *held* that a ballot for "Pence" could not be counted, — *State v. Judge*, 13 Ala. 805, — but in Illinois, where the name of the candidate was William E. Robinson, ballots cast for "W. E. Robso," and "W. E. Robers" were counted for him, — *Clark v. Robinson*, 88 Ill. 498, — and in Wisconsin, votes for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter," were counted for Mathew H. Carpenter. *Att'y-Gen'l v. Ely*, 4 Wis. 420. In the New York Assembly, votes for "Abraham Gurn" and "Abram Gurney" were allowed for Abraham Gurney. *Sufferin v. Gurney*, N. Y. Cont. El. Cases.

In Iowa, where ballots were printed by mistake, "F. W." instead of E. W., and there was no person by the name of "F. W." in the district, and the votes were cast by a person of the party of E. W., they were counted for E. W. *Wimmer v. Eaton* (Iowa), 34 N. W. Rep. 170.

In the House of Representatives, where there is proof that certain persons are candidates, votes will be allowed if there is any possibility of identifying them with the name of the candidate. "Thos. Gunttee," "T. M. Gunttee," "Thomas M. Gunttee," and "T. Ross Gunter," were allowed for Thomas M. Gunter. *Gunter v. Wiltshire*, 4 Cong. El. Cases, 233. Votes for "Hebert" were allowed for Herbert. *Strobach v. Herbert*, 6 Cong. El. Cases, 5. Votes for "Moorey" were allowed for Henry L. Morey, and those spelled "Eamel" for James E. Campbell, — *Campbell v. Morey*, 48 Cong. H. R. 1845, — and votes for "Major Wallac," "M. A. Wallac," "Wollac," "Mag. Wolac," "Wallac," "Wallace," "Woloc," "Mage. Wolac," "Wollac," "W. H. Wallce," "W. W. Wallace," "J. Wales," "Jonathan Walser," and "Jonathan H. Wallace," were allowed for Jonathan H. Wallace. *Wallace v. McKinley*, 48 Cong. H. R. 1548.

In the case of *Lee v. Rainey*, 4 Cong. El. Cases, 589, the name of the sitting member

was Joseph H. Rainey, and in one county several hundred ballots were cast for "Jas. H. Rainey." Evidence shows that the tickets were printed by mistake, and that there was no candidate for Congress, nor any man by that name known to the voters in the district. The votes were counted.

1. *Newton v. Newell*, 26 Minn. 525.

2. *People v. Tisdale*, 1 Doug. (Mich.) 65.

3. Thus, in *McKenzie v. Braxton*, 4 Cong. El. Cases, 19, the officers of election not being advised of the repeal of a prior law, which had required the numbering of the ballots, numbered them as had been required by the old law. The committee in a unanimous report decided, "That the numbering of the ballots cast at an election, in the absence of a statute expressly so declaring, does not of itself invalidate an election, unless some injury is shown to have resulted to the party complaining." In *Giddings v. Clark*, 4 Cong. El. Cases, 91, the statute expressly prohibited placing a number on the ballots, and made it a misdemeanor to do so, but did not declare that the vote should be rejected. The committee in a unanimous report, adopted without a division, *held* that the vote of the county which had been rejected by the State canvassers because the ballots were numbered, should be received. This same view was held in the cases of *Finley v. Walls*, 4 Cong. El. Cases, 374, and *Finley v. Bisbee*, 5 Cong. El. Cases, 102.

In a later case of *Donnelly v. Washburn*, 5 Cong. El. Cases, 439, a majority of the committee were inclined to depart from these precedents, claiming that the voters had been intimidated; but the report was recommitted, and not again presented to the House.

The law of California provided, that, where a ballot found in any box bears upon the outside thereof an impression, device, color, or thing, or is folded in the manner designed to distinguish it from other legal

On the other hand, where the law requires that ballots should be numbered, and that those not numbered shall be rejected, this requirement is mandatory.¹

6. *Counting Rejected Votes.*—Where the system of *viva voce* voting prevails, and a qualified voter offers to vote for a certain candidate, and his vote is improperly rejected, there can be no difficulty in counting the vote. And this was the universal custom in cases of scrutiny in the British Parliamentary cases, when that system prevailed. When the voting is by ballot, it is a question of more doubt whether a vote should be allowed to be counted, if improperly rejected.²

7. *Double Ballots.*—The statutes of most of the States require double ballots to be destroyed, when they are so folded to appear as one, and in such a case they cannot be counted as a single vote;³ but where the names of the county officers were placed upon one piece of paper, and those of the township officers on another, and they were folded together, and were received by the judges as a single vote, it was held that the vote should be counted as cast.⁴

8. *Illegality in Ballots.*—In many of the States there are statutes prescribing the form of the ballots, the kind of paper, etc., and prohibiting any marks, figures, or devices by which one

ballots, must, with all its contents, be rejected.

In the case of *Wigginton v. Pacheco*, 5 Cong. El. Cases, 1, there were six ballots upon which the judges had written, "Challenged: the cause, not in the precinct thirty days; challenge disallowed." Part of the inspectors had signed their names to the indorsement.

The committee reported, that, while the strict letter of the law would exclude these ballots, the spirit of the law was evidently otherwise; that, if these marks had been placed upon the ballot by the voter, they should have been rejected, but that the law was made to protect the voter, and not to disfranchise him.

1. *West v. Ross*, 53 Mo. 350; *Ledbetter v. Hall*, 62 Mo. 422.

Where the statute required the ballots to be numbered, and an unnumbered ballot was enclosed in a numbered one, it was held that this would not warrant the rejection of the numbered vote.

2. In the New York Assembly it was held that votes improperly rejected could not be counted for the party for whom they were offered; but that, if enough votes were rejected to change the result, the whole election would be void. *Murphy v. Crawford*, N. Y. Cont. El. Cases, 380. To the same effect are *Hart v. Harvey*, 32 Barb. (N. Y.) 55; *Webster v. Byrnes*, 34 Cal. 273.

In an early Congressional case—*Biddle*

& *Richards v. Wing*, 1 Cong. El. Cases, 506—this same doctrine was announced, but the report of the committee was not adopted; and this is contrary to the universal practice in that body since that time. *Valandigham v. Campbell*, 2 Cong. El. Cases, 231; *Delano v. Morgan*, 3 Cong. El. Cases, 170; *Bell v. Snyder*, 4 Cong. El. Cases, 247; *Bisbee v. Finley*, 6 Cong. El. Cases, 172; *Sessinghaus v. Frost*, 6 Cong. El. Cases, 380.

In the case of *Niblack v. Walls*, 4 Cong. El. Cases, 104, *Judge McCrary* said, "That it is the rule, which is well settled, that, where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted."

In Kentucky it was held, where persons were prevented from voting because the polls were closed at an hour earlier than prescribed by law, the votes could not be counted. *Newcum v. Kirkley*, 13 B. Mon. (Ky.) 515.

3. *Adams v. Wilson*, 1 Cong. El. Cases, 373; *Campbell v. Weaver*, 49 Cong. H. R. No. 1622.

4. *Wildman v. Anderson*, 17 Kan. 344. But in Illinois, where the name of the candidate for one office was placed upon a slip, enclosed within, but not attached to, the ballot, it was held that the name on the slip could not be counted. *Webster v. Gilmore*, 91 Ill. 324.

can be distinguished from another. These statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory, and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted; but if this provision is lacking, while it is the duty of the election officers to refuse to receive the ballots, if the deviations from the law are manifest; if they have been received, they should not be rejected, if the variations are but trifling.

Where, however, the ballots conform to the requirements of the statute, it seems they cannot be rejected if they have other peculiarities. It will be necessary in the notes to consider the decided cases, to determine what will be sufficient grounds for the rejection of the ballots.¹

1. In Ireland and in Canada the law requires the names of all candidates to be printed on an official ticket, furnished to the voter by the election officers, and that the voter should indicate the candidate for whom he wishes to vote by making a cross on the right-hand side of the name of the candidate. But it was *held*, in the Athlone Case, 8 Irish Rep. C. L. 240, that making the mark on the left-hand side did not invalidate the vote.

In Lower Canada, however, it was *held* that the use of any other mark than that of the cross would invalidate the vote, — *Montreal West Case*, 2 Low. Can. Jurs. 22; *Dionne v. Gagnon*, 9 Quebec, 20, — and in Upper Canada, — *Parliamentary Cases*, — that, where the mark consists of a single stroke; two strokes; is placed at left instead of right; having additional marks; or any marks by which the voter could be identified, — the vote would be rejected. *Monck Case*, *Hodgins (El. Cases)*, 725; *North Victoria Case*, *id.* 671.

In California it is *held*, in *Kirk v. Rhoades*, 46 Cal. 398, that, as to those things over which the individual voter could have no control, such as to exact size of the ticket, the precise kind of paper, and the particular kind of type or leads used in printing, the statutes should be considered as directory; and that a ballot cast in good faith should not be rejected for lack of an exact compliance with the provisions of the statute in such respect. But see *Reynolds v. Snow*, 67 Cal. 497.

In a case for an election for vestrymen in Pennsylvania, the by-laws provided that no symbol or mark should be used upon the ballot; but one party, for the purpose of determining who voted for its candidates, and intimidating others, printed upon its tickets an eagle, so that it could be seen when the ballot was folded; and it was *held* that the vote should not be counted. *Com. v. Woelper*, 3 S. & R. (Pa.) 29.

Where, however, the law makes regulations, a compliance with the statute is all that can be required. Thus, where the law prohibited the use of a picture, sign, vignette, stamp, mark, or device, it was *held* that a ballot printed on diamond-shaped paper should not be rejected. *State v. Phillips*, 63 Tex. 222. And a sticker or pasteur is *held* not to be a cut or device to distinguish one ballot from another. *Quinn v. Markoe (Minn.)*, 35 N. W. Rep. 263.

At an election in Indiana, ballots of different grades of paper were used by different parties, one party using an unusually heavy paper with extra finish. In a case in Congress, — *English v. Peelle*, 48 Cong. H. R. No. 1547, — the committee recommended the seating of the contestant upon this and some other grounds; but in the case of *State v. Wasson*, 99 Ind. 261, subsequently decided by the Supreme Court of the State, it was *held* that, "when an elector's ballot conforms to the letter of the law, his vote is not to be rejected because the quality or grade of paper upon which it is printed differs from that of others which also come within the letter of the statute, even though the difference be so perceptible as to partially destroy the secrecy of the ballot."

In Illinois, where the statute provided that ballots should be of plain white paper, without any marks to distinguish one from another, it was *held* that ballots on paper slightly tinged with blue, with ruled lines, should not be rejected if cast in good faith. *People v. Kilduff*, 15 Ill. 492. But in *State v. McKinnon*, 8 Oregon, 493, under a similar statute, it was *held* that a ballot written on colored paper should not be counted.

In Mississippi, where the names were closer together than provided by statute, it was *held* that the votes should be rejected. *Perkins v. Caraway*, 59 Miss. 222.

Where tickets were two and seven-eighths inches wide, when the State statute provided

that they should not be more than two and a half inches, they were allowed to be counted in the Congressional case of *Campbell v. Morey*, 48 Cong. H. Rep. 1845.

Distinguishing Marks.—In *Indiana*, where the statute provided that ballots should be printed on plain white paper, without any distinguishing marks or other embellishments thereon, except the names of the candidate and the officers to be voted for, and that the inspectors should refuse all ballots offered of any other kind, it has been repeatedly *held* that this was merely to prevent external marks on the ballot by which the secrecy was destroyed, and that headings of a ballot were not distinguishing marks, — *Druliner v. State*, 29 Ind. 308; *Steighley v. State*, 29 Ind. 312; *Stanley v. Manley*, 35 Ind. 275; *Milholland v. Bryant*, 39 Ind. 363, — and, where the ballots were so printed, that, when folded, the names of the candidates would show through the paper, it was *held* that this did not render the ballot illegal. *State v. Adams*, 65 Ind. 393.

On the other hand, in *Mississippi*, it was *held* that printers' dashes, such as are ordinarily used in printing, were embellishments, and that ballots containing them should be rejected, — *Oglesby v. Sigman*, 58 Miss. 502; — and also that a dotted line for a blank, under the name of an office, was such a mark as would vitiate the ballot. *Steele v. Calhoun*, 61 Miss. 556.

Under a statute providing that any ballot which bore an exterior mark, designed to distinguish it, should be rejected, where the ink used in scratching the names from the ballot struck through the paper, and discolored the ballot, it was *held* that this would not warrant its rejection. *Wyman v. Lemon*, 51 Cal. 273. And where, in an election for judge, a ballot was cast, upon the face of which was written, "For President, Hancock and English," it was *held* that the vote should be counted. *Coffee v. Edmunds*, 58 Cal. 521.

In *Texas*, where the statute prohibited using a ticket upon which appears a picture, sign, vignette, stamp, mark, or device, it was *held* that this was not violated by printing on it the names of the party candidates for President or Vice-President, or the names of the counties in which the candidates for electors resided. *Owens v. State*, 64 Tex. 500.

Where the statute provided that the ballot should not bear any other writing or printing than the names of persons and the designations of the offices, and the sheriff was *ex-officio* collector, a ballot adding the words, "and collector," after the words, "for sheriff," was allowed to be counted. *State v. Watson*, 9 Mo. App. 593. And the addition of the words, "for," or "against township organization," and "for"

and "against allowing stock to run at large," with the caption, "Erase the clause you do not favor," did not avoid the ballot, where the statute authorized those questions to be submitted to the people. *Applegate v. Egan*, 74 Mo. 258.

In the case of *Burns v. Young*, 4 Cong. El. Cases, 181, and *Fenn v. Bennett*, 4 Cong. El. Cases, 592, the committee counted votes where the ballots had the prefix "Hon." before the name of the candidate, when the statute provided that the ballots should have on them the name of the persons voted for, and no other distinguishing marks.

In *North Carolina*, the statute provided that tickets should be without device; and that if, in counting the ballots, any one appeared to have a device on it, it should not be counted, but should be void.

In the case of *Yeates v. Martin*, 5 Cong. El. Cases, 389, it appeared that one hundred and eight ballots had upon them the heading, "Republican ticket," and the committee held that this was a device, and rejected the vote; but this was undoubtedly an extension of the term "device," as used in law, it being a heraldic term, signifying a motto accompanied by a pictorial emblem. In the case of *Lynch v. Chalmers*, 6 Cong. El. Cases, 338, the same question came up before Congress, which was decided by the Supreme Court of *Mississippi*, in the case of *Oglesby v. Sigman*, *supra*; and the committee, refusing to follow the construction of the court, counted the votes upon ballots which had the ordinary printers' dash between the different parts of the ticket. In *Lowe v. Wheeler*, 6 Cong. El. Cases, 61, under a similar statute in *Alabama*, the canvassers had rejected six hundred and one ballots, because they had the words "State at large," after "electors for President and Vice-President," and the words "district electors" above the names of those officers, and "first district," "second district," etc., at the side of the name; and by this rejection the contestee was returned as elected, by a majority of forty-three. The committee reported in favor of counting the vote, holding that, in a case of this kind, where the objections were merely technical, all doubtful cases should be settled in favor of the right of suffrage.

This doctrine was carried to an extreme limit in the case of *Wigginton v. Pacheco*, 5 Cong. El. Cases, 5, where the statute of *California* provided that, "When a ballot found in any ballot-box bears upon it any impression, device, color, or thing, or is folded in manner intended to designate or impart knowledge of the person who voted it, such ballot must, with all its contents, be rejected;" and the committee reported in favor of counting a vote where the voter had written his own name across the ballot.

XIII. Illegal Voting. — 1. *What makes Vote illegal.* — A vote may be illegal, because the person casting it may not be qualified to vote at the election, or because it is given at the wrong place, or the wrong time, by a qualified elector,¹ or because it is cast with-

The statute of Ohio provided that ballots should be without device or mark by which one may be distinguished or known from another from its appearance, but did not require that the ballots should be rejected for want of conformity to this provision; and in the case of *Wallace v. McKinley*, 48 Cong. H. Rep. 1548, a ticket was counted which had a name and two columns of figures on the back of it, upon proof that it was cast in that condition by accident; and in *Campbell v. Morey*, 48 Cong. H. Rep. 1845, from the same State, the committee counted four votes where the ballots had been marked on their faces by the voters themselves.

In the case of *Lowe v. Wheeler*, 6 Cong. El. Cases, 61, the committee held that the provision of the act of Congress, in sect. 727 of the Revised Statutes, providing that all votes for representative in Congress must be by printed or written ballots, was exclusive and supreme, so far as it goes, and that the States have no power to alter it by providing additional regulations so far as that office is concerned.

In the case of *White v. Harris*, 2 Cong. El. Cases, 260, in the absence of any statute upon that subject, where the ballots were marked with red strips, which could have been readily distinguished, the committee reported that this was in violation of the law of the State, which provides for a system of voting by ballot, but the report was laid upon the table.

Headings. — The statute of Missouri provided that each ballot might have a plain written or printed caption, of not more than three words, expressing its political character, but that it should not be designed so as to mislead the voter; and that any ballot not conforming to the provisions of the act should be deemed fraudulent, and should not be counted. A ballot was voted, made up of names of different persons from the various parties, headed "Republican, Independent, Greenback," and it was held to be legal. *Turner v. Drake*, 71 Mo. 285.

In another case, a ticket headed "Chronicle Selected Ticket," made up of persons selected from the Republican and Democratic regular tickets, was held legal. *Sessinghaus v. Frost*, 6 Cong. El. Cases, 380. And a ballot headed "Democratic State, Congressional and Senatorial, and Independent, Judicial and County Ticket," was held to sufficiently express its political character. *Shields v. McGregor*, 91 Mo. 534.

The statute of Ohio declares that, whenever any ballot with a certain designated heading shall contain printed thereon, in place of another, any name not found on the regular ballot having such heading, such names so found shall be regarded by the judges of election as having been placed thereon for the purpose of fraud; and said ballot shall not count for the name so found.

A local party labor organization printed tickets with the heading, "Republican State Ticket," and "Democratic State Ticket," and below the "State Ticket," the heading, "County Removal Ticket."

There was a difference of opinion in the Supreme Court as to the meaning of the phrase, "Certain designated headings," — some judges holding that it applied to the different headings on the ticket; and others, that it applied to the words at the top of the ballot; but all agreed that such a ticket was not to be rejected as fraudulent. *Roller v. Truesdale*, 26 Ohio St. 586.

At another election under this same statute, tickets were prepared, having the heading, "Democratic County Ticket," with the words, "Except sheriff," under it, in small type, and the name of the candidate of the opposite party was substituted; and enough of such tickets were cast to elect the Republican candidate, if counted.

In a contest before the District Court of Hamilton County, it was held that such tickets were within the provisions of the statute, and must be rejected; that, if the electors knowingly voted them, they were parties to the illegal transaction; and, if not, they were defrauded; and that, in either case, the votes could not be counted. *Hawkins v. Breresford*, 11 Weekly Law Bulletin (Ohio), 7.

1. Where the vote of a qualified elector is cast at the wrong place, it is well settled that it is illegal. *Scafield Case*, 20 Law Times, N. S. 307; *People v. Holihan*, 29 Mich. 116; *Miller v. Thompson*, 29 Mich. 118; *Vallandigham v. Campbell*, 2 Cong. El. Cases, 252; *Wigginton v. Pacheco*, 5 Cong. El. Cases, 5. And it has been held, that, when a voter voted by mistake at the wrong place, he could not withdraw his vote, nor vote again at the proper place. *Harbaugh v. Cicott*, 33 Mich. 241.

When the election is to be opened or closed at a certain time, votes received before or after the proper time are illegal. *Myers v. Moffatt*, 3 Cong. El. Cases, 564.

out a compliance with the requisite preliminaries,¹ or because given in an improper manner.²

2. *Illegality of Votes inquired into in Contest.*—It is the uniform practice in the House of Representatives to consider the question of the legality of votes in contested cases in that body; and although, in some cases, the power of the court to go into the questions of the qualification of voters was doubted, or affirmed by divided courts,³ it may be said that the practice of doing so prevails in the courts of nearly all the States.⁴

3. *Effect of Reception of Illegal Votes.*—Where no fraud is charged, the fact that illegal votes were received will not affect the election, or render it void, unless the number is great enough to affect the general result.⁵

When, however, it is shown that illegal votes have been cast for a candidate, they should be deducted from his vote; and if, by so doing, the general result is changed, the opposite candidate should be declared elected.⁶

Where there is proof that there are enough illegal votes cast to overcome the majority of the successful candidate, and no fraud is shown, and it is impossible to show for whom they were cast, the effect of this proof is somewhat doubtful.⁷

1. Where the law requires the performance of certain preliminary acts, and provides that the votes shall be rejected unless the acts are performed, the reception of the votes will be illegal. *Lindsay v. Scott*, 2 Cong. El. Cases, 569; *Finley v. Walls*, 4 Cong. El. Cases, 367; *Bisbee v. Finley*, 6 Cong. El. Cases, 172; *Gibbons v. Shepherd*, 2 Brews. (Pa.) 129.

2. Where a vote is to be taken by ballot, and they are taken *viva voce*, they will be rejected. *Easton v. Scott*, 1 Cong. El. Cases, 272; *Otero v. Gallegos*, 2 Cong. El. Cases, 177.

3. In the case of *The People v. Cicott*, 16 Mich. 311, Mr. Justice Campbell gives very strong reasons for refusing to go into the question; but the majority of the court held that it was proper to do so.

In *People v. Pease*, 30 Barb. (N. Y.) 588, the Supreme Court was equally divided on this point; but the majority of the court of appeals upheld the power. *People v. Pease*, 27 N. Y. 45.

4. *People v. Cook*, 8 N. Y. 67; *Knox Co. v. Davis*, 63 Ill. 405; *Judkins v. Hill*, 50 N. H. 140; *Pradat v. Ramsey*, 47 Miss. 24; *Daly v. Petroff*, 10 Phila. 389; *McCullough Re* 12 Phila. 570; *Blandford Trustees v. Gibb*, 2 Cush. (Mass.) 39; *Sudbury v. Stearns*, 2 Pick. (Mass.) 148; *Clark v. Robinson*, 88 Ill. 498.

5. *State v. Board of Education*, 64 Mo. 53.

6. *Cook v. Cutts*, 6 Cong. El. Cases, 243.

In such a case, illegal votes should be deducted from both sides. *Allen v. Crow*, 48 Ind. 301. Where the votes of a certain district are illegally counted, and change the result as based upon the vote of the rest of the territory, the votes of this precinct should be deducted from both sides, leaving the result to the votes of the rest of the district. *State v. Merriman*, 6 Wis. 14.

7. In the case of *The People v. Tuthill*, 31 N. Y. 550, it was held that the election should be set aside in such a case; but in *People v. Cicott*, 16 Mich. 283, it was held that it must not only be shown that enough illegal votes were cast to change the result, but it must also be shown that they were cast for the successful candidate, before the result could be changed. And in *Knox Co. v. Davis*, 63 Ill. 405, it was held, that, where the fraudulent votes were cast without the connivance of the election officers, the returns were not to be invalidated, but were *prima facie* evidence of what they stated, subject to be corrected, by showing the illegality of the vote; but in this State, when a vote was found to be illegal, as the ballots were numbered, there was no difficulty in determining for whom it was cast.

In the Massachusetts legislature, it was also held that proof that illegal votes enough had been cast to change the majority, would not vitiate the election, without showing for whom they were cast. *Ashfield Case*, *Cushing's El. Cases*, 583.

4. *Purging the Polls.*—Where more ballots are found in the ballot-box than there are names on the poll-list, the statutes of many of the States require the officers of elections to draw out enough ballots, without seeing them, to make the number equal to that of the voters.

And where they have not done this, it is probable that no other mode would be preferable to that of deducting from each candidate a number of votes proportioned to his total vote, compared with the aggregate vote of the precinct.¹

5. *Presumption that Vote is legal.*—The reception of the vote by the officers of election raises the presumption that it is legal, and throws the burden of proof upon the one challenging the vote; and when the evidence is doubtful, it should not be rejected, where the officers of election had power to investigate the matter.²

XIV. Fraud.—1. *Fraud and Illegal Voting contrasted.*—While the reception of illegal votes, where no fraud is charged upon the election officers, will not affect the election, unless the number of votes received was great enough to change the result, fraud destroys the value of returns as evidence. The fraud does not invalidate the legal votes cast, but, by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, the return of the precinct will be rejected.³

1. *Shepherd v. Gibbons*, 2 Brews. (Pa.) 128; *Finley v. Walls*, 4 Cong. El. Cases, 367; *Platt v. Goode*, 4 Cong. El. Cases, 650. But where the vote is so close that the application of this rule will change the result, as said by Judge McCrary, —Am. Law of Elections, section 299,—it will be much safer, and more conducive to the ends of justice, if the tribunal have the power so to do, to order a new election, rather than to reach a result by the application of the method above stated. And this is the practice in the legislature of Pennsylvania. See *McDaniels' Case*, *Brightly's El. Cases*, 238, note.

But the legislative rule is not followed by the courts of the State, when they have no authority to set aside the election.

In one case in Pennsylvania, —*Duffy Re* 4 Brews. 531,—it was held that the burden of proof was upon the majority candidate, to prove that the illegal votes were cast for his opponent, or lose them himself; but this is a reversal of all the rules of evidence.

2. *Clark v. Robinson*, 88 Ill. 498. In the case of *Anderson v. Reed*, 6 Cong. El. Cases, 284, where the law required a man's name to be placed upon a check-list, as a prerequisite to the right of voting, and a number of cases had been passed upon by

the selectmen, and the names placed upon the list or rejected by them upon the evidence before them, it was held that in the absence of fraud, or suggestion of bad faith, it would require more than conflicting evidence to overrule the decision.

3. Thus, in the case of *Knox v. Blair*, 2 Cong. El. Cases, 526, it was said, "When the result in any precinct has been shown to be 'so tainted with fraud that the true cannot be deducible therefrom,' it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of the truth, not only sanction, but call for, the rejection of the entire poll, when stamped with the characteristics here shown."

In the case of *Mann v. Cassidy*, 1 Brews. (Pa.) 11, it was held that it was the plain duty of the court to throw out the returns of the whole division when the acts of the officers were unreliable and fraudulent.

In *Knox Co. v. Davis*, 63 Ill. 405, it was held, that, in such a case, the only purpose for which the poll-books and returns can be admitted, is to show that an election was held. And see *Russell v. State*, 11 Kan. 308; *Judkins v. Hill*, 50 N. H. 140; *Littlefield v. Green*, *Brightly's El. Cases*, 493.

The legislative bodies, with but few exceptions, hold the same doctrine. Mc-

2. *Fraud of Officers and of Third Persons.* — There seems to be a difference in the effect of fraudulent acts of third persons and of officers of election upon the value of the returns as evidence; and if the officers of election act in good faith, and frauds are committed without their knowledge, it has been held that the reception of a number of illegal votes, fraudulently cast, would not affect the credibility of the returns as *prima facie* evidence, but that they could be corrected by proof.¹

3. *Fraud not presumed.* — The maxim that "fraud is not to be presumed," applies as well to the conduct of elections, and making returns, as to transactions between individuals; and there is also a stronger presumption against fraud, which arises from the acts of public officers, acting under the sanction of their official oaths; and nothing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns.² It is not sufficient to cast suspicion upon them: they must be proved fraudulent before they are rejected.³

4. *Fraud may be proved by Circumstances.* — While fraud is not to be presumed, it is equally true in election, as in other cases, that it is usually proved by circumstantial evidence. It would be very difficult, and generally impossible, to prove an agreement between the parties who committed the fraud; and, if no circumstantial evidence was recognized as sufficient, the frauds would generally go unrebuked. But, when the circumstances can be explained upon the hypothesis of good faith, this explanation

Keever v. Whallen, N. Y. Cont. El. Cases, 430; *McLeod v. Halpine*, id. 439; *Lee v. Richardson*, 6 Cong. El. Cases, 520; *Lowe v. Wheeler*, id. 83; *Lynch v. Chalmers*, id. 358; *Bisbee v. Finley*, id. 191; *Smith v. Shelly*, id. 40; *Mackey v. O'Connor*, id. 561; *Finley v. Bisbee*, 5 Cong. El. Cases, 74; *Finley v. Walls*, 4 Cong. El. Cases, 389; *Washburn v. Voorhees*, 3 Cong. El. Cases, 54; *Dodge v. Brooks*, id. 78; *Co-vode v. Foster*, id. 603.

In the case of *Morey v. Spencer*, 4 Cong. El. Cases, 447, the committee held that fraud vitiates every thing into which it enters, and that it is just as impossible to determine how far the fraud affects the election, as to separate the pure from the poisonous drops, if poison be dropped into water.

In one case, however, in the New York Assembly, it was held that corruption and improper practices on the part of the officers would not be ground for setting aside the election, or for rejecting the vote of the precinct, when it did not appear that the number of illegal votes received at that precinct was enough to change the result. *Field Case*, N. Y. Cont. El. Cases, 27.

1. *Knox County v. Davis*, 63 Ill. 504.

But where the officers themselves are

guilty of fraud, the whole return becomes worthless.

2. *Russell v. State*, 11 Kan. 308; *Judkins v. Hill*, 50 N. H. 140.

In cases, however, where the officers have been guilty of such negligence, in leaving the ballot-boxes exposed, that they may be tampered with by others, it will be equivalent to an active participation by them in the fraud. *Patton v. Coates*, 41 Ark. 111.

It has been held, that proof that frauds were committed in one box at the election, was not a sufficient ground to set aside the return for an office for which the votes were deposited in another box. *Wheeler v. Granger*, N. Y. Cont. El. Cases, 83. But it would seem that slight evidence or suspicious circumstances would be sufficient in such a case to avoid the whole election.

3. In *Littell v. Robbins*, 2 Cong. El. Cases, 138, hearsay evidence, attempted deductions from a political census, newspaper reports as to great frauds, and subsequent unofficial counts, are entirely insufficient to prove the commission of a fraud. *Gooding v. Wilson*, 4 Cong. El. Cases, 79; *Strobach v. Herbert*, 6 Cong. El. Cases, 7; *Norris v. Handley*, 4 Cong. El. Cases, 75; *Ingersol v. Naylor*, 2 Cong. El. Cases, 33.

should prevail, rather than one which would indicate a fraudulent intent.¹

Among the facts held to indicate fraud, are a large excess of votes,² failure to return the votes cast,³ illegal reception of large numbers of votes,⁴ refusal to permit proper officers to be present.⁵

1. See *Dodge v. Brooks*, 3 Cong. El. Cases, 81; *Shields v. Vanhorn*, 3 Cong. El. Cases, 922, for instances where fraud in registration was held proven by the circumstances of the case.

2. It may be difficult to determine what number of excessive votes will be sufficient to raise the presumption of fraud on the part of the officers, and this must depend upon other circumstances of the election: if there were other suspicious circumstances, a much smaller number might be considered as showing complicity on the part of the officers, than where every thing else was apparently fair. Thus in *Judkins v. Hill*, 50 N. H. 140, it was held that the mere fact that there were twenty-seven more ballots found in the box than there were names on the poll-list, would not warrant the inference of fraud, as the discrepancy might have resulted from a mistake in the count, from a failure to check all the names of those who had voted, or from double voting without the knowledge of the Board. But in an early Congressional case, — *Jackson v. Wayne*, 1 Cong. El. Cases, 47, — where in one county there were 9, and in another 63, more votes cast than the number upon the list of voters of the county, the seat was declared vacant.

In the case of *Lowe v. Wheeler*, 6 Cong. El. Cases, 68, where there were 188 names, and the officers counted 199 votes, after destroying 11 others folded together, this was held to make a show of fraud, which was rendered conclusive by evidence that the ballot-box had been stuffed.

In *Knox v. Blair*, 2 Cong. El. Cases, 526, where the vote polled was about four times the usual vote of the precinct, and the officers permitted non-residents to vote without taking the oath that they had not voted at any other place, it was held that the presumption of fraud must prevail; and this same decision was reached in *Blair v. Barrett*, 2 Cong. El. Cases, 308, where it appeared that the vote of the district had increased more than five thousand in two years, and that this increase was nearly all in the vote of one party, without decrease in that of the other parties, and was nearly all in seven or eight voting precincts where great irregularities had occurred.

In *Manzanares v. Luna*, 48 Cong. H. Rep. 667, where the vote of one party had increased more than three thousand in three years, when the whole number of voters two years before had been but about

half the vote returned, and no votes were returned for the other party, although it was shown that a number had been cast, it was held that the evidence clearly proved the fraud.

3. Where it is satisfactorily proved that a much larger number of votes were cast for a candidate than were returned for him by the officers, it raises a strong presumption of fraud, and, if other suspicious circumstances concur, will warrant the rejection of the returns from the precinct.

In the case of *Washburn v. Voorhes*, 3 Cong. El. Cases, 62, where in one precinct but 143 votes were returned, while 173 were cast for contestant, and in another 20 less were returned than were proved, and the officers were shown to have been violent partisans of the party in whose favor the frauds were, the whole vote of the precinct was rejected.

In the case of *Bisbee v. Finley*, 6 Cong. El. Cases, 177, where 259 votes were cast at one precinct for a candidate, and only 69 were returned for him, it was said in the report, "That any considerable number of votes proven for one candidate in excess of the number returned for him, has always been regarded as evidence of fraud, and a legitimate method of impeaching the returns. We think it is sufficient to exclude the return from the count without further evidence."

4. Thus in the case of *Myers v. Moffatt*, 3 Cong. El. Cases, 567, it was held, that, while the mere fact that there were 250 illegal votes cast in a large district would not necessarily invalidate the election, the reception of such a number, with knowledge that they were fraudulent, destroyed the credit of the returns for any purpose whatever. And in *Covode v. Foster*, 3 Cong. El. Cases, 600, the contestant was seated by the rejection of the votes of two precincts, where persons were permitted to vote after repeated challenges without taking the oaths required by law, the committee holding such acts on the part of the election officers to be conclusive evidence of fraud.

5. A refusal on the part of the election officers, to permit a United States supervisor of elections to be present at an election for representative in Congress, was held to be conclusive evidence of fraud, — *Smith v. Shelly*, 6 Cong. El. Cases, 40, — as was also an attempt to bribe the supervisor by one of the officers; and in two other cases returns were rejected because the super-

5. *Fraud on Voters.* — In the absence of statutory provisions as to the effect of a fraudulent substitution of the name of the candidates on ballots, it may be considered doubtful whether such acts will vitiate the election; though in some cases the votes so proven have been taken by the candidate, and given to his opponent.¹

6. *Presumption where Fraud is proved.* — Where fraud is proved, it will be presumed to be for the benefit of the party having a majority in such district, especially if the officers of election are of the party in whose favor such a majority is returned.²

7. *Purging or rejecting Poll.* — The rule of purging the poll by deducting the illegal votes proportionately from the different candidates, cannot properly be adopted in cases of fraud, as this would give the fraudulent party the benefit of one-half of the fraudulent votes, and deduct from the honest party the same number. Therefore, where there is no evidence by which an exact, or nearly exact, legal result can be reached, the whole poll should be rejected, in which case each party will receive the vote which he proves to have been cast for him; but this rejection of the whole poll

visors were not permitted to be present. *Buchanan v. Manning*, 6 Cong. El. Cases, 287; *Smalls v. Tillman*, 6 Cong. El. Cases, 430.

Under a statute in Pennsylvania, where the overseers of election were driven away by the election officers, it was held that improper conduct on the part of such officers would present the only excuse for a desire to keep the overseers away. *Duff Re*, 4 Brews. (Pa.) 531.

1. In the case of *Norris v. Handley*, 4 Cong. El. Cases, 74, it was shown that tickets purporting to be those of the Republican party, with the name of the Democratic candidate for Congress substituted, had been circulated; but as there was no proof of the number of such votes, except hearsay evidence, it was held that the election should not be set aside.

In the case of *Acklen v. Darrell*, 5 Cong. El. Cases, 124, by the official count in five voting precincts, the contestant received 436, and the sitting member 1,307; but by a recount the sitting member had but 499, and the contestant 955, with 385 blank. The committee held, that, by the fraud of a Republican enemy of the Republican candidate, thousands of tickets headed "Republican ticket," but with the name of the Democratic candidate substituted, or a blank left for that office, had been circulated, and that the fraud had passed unnoticed until the recount of the vote. By giving effect to the fraudulent tickets, the contestant had a small majority, and the committee, without attempting to justify the fraud, gave effect to the fraudulent ballots; but in the case of *English v.*

Peelle, 48 Cong. H. Rep. 1547, where there were some Democratic tickets with the Republican candidate's name substituted, they were deducted from the Republican candidate, and given to the Democratic candidate; although in the case of *Frederick v. Wilson*, 48 Cong. H. Rep. 2623, the same committee failed to carry out this principle.

In *Campbell v. Morey*, 48 Cong. H. R. 1845, upon the statement of a voter, that a person of the opposite party had given him a ticket which he supposed to be different from what it turned out to be, the vote was deducted from contestee, and added to that of the contestant.

In the case of *Bradley v. Slemmons*, 5 Cong. El. Cases, 309, it was shown that in two or three counties fraudulent posters had been circulated, announcing that a Republican candidate had been put in nomination, and that by this means many Republicans were prevented from voting for contestant, who was an independent candidate. It was stated by the committee, that if the evidence had shown that the effect upon the voters had been to produce a different result from that which otherwise would have occurred, and that contestee was in complicity with such a dishonorable act, they would report in favor of setting aside the election.

2. *Barber Re*, 10 Phila. 579; *Duffy Re*, 4 Brews. (Pa.) 531; *Lemoyne v. Farwell*, 4 Cong. El. Cases, 410. It was said by the committee, in the case of *Platt v. Goode*, 4 Cong. El. Cases, 656, "The presumption is, that Democrats will not intentionally commit frauds to help Republicans, nor vice versa."

should never be permitted where the true result can be otherwise reached.¹

8. *True Vote may be proved.*—When a return is rejected for fraud, this will not necessarily disfranchise the legal votes of the precinct, but the true vote may be proved by any competent evidence.²

9. *Fraud indictable at Common Law.*—Where common-law offences are recognized, fraud at an election for public officers is indictable in the absence of a statute making it an offence.³

10. *Effect of Laches.*—Fraud in an election to authorize a subscription to the capital stock of corporations for making internal improvements, will vitiate the election; but in such cases proceedings must be taken to set aside the election in apt time, and before the rights of third parties have intervened, or it will be too late.⁴

11. *Remedy for Fraud.*—In elections for public officers, there being remedies at law by *quo warranto*, or by contest, in the manner provided for by statute, there is no ground for the interposition of a court of equity, and it has no jurisdiction in such cases;⁵ and in other cases, such as elections for removal of county-seats, wherever there is a provision of law for a statutory contest, an injunction will not be granted.⁶

But where there is no provision for contesting an election held

1. *Lemoyne v. Farwell*, 4 Cong. El. Cases, 411; *Washburn v. Voorhes*, 3 Cong. El. Cases, 59, where the committee say, in speaking of the rejection of the whole vote, "It is not to be adopted if it can be avoided. No investigation should be spared which would reach the truth, without a resort to it."

In the cases of *Lemoyne v. Farwell*, *supra*, and *Mackey v. O'Connor*, 6 Cong. El. Cases, 520, on account of the frauds of the election officers, who were in each case opposed to the contestant's party, the contestant would have suffered greater injury by rejecting the poll than by letting the fraud stand; and the result was corrected by adding the number shown to have been given for contestant to his poll, and deducting the remainder of the surplus from count of contestee.

2. *Reed v. Julian*, 3 Cong. El. Cases, 832; *Smith v. Shelly*, 6 Cong. El. Cases, 18; *Lowe v. Wheeler*, 6 Cong. El. Cases, 61; *Lynch v. Chalmers*, 6 Cong. El. Cases, 338.

It would seem that the burden of proof would rest upon each candidate to prove the vote cast for him, if he wished it counted. *McCrary*, Am. Law of El. § 391; *Washburn v. Voorhes*, 3 Cong. El. Cases, 54; *Vallandigham v. Campbell*, 2 Cong. El. Cases, 223.

In the case of the *People v. Thatcher*, 7 Lans. (N. Y.) 274, where the whole number of votes were shown, and two of the candidates proved that they had received a

certain number, the third candidate, who had offered no evidence, was allowed the rest by the trial court; but upon error this was reversed.

In the case of *Finley v. Bisbee*, 5 Cong. El. Cases, 88, a material qualification was added to this rule. The returns of one precinct having been rejected, the contestee proved the number of votes cast for him, but the contestant made no effort to do this. But proof having been offered that some votes had been cast for him without attempting to show the number, so that they could be counted, the committee held that it would be manifest injustice to count the votes proved by the contestee, increasing his majority to the full number of votes proved. But this offers too great a premium for negligence, and upholds the fraud.

3. *Commonwealth v. McHale*, 97 Pa. St. 397.

4. *Prettyman v. Tazewell Co.*, 19 Ill. 406; *Butler v. Dunham*, 27 Ill. 474.

5. *Hulseman v. Rems*, 41 Pa. St. 396.

In the case of *Reed v. Moulton*, 51 Ala. 255, the Supreme Court held that equity might enjoin the use of a certificate of election, founded on fraudulent returns, when there was no mode of contest prescribed by statute; but in the same case, when again before the court (54 Ala. 320), this doctrine was overruled, and it was held that the remedy was by *quo warranto*, and not by bill in equity.

6. *Peck v. Weddell*, 17 Ohio St. 271.

for a special purpose, such as authorizing a subscription or donation to a corporation, or an appropriation for internal improvements in municipal corporations, equity will enjoin the performance of the acts authorized by the election, when such frauds are shown in the conduct of the election as should vitiate the return, or defeat the election.¹ But where there is a method of contest provided by statute, an injunction will not lie to prevent the officer from doing the act for any reason which would have been available in a contest.²

No State statute can bind the House of Representatives by providing that the decision of a tribunal, or canvassing board, upon questions of fraud, shall be final, nor prevent the House from considering the evidence as to the actual vote in such cases.³

XV. Violence and Intimidation. — 1. *Elections must be free.* — It is an old adage of the common law, that elections should be free; and any thing which prevents the free exercise of the right of suffrage by the qualified electors will be a sufficient ground for setting aside an election in any country or State where the rules of the common law prevail.

When persons are prevented by force from casting their ballots, it cannot be said that there has been an election, although there may have been the form of one; and the people should not be bound by such a proceeding.

2. *Military Interference in England.* — It has been the usage from the time of Edward I. to remove all bodies of troops stationed near any polling-place while the Parliamentary election was in progress; and by the statute of 8 Geo. II. chap. 30, it was made the duty of the secretary of war to remove any body of troops not in regular garrison, at least two miles from the town where an election was to be held, and keep them away at least one day after the polls were closed.⁴

1. *Boren v. Smith*, 47 Ill. 482; *People v. Winant*, 48 Ill. 263.

In Alabama, however, it was *held*, that, where there was no statutory provision for contesting an election for the removal of a county-seat, neither *mandamus* nor *quo warranto* would lie, — *Leigh v. State*, 69 Ala. 261, — and in another case, that the statutory method could not be followed, and that there was no remedy when there was a *prima facie* majority. *Savage v. Wolfe*, 69 Ala. 569.

2. *Scott v. McGuire*, 15 Neb. 304.

3. *Norris v. Handly*, 4 Cong. El. Cases, 68.

4. 1 Roe on Elec. 305. In the Westminster case, in 1741, there having been disturbance and rioting during the election, the officers called in a body of troops to assist in preserving order. The election was set aside; but it does not appear from the proceedings whether it was on account

of the employment of the soldiers, or because of the riot. The magistrates who called in the military were called before the House of Commons, and reprimanded on their knees by the speaker, and the House passed the following resolution: "That it appears to this House that a body of armed soldiers, headed by officers, did, on Friday, the eighth day of May last, come in a military manner, and take possession of the Churchyard of St. Paul, Covent Garden, near the place where the poll for the election of citizens to serve in this present Parliament for the city of Westminster was taken, before the said election was ended; that the presence of a regular body of armed soldiers at an election for members to serve in Parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." 24 Journal

3. *Military Interference in the United States.*—Sect. 2002 of the Revised Statutes of the United States prohibits the bringing of armed troops to a place of election, except to repel the enemies of the United States, or to keep the peace; and the presence or employment of armed troops at any election is prohibited by statute in several of the States.

While there can be no reasonable doubt that in this country, as well as in England, any acts done by the military, which would tend to prevent the free exercise of the right of suffrage, would be held to be sufficient to defeat the election, yet Congress does not seem inclined to give such effect to the mere presence of troops near the polls, when no intimidation is in fact shown.¹

4. *Degree of Intimidation or Violence.*—It is not every disturbance or breach of the peace in the election district, or at the polls, on the day of election, that will be considered as sufficient to set aside the election on the ground of violence or intimidation.

The violence or menace must be of such a character that a man of ordinary firmness would be deterred from attempting to vote, and the time and circumstances of its exercise must have been such as to render it highly probable that the result was rendered uncertain. The precise degree of violence or intimidation required to avoid the election is difficult to determine, as much depends

of Commons, 25; 1 Roe on Elections, 311.

1. In the year 1793, during the Congressional election, a company of United States troops, whose captain was a brother of the sitting member, was stationed near the voting-place in one county, and on the day of election was marched to the polls, and paraded near the court-house. The troops were allowed to vote, but their votes were thrown out by the returning officers. The soldiers were guilty of a number of acts of violence, and some threatened to beat any person who voted for contestants.

The committee reported that the conduct of the soldiers and their commander was inconsistent with that freedom and fairness which ought to prevail at elections, and that, although it did not appear from any other than hearsay testimony that any voter was actually prevented from voting, yet there was every reasonable ground to believe some were, and that the election was unduly and unfairly biased by the turbulent and menacing conduct of the military; but the report was not adopted, and the sitting member retained the seat. *Trigg v. Preston*, 1 Cong. El. Cases, 78.

In the case of *Bruce v. Loan*, 2 Cong. El. Cases, 482, it was claimed that there was an interference with the election in several counties by the militia of the State, by which enough voters were prevented from voting to change the result, and the committee reported in favor of declaring

the seat vacant. But the minority report, justifying the acts of the State authorities in protecting the polls by the guards of the enrolled militia, was adopted.

In the case of *Richardson v. Rainey*, 5 Cong. El. Cases, 224, it was shown, that, upon a request of the governor of the State, United States troops were sent into the district, at various points, a short time before the election, and remained there until after its close. It was not claimed that the conduct of the soldiers was improper, or that they did any acts by which the voters were in fact intimidated; but the committee reported in favor of declaring the seat vacant; but the report was re-committed, leaving the sitting member in his seat.

This action of the House was in accordance with the precedents set by the approval of the unanimous report of the committee in case of *Bromburg v. Haralson*, 4 Cong. El. Cases, 355, where there had been a small squad of United States soldiers stationed near the polls in one precinct on the day of election, but, there being no disorderly or threatening conduct on their part, it was said that it was apparent that no man of ordinary firmness was or could have been intimidated, and prevented from voting.

From these cases it may be said that the same rule prevails in this country, where the intimidation is alleged to have been caused by soldiers as by other persons.

upon the circumstances of each particular case, — the habits of society, and the character of the ordinary gatherings of the people.

Of course, if the voting was, in fact, arrested, and the officers compelled to suspend the election, or were compelled by force to make false returns, no election could be upheld.¹

In England it would seem that a less degree of violence will be sufficient to set aside the election, where it is shown that it was instigated by the candidate or his agent rather than by other parties;² and in the absence of connivance on his part, it must be shown that the violence was so great as to prevent a fair and free election;³ and this would doubtless be held to be the correct rule in this country.⁴

1. Morpeth Case, 1 Doug. (El. Cases) 147.

2. Staleybridge Case, 20 Law Times, N. S. 75.

3. Pontefract Case, Glanville (El. Cases), 143; Nottingham Case, 1 Peckw. (El. Cases) 85; Southwark Case, Haywood Co. El. 582; Westminster Case, id. 582; Coventry Case, id. 583.

Where it was claimed that the election had been disturbed by a number of butchers, who knocked one man down, and threatened to knock any one down who spoke against the sitting member, it was *held*, in an early case, that this did not avoid the election. Exeter Case, 1 Roe on El. 336.

In another case, where the polls were closed for two hours, by proclamation, on account of riots, but were re-opened in a half an hour, and the elections were proceeded with, it was *held* to be valid. Roxborough Case, Fal. & Fitz. (El. Cases) 475. It has been *held* that general violence and intimidation vitiates the election, — Bradford Case, 1 O'M. & H. (Eng. El. Cases) 40; Drogheda Case, id. 253; Galloway Case, 2 O'M. & H. 56, — but the difficulty is to determine what is sufficient to constitute general violence. In the Nottingham Case, 15 Law Times, N. S. 94, where there were violent and tumultuous proceedings at the election, gangs of hired men armed with sticks paraded the streets on behalf of one of the candidates, and the windows of dwellings were smashed by the mob, it was *held* that there was no such case of general violence as would avoid the election.

In the Cook Case, Bar. & Aus. (Eng. El. Cases) 534, when the majority on the side of the sitting member was so great that it was not probable the result was changed by the tumult, it was *held* that violence and continuous rioting did not invalidate the election. And in Coventry Case, C. & R. (Eng. El. Cases) 260, where there was rioting during the greater portion of the day, but it was not shown that the return was affected by it, the election was upheld.

In the Nottingham Case, 1 O'M. & H. (Eng. El. Cases) 246, it was *held* that hiring ruffians to create a disturbance did not avoid the election when there was no rioting sufficient to deter persons of ordinary prudence from voting; and in the Stafford Case, 1 O'M. & H. 229, that proof that a few persons were kept from voting by violence did not establish general intimidation.

4. In a case in the New York Assembly, it was shown that a general system of intimidation prevailed at the polls in one precinct, and that gangs of men under the leadership of persons pretending to act as special constables, under the authority of the election officers, prevented the persons who were known to be of the opposite party from reaching the poll, and the vote of the precinct was rejected. Shook v. Hungerford, N. Y. Cont. El. Cases, 375.

In Louisiana it has been *held*, that, in order to set aside an election for alleged violence in keeping persons from the polls, it must be averred that there was a sufficient number of persons kept from voting to vary the result. State v. Mason, 14 La. Ann. 505. And in Mississippi it was *held* that when the right of a contest, ant depends upon the fact of violence, he must show that such disorder and tumult, prevailed at the polls as to interfere with the voting, and to prevent balloting to such a degree as to vitiate the election. Pradat v. Ramsey, 47 Miss. 24. And see Tarbox v. Sughrue, 36 Kan. 225.

In the Congressional Case of Harrison v. Davis, 2 Cong. El. Cases, 341, it was *held*, that, in order to avoid an election for violence, it must be shown, either that the election was broken up, or that so many individuals were excluded from the poll as would, if they had been allowed to vote, have given contestant a majority: and that a statement in the notice of contest, that in all wards, bands of men conspired to exclude and obstruct legal voters who intended to vote for contestant; and that they did in fact assemble at and near the voting-

5. *By whom intimidated.*—It is not necessary that the persons who are guilty of violence or intimidations should be connected with the candidate; but, if there is such violence that the voters cannot safely deposit their votes, the election should be set aside, regardless of the relation of the persons by whom it was committed.¹

places armed, and by threats intimidated, and by violence obstructed, and drove thousands of legal voters away, and deterred many from approaching the poll, was wholly insufficient to avoid the election if proved. And in *Preston v. Harris*, 2 Cong. El. Cases, 346, it was *held*, that, where the election was not interrupted, it must be shown that the number of intimidated votes was so great as to change the result.

Since the civil war, in a number of Congressional cases from the Southern States, it was alleged that colored voters were intimidated, and that the election should be set aside for this reason.

In the case of *Hunt v. Sheldon*, 3 Cong. El. Cases, 530, it was claimed, that, in two parishes in the district, there had been a reign of terror for a week before the election; that there had been two hundred and thirty-two persons of one party either murdered or badly maltreated, and that the vote cast was nearly twelve thousand less than that registered. The committee reported in favor of excluding the votes of the two parishes upon the *prima facie* case; and at the next session, the same case being heard upon the merits, it was claimed, that, as there was no violence on the day of election, it ought to be held valid; but the committee reported, that, by acts of the preceding week, the voters had become so terrified that it would have been impossible to have drawn them to the polls in the face of their opponents, and the House finally excluded the votes from those parishes. *Hunt v. Sheldon*, 3 Cong. El. Cases, 703.

Under similar circumstances, in the case of *Sypher v. St. Martin*, 3 Cong. El. Cases, 731, the committee voted in favor of the contestant, but the House declared the seat vacant. The same session, in the case of *Wallace v. Simpson*, a report was adopted unanimously, seating contestant, where he had a majority of more than a thousand in the peaceful counties which comprised one-half the district; and at the same session, in the cases of *Darrell v. Bailey*, 3 Cong. El. Cases, 754, and *Newsham v. Ryan*, 3 Cong. El. Cases, 724, the returns from nearly half of the districts were rejected for violence and intimidation, and the contestants were seated on account of their majority in the peaceable districts; and in the case of *Morey v. McCranie*, where less than one-half the district was peaceable, the seat was declared vacant. See also *Giddings*

v. Clark, 4 Cong. El. Cases, 97; *Bisbee v. Finley*, 6 Cong. El. Cases, 189; *Smalls v. Tillman*, 6 Cong. El. Cases, 430, where the returns were rejected for violence.

In the case of *Bromburg v. Haralson*, 4 Cong. El. Cases, 366, where the evidence showed that much bitter and inflammatory language was used during the campaign, and threats were made by colored voters against those of their own race, and three or four were prevented from voting the Democratic ticket, it was *held* that this would not justify the rejection of the votes for the sitting member. In the case of *Lee v. Richardson*, 6 Cong. El. Cases, 520, where there were no actual personal violence, or physical display of force, on the day of election, the committee refused to set aside the election on account of disturbances and rumors that the Democratic party were armed to prevent the colored people from casting their votes. *Judge McCrary*, in speaking of the degree of violence necessary to set aside an election, says, "To vacate an election on this ground (of violence), if the election was not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness;" and the authorities unquestionably support this rule, but it may be questioned whether there are not exceptions to it; and the Supreme Court of Arkansas, in *Patton v. Coates*, 41 Ark. 111, has *held* that intimidation sufficient to render it uncertain what the result of an election would have been, will avoid it, though it may not have been such as would have influenced men of ordinary firmness.

1. *Coventry Case*, C. & R. (Eng. El. Cases) 288.

In a number of cases during the late civil war, parties were denied seats in Congress because the voters were prevented from voting by military occupation of large parts of the districts by the Confederate forces. *McKenzie Case*, 2 Cong. El. Cases, 460; *Pigott's Case*, id. 463; *Grafflin's*, id. 464; *Hawkins' Case*, id. 466; *McKenzie v. Kitchen*, id. 468.

In the case of *Harrison v. Davis*, 2 Cong. El. Cases, 343, it was alleged that there was intimidation of the voters by the police force of the city of Baltimore; but the committee said, "This (sixth specification in the notice) is a general impeachment of the conduct of the police, or some portion of it, on the day of the election; but since it

6. *Threats of Loss of Occupation.* — It is not necessary that the intimidation should proceed from a fear of personal injury; but a combination on the part of employers of laboring-men to discharge their workmen, or an agreement not to employ persons, unless they vote in accordance with their demands, will be sufficient to avoid the election, if the intimidation is so general as to affect the result.¹

7. *Social and Religious Intimidation.* — It has been held that a fear of social or religious ostracism may have an effect in intimidating voters as to avoid an election.²

is not essential that there should be any police to make an election valid, we do not perceive the relevancy of the specification." But in the case of *English v. Peelle*, 48 Cong. H. Rep. 1547, where it was charged that the police force, being entirely in the hands of contestee, had challenged and intimidated voters in many instances, this was made one of the grounds for seating contestant.

1. Thus, in England, where the employer of a large number of workmen canvassed them, at the request of one of the candidates, and dismissed some who voted against his candidate, in such a way that the rest of the men were led to believe that they would be discharged if they did not vote as he desired, it was *held* to be such intimidation as would avoid the election, although the action of the employer was caused by personal hostility to the other candidate. *Westbury Case*, 1 O'M. & H. (Eng. El. Cases) 47, *Blackburn Case*, 1 O'M. & H. 198.

In the case of *Donnelly v. Washburn*, 5 Cong. El. Cases, 439, it was *held*, that, where large numbers of workmen had been compelled to vote for one candidate, by threats of discharge, it would avoid the election; and this principle was assumed to be correct in *Duffy v. Mason*, 5 Cong. El. Cases, 361.

In the case of *Richardson v. Rainey*, 5 Cong. El. Cases, 233, it was said that a general adoption by a large part of the property owners of a pledge not to assist, or extend any favor to, any person who should vote for the opposite party, and that, in business transactions, they would give the preference to those who should vote for their candidate, would be a reason for declaring that the election was not a full or free one, and was therefore void.

2. Thus, in the case of *Richardson v. Rainey*, 5 Cong. El. Cases, 233, the report of the committee says, "In giving the citizen the right to vote at all, the right to vote as he chooses, free and untrammelled, was necessarily included. It does not require any active restraint of the body to make out a case of intimidation. It need

not be that there is, at the time of voting, the presence of threats, or of force, or the present fear of actual bodily hurt. The genius of free institutions demands that the mind, as well as the body, shall be free to exercise the elective franchise as the voter may see fit. The fear of bodily harm, of social ostracism, the fear of religious wrath, if brought to bear upon the body of the voters, or, if exercised to any great extent, mar the purity, and destroy the freedom, of elections; and if it be so general as to affect the result, or that from it the real result cannot be ascertained from the returns, the election is void.

In the case of *Trench v. Nolan*, 6 Irish Rep. C. L. 464, where the influence of the clergy of the Catholic Church was used in favor of one of the candidates, and their zeal led them to make threats that those who voted against their candidate should be excommunicated, or refused the sacraments of the Church, it was *held* that this was such an undue influence as would avoid the election. And in the *Mayo Case*, W. & D. (Eng. El. Cases) 1, where the Catholic bishops and clergy, in an organized attempt to elect a candidate, signed and issued proclamations in his favor, and the clergy stated, at the altar, that the curse of God would rest on all who voted for the opposing candidate, it was *held* to be a case of spiritual intimidation, which would avoid the election. And see *Langford Case*, 2 O'M. & H. (Eng. El. Cases) 16.

The same question was presented in the Province of Quebec, where a Catholic priest, with the knowledge of one of the candidates, and without objection on his part, threatened to refuse the sacraments to those voters who should vote for the opposite candidate; and it was *held* to be sufficient to avoid the elections. *Hamilton v. Beauchesne*, 3 Quebec Rep. 75.

In the case of *Brassard v. Langevin*, 1 Sup. Ct. Can. 145, where the court of the Province of Quebec had upheld the validity of an election, where the respondent had been supported by all the priests of the Catholic Church, who had used their influ-

8. *Unsuccessful Attempts at Intimidation.* — The fact that there had been outrages in a precinct or district, and that repeated attempts have been made to intimidate and frighten the voters of one party, will not have the effect of avoiding the election, if it appears a matter of fact that these actions did not have the effect of preventing a sufficient number of the electors from voting, to change the result.¹

9. *Evidence of Intimidation.* — Hearsay evidence, common rumor, or newspaper reports, are not sufficient to prove, either that outrages have been committed, or the number of voters intimidated; but these facts must be proved by competent evidence in order to affect the result of the election.²

ence in the pulpit for his election, the decision of the Provincial Court was reversed, although, on account of a secret ballot, it was not possible to show that more than six or eight voters had been influenced by the sermons. *Mr. Justice Ritchie*, in the opinion, says, "All these sermons, accompanied by threats and declarations of cases of conscience, were of a nature to produce, in the minds of a large number of electors of the county, compelled to hear these things during several consecutive Sundays, a serious dread of committing a grievous sin, and that of being deprived of the sacrament. There is here exciting and undue influence of the worst kind, inasmuch as threats and declarations fell from the lips of the priest, speaking from the pulpit in the name of religion, and were addressed to persons of little instruction, and generally well disposed to follow the counsel of their curés.

"I can conceive that these sermons may have had no influence whatever on the intelligent and instructed portion of the hearers: nevertheless, I have no doubt but these sermons must have influenced the majority of the persons void of instruction, notwithstanding that, by reason of the secrecy in voting by ballot, it has not been possible to point to more than six or eight voters as having been influenced to the extent of affecting their will.

"According to the testimony of over fifteen witnesses, a very large number changed their opinion in consequence of this undue influence."

1. Thus, in the case of *Norris v. Handley*, 4 Cong. El. Cases, 68, *Judge McCrary*, in the report of the committee, in speaking upon this subject, says, "These crimes (outrages proven) were well calculated to alarm and intimidate the colored people; and it must be said, to their great credit, that, in spite of all the danger and difficulties, the great body of them did, in fact, exercise their right to vote, many of them travelling ten, fifteen, and even twenty

miles from their homes, for that purpose. These outrages, therefore, do not invalidate the election, because they did not intimidate the freedmen;" and see *Niblack v. Walls*, 4 Cong. El. Cases, 101. In such a case, however, it would seem that the party guilty of the outrages should be required, to show by clear proof that the natural consequences of their actions did not follow.

When the partisans of a candidate drove the voters away from the regular polling-place, but the votes were received at a back-door, and counted, it was *held* that the candidate was estopped to question the validity of the votes. *Soucy v. People*, 113 Ill. 109. And see *State v. Howard* (Kan.), 13 Pac. Rep. 212.

2. Thus, in the case of *Anderson v. Reed*, 6 Cong. El. Cases, 286, the committee reported, "Third, as to the charge of intimidation, the evidence falls far short of substantiating the charge. It consists merely of hearsay and rumors, and does not disclose a single incident of violence, or even threatened violence. A common report, 'that men would lose their job, if they did not vote as their superiors directed,' hardly constitutes an overthrow of men's wills and determinations, such as can be taken notice of by the law."

In the case of *Duffy v. Mason*, 5 Cong. El. Cases, 361, it was *held* that the proof that rumors existed, that persons friendly to contestee improperly influenced their employees to vote for him, was incompetent, and must be rejected as hearsay; that the truth of the rumors, and not their mere existence, must be established.

In the case of *White v. Davis*, 2 Cong. El. Cases, 265, the contestant offered in evidence lists of persons whom the parties making had seen, and who claimed to have been, intimidated, or whom they heard from others had been intimidated; and, although the committee *held* that this was sufficient, their report was tabled. And in the case of *Donnelly v. Washburn*, 5 Cong. El. Cases, 454, where the committee re-

10. *Counting Votes of Intimidated Voters.* — It is not often that there is such a state of affairs that any great number of votes not offered directly to the election officer can be counted so as to give the election to the candidate shown to be in the minority by the returns; but in some cases, even this may be done.¹

11. *Obstruction of Voters at Congressional Elections.* — Hindering, obstructing, or delaying any legal voter from casting his ballot at a Congressional election, or from doing any act required to be done to qualify him to vote at such election, may be punished under the Act of Congress of May 30, 1870; although the persons may afterward cast their ballots.²

XVI. Bribery and Undue Influence. — 1. *Freedom from Bribery in the United States.* — An American citizen may well be proud of the comparison between the number of cases in this country where bribery has been charged and proved in election cases when compared with those in Great Britain and Canada: there does not seem to be a case in the reports of the various courts in this country where an election has been declared void, or an officer removed from office or unseated, by reason of bribery at his election, although in one case a person elected sheriff was convicted of bribing an elector; but as in that State it required the conviction of an infamous crime to disqualify one for voting or holding office, and as the punishment of bribery consisted only of fine or imprisonment in the county jail, it was held that it was not an infamous crime, unless committed in cases for the instruction of

ported that the testimony of a person showed that railroad hands told him they were compelled to vote the way their boss told them to, — that they had to vote the ticket of their own boss, — the House refused to act on their testimony.

In the case of *Norris v. Handley*, 4 Cong. El. Cases, 75, where the only testimony of intimidation was, that the witnesses had heard others say that they were intimidated, the committee held that such testimony was insufficient of itself to establish the fact of intimidation, and that it should at least be corroborated by other facts, — such as the unexplained failure of large numbers to vote. And see *Niblack v. Walls*, 4 Cong. El. Cases, 101.

1. *Judge McCrary* says, — Law of Elections, sec. 423, — “In order that a vote not cast shall be counted as if cast, it must appear that a legal voter offered to vote a particular ballot, and that he was prevented by fraud, violence, or an erroneous ruling of the election officers. Just what is to be understood by offering to vote, is not perhaps perfectly well settled. If a voter approaches, or attempts to approach, the polls for the purpose of depositing his ballot, and is driven away, or by violence, intimidation, or threats, prevented from the

actual presentation of his ballot to the proper officer, and he used proper diligence in endeavoring to reach the polls and deposit his ballot, and was not intimidated without sufficient reason, the better opinion seems to be that his vote may be counted.”

In the case of *Niblack v. Walls*, 4 Cong. El. Cases, 101, this principle was announced, and the vote of electors is counted where the witnesses testify that they tried to get to the polls for the purpose of casting their ballots for the sitting member, but were prevented from so doing by threats of violence, the exhibition of deadly weapons, and by the crowding of the opposite party around the polls so as to prevent them from reaching the ballot-boxes.

2. *U. S. v. Souders*, 2 Abb. (U. S.) 456. In this case the evidence disclosed that the defendant, with others, attacked a number of voters, waiting in line for their turn to vote, and expelled them from the room, and they afterwards returned and voted: it was held, that, as the statute was broad enough to cover a hindrance, delay, or an obstruction in the right of voting, the fact that, after such obstruction or hindrance, the voter made another attempt to vote, and was successful, would not relieve the party of the guilt of his former act.

justice in the courts, and did not disqualify a person for holding an office.¹

In the Congressional cases the charge of bribery has been made in but few instances: and in but three cases has it been sustained by the report of the committee, and in but two has the member been unseated by reason of alleged bribery, and those were cases where the alleged bribery consisted in the employment of voters by the government in the navy-yards; while in England and Canada a large number of the contests are based upon allegations of bribery, and the charges have been sustained, and members of Parliament unseated for this offence in a great number of cases.²

2. *Effect of Bribery upon the Election.* — By the common law of Parliament, which is considered a part of the common law of England, no person who was shown to be guilty of bribery was entitled to a seat in the House of Commons, even if he had a majority of the legal votes cast; and in 1677 a resolution was passed declaratory of this principle, providing that in case any person returned should, after the test of writ for summoning a Parliament or after the date a vacancy therein, make any present, gift, or reward, or any financial obligation, or engagement to do the same either to any person or persons or to any county, city, town, port, or borough in general, or to and for the use of them or any of them, he should be guilty of bribery, and such acts would render the election void. And the committee on elections was required to take especial notice and care in regard to these matters in cases coming before them.³

And by the statute of 49 Geo. III. chap. 118, every person guilty of bribery was incapacitated from serving in that Parliament. In most of the States there are either constitutional or statutory provisions which disqualify a candidate convicted of bribery at an election from holding the office; and in some States such disqualifications extend to the right to hold office and to the right of suffrage; but in the absence of such provisions, the fact of bribery or attempted bribery on the part of the candidate would not disqualify him for holding the office,⁴ nor avoid the election

1. *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

2. This difference may be accounted for in part by the greater number of voters in the constituency in this country, and partly by the fact that law in England and Canada will unseat the member if a single act of bribery by candidate or his agent is proved; and if by the candidate, or an agent with the knowledge of the candidate, he will be rendered ineligible to re-election to a seat in that Parliament: while in this country the only result is that the bribed votes will be considered illegal, and be deducted from the number cast for the party for whom they vote. But in England the two cases — *Abbott v. Frost*, 4 Cong. El.

Cases, 594; *Platt v. Goode*, 4 Cong. El. Cases, 650 — in which the contestant was seated for alleged bribery by the opposite party would never have been decided in that way; as in that country the vote of each person is to be considered separately, and his opponent could only be seated by a scrutiny of the individual voters which would result in deducting enough votes from contestee poll to give his opponent the majority; although, where general fraud and corruption were shown, the seat might be vacated.

3. 1 *Roe on Elect.* 129.

4. *Com. v. Shaver*, 3 W. & S. (Pa.) 338; *People v. Thornton*, 25 Hun (N. Y.), 456.

unless the number of bribed votes was so great as to affect the result of the election.

3. *Of what Bribery consists.* — It may be said that bribery is committed whenever any person is bound to act without any view to his own private emolument, and another by a corrupt contract engages such persons on condition of the payment of the money, or other valuable considerations, to act in a manner which he may prescribe.¹

Where a gift of money, or other valuable things, is made after the election to a voter who has voted for a candidate without a prior promise expressed or implied, it will not constitute bribery, unless there has been a corrupt expectation raised from the circumstances of the case;² nor will the payment of travelling expenses and for loss of time made after the vote was cast constitute bribery, where this payment had not been promised before.³

In the early Parliamentary cases it was held that it was not bribery to pay the actual travelling expenses and for actual loss of time;⁴ but the later cases hold that such payment avoids the vote, if made in consideration of an agreement before the vote was cast.⁵

Where there is a gift of the same sum of money to a large number of persons after the election is over, the presumption will be, that it was in consequence of an implied agreement or a corrupt expectation.⁶

It seems to be quite well settled, that if a candidate for public office makes a public offer, that if elected he perform the duties of the office for less than the legal fees or salary, it will be ground for rejecting all votes cast for him on account of the offer, and it may be sufficient to avoid the election;⁷ but where the inhabitants

1. Orme on El. 307.

2. Dublin Case, Fal. & Fitz. (Eng. El. Cases) 204.

3. Worcester Case, 1 K. & O. (Eng. El. Cases) 248.

4. Worcester Case, 3 Doug. (Eng. El. Cases) 258; Ipswich Case, 1 Lud. (Eng. El. Cases) 41; Southampton Case, 2 P. R. & D. (Eng. El. Cases) 55; Huddersfield Case, Wolferstan & Bristow (Eng. El. Cases), 29. But when more than the actual amount was paid, it constitutes bribery. Clare Co. Case, W. & B. (Eng. El. Cases) 141; Beverly Case, id. 189.

5. Cooper v. Slade, 6 El. & Bl. 447; 25 L. J. Q. B. 324. And in Quebec it was held that payment of travelling expenses, and for loss of time, are corrupt acts. Vennor v. Archer, 1 Quebec L. R. 283. And in the case of Donnelly v. Washburn, 5 Cong. El. Cases, 439, where workmen refused to go and vote unless their employers paid them for the time while they were absent, this was held to be bribery by the committee, but the report was not adopted. Where

the same sum was paid for travelling expenses to all voters by all candidates for their travelling expenses, it was held to be bribery. Durham Case, 2 Peckw. (Eng. El. Cases), 178; Bremridge v. Campbell, 5 C. & P. 186.

6. Hartford Case, 1 Peckw. Eng. El. Cases, 184; Berwick Case, id. 401; Durham Case, Bar. & Arn. (Eng. El. Cases) 201.

7. Thus, in Wisconsin it was held, that where a candidate offered to perform the duties of an office for four hundred dollars less than by law, while it was not bribery, it was against public policy, and the votes so obtained must be rejected. State v. Purdy, 36 Wis. 213. And see State v. Collier, 72 Mo. 13; Carruthers v. Russell, 53 Iowa, 346. But in New York it was held, that, before an officer would be ousted for such an offer, it must be shown that a number of votes in excess of his majority were cast under the influence of the offer. People v. Thornton, 25 Hun (N. Y.), 456.

of a town promise to erect public buildings, or do other acts to secure votes for the establishment of a county-seat, this will not avoid the election, or be considered as bribery.¹

For other acts which constitute bribery, see notes.²

1. *Wells v. Taylor*, 5 Montana, 202; *Neil v. Shinn* (Ark.), 4 S. W. Rep. 771; *State v. Elting*, 21 Kan. 397; *Hall v. Marshall*, 80 Ky. 552; *Dishon v. Smith*, 10 Iowa, 215; *Hawes v. Miller*, 56 Iowa, 395.

In Tennessee, when pending an election to decide whether a county should take stock in a railroad company, some of the citizens of the county entered into an agreement to subscribe an amount equal to the tax in one district, in order to improve the public road leading from that district to the terminus of the railroad, upon the condition that the proposition to take stock should receive a majority of the votes of that district. It was *held* that such an agreement was not in a nature of a bribe, did contravene public policy, and would not vitiate the proceedings. *Hord v. Rogersville, etc.*, R. Co., 3 Head (Tenn.), 208.

2. An offer to allow a voter a gross rent free was *held* to be bribery. *Lancaster Case*, 14 Law Times, N. S. 307. And an offer to let property worth twenty shillings per annum for twelve, in consideration of the vote, is corrupt, although the agent refused to take nine shillings and lost the vote. *Banbury Case*, 14 Law Times, 308. The procurement of employment for a voter in consideration of his vote has been *held* to be bribery. *Chatham Case*, 2 P. R. & B. (Eng. El. Cases) 39. But the *bona fide* employment of a voter to canvass a certain class of voters, or to make speeches, is not bribery unless coupled with a condition that the party shall vote. *West Toronto Case*, *Hodgins* (Canada El. Cases), 97; *N. Ontario Case*, id. 785. But when the employment is only colorable for the purpose of securing votes, it will be bribery, — *Crenon v. Perault*, 5 S. C. Can. 133, — or when the employment is given on condition of their voting for the candidates. *Tamworth Case*, 1 O'M. & H. (Eng. El. Cases) 78; *Penrhin Case*, id. 129; *Gloucester Case*, 2 O'M. & H. 62; *Abbott v. Frost*, 4 Cong. El. Cases, 594; *Platt v. Goode*, 4 Cong. El. Cases, 676.

Engaging twenty-seven public-houses within one mile of the polls, and paying to the proprietors from ten to twenty guineas each, when they were not used for any legitimate purpose, was *held* to be bribery. *New Windsor Case*, 15 Law Times, N. S. 105.

In the case of *Frost v. Metcalfe*, 5 Cong. El. Cases, 439, one of the grounds of the contest was, that there were seven hundred and twenty-eight United States

deputy marshals appointed in the district without necessity, and that the money had been paid them as a bribe for their votes. The committee deprecated the existence of the law authorizing the appointment of the deputy marshals, but *held* that, as it did not limit the number, the fact must be shown that, but for such alleged bribe, they would have voted the other way.

A loan made in consideration of a vote is bribery. *Lyme Regis*, 1 P. R. & B. (Eng. El. Cases) 38. The payment of a past debt in consideration for a vote may be bribery if the payment is made with the intent to induce a voter to vote or refrain from voting; but that it is made near the time of the election will not make it bribery, if the vote was neither asked nor promised. *McKay v. Glen*, 3 Sup. Ct. Can. 641; *West Toronto Case*, *Hodgins* (Can. El. Cases), 821; *Dundas Case*, id. 205; *North Victoria Case*, id. 252; *South Ontario Case*, id. 751; *North Ontario Case*, id. 785.

In England it was *held* not to be bribery to procure situations for the sons of voters, — *Maidstone Case*, 15 Law Times, N. S. 135, — and in Canada that a promise made by a candidate to a political friend to endeavor to secure an appointment for one of his friends, was neither bribery nor undue influence. *Summerville v. LaFlamme*, 2 Sup. Ct. Can. 216. Colorable purchases to secure votes constitutes bribery, and also the payment of a grossly inadequate price for an article or for work. *Cornwall Case*; *Hodgins* (Can. El. Cases), 547, 843.

When a person, not an elector, made a wager with a voter to induce him to vote for the person in whose favor he had bet, it was *held* to be bribery. *Allen v. Hearne*, 1 Term Rep. 56.

It has been *held* that subscribing for the funds of benefit societies, where many of the members were voters, was bribery. — *New Windsor Case*, 15 Law Times, N. S. 105, — but that a gift of a half a cord of wood to a poor voter out of charity, without a bargain for the vote, or the gift to relatives of the voter out of charity, where the relative was a friend to the candidate, and there had been prior gifts, was not bribery, — *London Case*, *Hodgins* (Can. El. Cases), 214; *North Victoria Case*, id. 252, — and that payments to charitable purposes, where the candidate has a legitimate motive, is not bribery, although he may also have a desire to gain votes by such payment; but that if this was his only

4. *Effect of Reception of Bribe upon the Vote.*—Where the bribery is committed by a third person not an agent of the candidate it will not avoid the election either in England or in America, unless the number of bribed votes is greater than the majority of the candidate for whom they were cast, unless the corruption was so general that there was no freedom or purity in the election.¹ But both in England and America the bribery of a voter, even by a third person, is ground for the rejection of the vote upon a scrutiny.²

5. *Evidence of Bribery.*—In the Parliamentary and Congressional Cases, there seems to be a departure from the rule against the admission of hearsay evidence; and declarations of voters and members of their families have been received, though the practice

motive, it would be bribery. *Windsor Case*, 2 O'M. & H. (Eng. El. Cases) 88.

When an offer, with a sum of money, is made to a person with a view of obtaining his vote, and the offer is accepted with an expressed or implied promise to give the vote, the offence is complete. *Henslow v. Fossett*, 2 Add. & El. 51. But when there was an offer of a sum by one party to a voter, which was not accepted, and the voter afterward offered to vote for the opposite party for the same sum, but, on being refused, voted for the first party, the offence was not complete. *Ipswich Case*, K. & O. (Eng. El. Cases) 388.

1 *Cheltenham Case*, 14 Law Times, 839, where certain persons, without the knowledge of the successful candidate, entered into a conspiracy to defeat his opponent by bribing votes, and *Wakefield Case*, 14 Law Times, N. S. 877. Where a person having large bets upon the election had practised bribery, without the knowledge of his candidate or his agent, the elections will not be set aside; but it has been held that general bribery will avoid an election, even if not committed by a candidate or his agent, upon the ground that there was no real, pure, or free choice in the matter, but what had occurred was a sham, and not a real election. *Litchfield Case*, 20 Law Times, N. S. 11; *Guilford Case*, 1 O'M. & H. 15; *London Case*, 24 Up. Can. C. P. 434.

2. *Malcome v. Parry*, 9 C. P. 610; *State v. Elting*, 29 Kan. 397; *State v. Purdy*, 36 Wis. 218.

In the case of *State v. Olin*, 23 Wis. 327, the Supreme Court of Wisconsin say, "In our form of government, where the administration of public affairs is regulated by the will of the people, or a majority of them, expressed through the ballot-box, the free exercise of the elective franchise is a matter of the highest importance. The safety and perpetuity of our institutions depend on this. It is therefore particu-

larly important that every voter should be free from pecuniary influence. For this reason the attempt by bribery to influence an elector in giving his vote or ballot, is made an indictable offence." "Can a vote thus obtained in direct violation of the statute be considered a legal vote? If it can, the very object of the statute—which is, that it shall not be so obtained—is defeated. We are of opinion that the judge was right in directing the jury to disregard them. This conclusion is sustained by the authorities, so far as we have been able to find any."

In the case of *Bromberg v. Haralson*, 4 Cong. El. Cases, 363, this case was cited with approval by the committee, who say, "Votes thus obtained (by bribery), even if cast by legal voters, it would seem ought to be rejected as illegal and void, even though it is not shown that the candidate who received them knew or consented to the corrupt practices whereby they were obtained. See also *Abbott v. Frost*, 4 Cong. El. Cases, 604; *Platt v. Goode*, 4 Cong. El. Cases, 676; *Delano v. Morgan*, 3 Cong. El. Cases, 168.

By the statute of Virginia, no one was a qualified voter unless he had paid a certain capitation tax; and it further provided that any one paying the capitation tax for another, with the intent of securing his vote, should be liable to a certain penalty; and the person whose tax was so paid was liable to the same penalty. It was held under this statute, in the case of the *United States v. Foster*, 6 Fed. Rep. 248, that an election officer could not reject the vote of a person because this tax had been paid for him by another, for the purpose of securing his vote. Even if paid as a bribe for the vote, that the statutory penalty was all that could be imposed, and that disfranchisement could not be added when it was not imposed by the statute; and this same principle was announced by the court of Upper Canada in *Brockwith El. Case*, 32 U. C. Q. B. 132.

before the Parliamentary committees as to the admission of such evidence was not uniform.¹

1. General Evidence of Corrupt Practices.

—Lancaster Case, 14 Law Times, N. S. 274. Declarations of a voter as he was coming out of the house of a candidate, that he had received money, were admitted. Galway Case, 14 Law Times, N. S. 810. In the following cases, declarations of voters or members of their families were received, —Huddersfield Case, 14 Law Times, N. S. 346; Shaftesbury Case, 2 Doug. Eng. El. Cases, 310; Lyme Regis Case, 1 P. R. & D. 32; Great Marlow, id. 16; Bridgenorth Case, 2 P. R. & D. 16; Kidderminster Case, 1 P. R. & D. 266; Taunton Case, 2 P. R. & D. 274; Sudbury Case, Bar. & Aust. (Eng. El. Cases) 249, —and in the following cases were rejected: Shaftesbury Case, 3 Lud. (Eng. El. Cases) 116; Guilford Case, 2 P. R. & D. 111; Wigton Burghs Case, 2 P. R. & D. 137. In the Ilchester Case, —3 Doug. 359, —and the Worcester Case, —id. 277, —it was said that the declaration of the voters made to others could be used against themselves, but not against a third party; but where evidence was offered to show that a person had told the witness that he had been authorized by a candidate to offer him a reward, it was rejected. Dumferling Case, 1 Peckw. (Eng. El. Cases) 6. In one case it was stated that the wife of a voter, who was alleged to have been bribed, was received. Kidderminster Case, 1 P. R. & D. 266.

In the Congressional case of Bromburg v. Haralson, 4 Cong. El. Cases, 362, there had been one and a half casks of bacon sent by the Government to be distributed among the sufferers from the overflow of the Tombigbee River.

Evidence was received to show that the reports had been circulated among the colored people, that in order to obtain the bacon, they would be required to vote the Republican ticket; and that if they received any of the bacon and did not vote that ticket, they would lose their legal right; and that the Republican leaders did not make any effort to correct the reports. No evidence was offered to connect the contestee with these reports, but the committee reported that in their judgment the votes so obtained should be rejected, but that their number was not great enough to affect the general result.

In the case of Abbott v. Frost, 4 Cong. El. Cases, 611, proof of the common talk and understanding as to the reason for the employment of men, and of the rumors in the newspapers upon the subject, was admitted, and proof of the statements of parties as to the reason of their employment were also received.

The general rules as to the burden of proof were also reversed in this case. There was no evidence offered to show that any of the persons alleged to have been bribed voted for the sitting member, or that they voted at all; but the committee laid down the following declaration as a rule of law. They say, "If the giving of employment to the voters, immediately prior to the election, was for the purpose of inducing them to vote for the contestee, and such object was in any manner made known to the voter, and he accepted or continued in such employment, after obtaining such information, he thereby becomes a party to the transaction, accepted its terms, and the *onus* of showing that he did not carry it out in good faith is on the contestee."

"If it be shown that an elector enters into an agreement or understanding, direct or indirect, for a consideration to vote a specified party's ticket, or for a particular candidate, it is fair to presume that he casts his ballot in accordance to such agreement or understanding; and unless the contrary is made to appear, such presumption becomes conclusive."

In the case of Platt v. Goode, 4 Cong. El. Cases, 679, the same doctrine was announced: the committee say, "The testimony shows that just previous to this election, in 1874, the force of this navy-yard (Portsmouth, Va.) was increased from nine hundred to fourteen hundred men; that such new employees were generally introduced by the executive committee of contestant's party; that it was generally understood that they would be expected to vote the Republican ticket. The giving and acceptance of such employment upon the terms and conditions stated, constitute bribery in law. The *onus* of proving that such persons did not carry out in good faith the agreement made, rests upon the contestant. The presumption is, that the voter complied with the obligation and executed his contract by giving his votes as he promised, and in the absence of proof to the contrary, that presumption becomes conclusive; and as it was shown that most of these five hundred men resided in three precincts which passed, in the aggregate, 1,619 votes, the report rejected the whole returns of those precincts, upon the ground that when the record showed that illegal votes had been cast, and furnished no method for their elimination, and that the vote of the precinct should be rejected.

No such presumption had ever been laid down in any court, or by any law-writer. In these cases the names of the persons

6. *Effect of Bribery by Agent.* — Under the law in England the question as to the responsibility of a candidate for the acts of his agent is one of great importance; but the question as to the knowledge of the principal of the acts of the agent is immaterial, so far as the effects of those acts upon the result of the election is concerned, for the acts of the agent are considered to be the acts of the principal, though unknown to, or even forbidden by, him.¹ But where those acts are done by an agent without the knowledge or consent of the candidate, while they might result in setting aside the election, they would not disqualify the candidate for standing for re-election; while if done with his knowledge he would become ineligible to re-election during that Parliament.

employed could have been proven, and the poll-book would have shown how many of them voted; and when the facts that the vote was cast had been thus shown, it might have been presumed without violence that their votes had been influenced by their employment; but the presumption that the parties had voted, and that their votes were illegal, is not warranted by any legal principle, and in the next Congress, where it was alleged that a large number of United States deputy marshals had been appointed as a bribe for their vote, the committee say, "It cannot with any strong reason be urged that this committee shall make an estimate from conjecture how many votes they changed by their conduct, nor would it be safe or warranted in assuming that the parties alleged to have been bribed, would, but for such bribe, have voted the other way." *Frost v. Metcalfe*, 5 Cong. El. Cases, 439.

1. In the case of *Felton v. Eastthorpe*, Rogers's Law and Practice of El. 221, Chief Justice Abbott told the jury, that if the agent bribes voters without the knowledge of the principal, it will avoid the election.

Mr. Rogers says, — Law and Practice of El. 221, note A, — "The principles of agency derived from the transactions of private life cannot be applied with strictness to cases of electioneering agency. A candidate at an election professedly seeks an office of trust for the benefit of the public; the public, therefore, is the party mainly interested; nor is it too much to require that, in seeking to obtain such office, the candidate should employ trustworthy agents. In elections, when the protection of the public interests is the object to be attained, a candidate has no right to complain if he is made to suffer from the misconduct of others selected or allowed by him to act for him;" and this principle is settled beyond question by the English Cases. But in the case of *Duffy v. Mason*, 5 Cong. El. Cases, 368, the committee seemed to hold a different view. In that case it seems that the Republican commit-

tee had used money for purposes forbidden by the State statute, though no bribery was proven. The committee say, "The contestants seek to hold the contestee responsible for the acts of the members of the committee representing the Republican party in the district who violated this statute, and in the absence of any proof showing, or tending to show, that the contestee directed or authorized the expenditure of money contributed by him for purposes forbidden by the statute. A principal is not liable for the illegal acts of his agent, unless done at his instance and assent. Good faith and innocence are always presumed. If A. intrusted B. with a sum of money to be used by him for certain lawful purposes, and B., without the knowledge and consent of A., diverts the money from the purposes for which it was to be applied, and uses it for immoral and illegal purposes, A. cannot be held liable for the misconduct of B."

This is undoubtedly true so far as a criminal liability is concerned; but if an agent intrusted with money for the accomplishment of a certain purpose in a legal way applies it in an illegal manner, his principal cannot be permitted to claim the benefit of the act, without being held liable civilly for its consequences. He cannot affirm it by taking advantage of its success, and repudiate his liability because he had not authorized it; and when the illegal act of an agent could be shown to have been the cause of carrying the election, the candidate should be held responsible, regardless of his connivance; and it was held that when the relation of principal and agent subsists between a candidate and person or organization acting for him, he must use ordinary care to find out what such agent is doing in the management of the campaign; and he cannot, by an agreement with an agent, intrust him with the management of his canvass, and then shut his eyes to his acts. *London El. Case*, 24 Up. Can. C. P. 434; *South Norfolk Case*, *Hodgins* (Can. El. Cases), 66c.

The law of Parliament, however, not being a part of the common law of this country, the question as to the liability of the principal for the acts of his agent is not so important in cases of bribery as in cases of fraud, violence, and undue influence.

7. *Agency proven by Acts.*—The doctrine as to the proof of agency by the acts and conduct of the person claiming to act as agent, is also carried farther in election matters than in civil cases in the English election contests.¹

1. Thus, in the Wakefield Case, 2 O'M. & H. 102, it was said, "By the election law the doctrine of agency is carried farther than in other cases. A wider scope has been given to the term 'agency' in election matters, and a candidate is responsible generally, you may say, for the deeds of those who, to his knowledge, for the purpose of forwarding his election, canvass and do such other acts as may tend to promote his election, provided that the candidate, or his authorized agent, have reasonable knowledge that those persons are acting with that object." In the Taunton Case, 21 Law Times, N. S. 169, it was *held* that when a political association of the party to which a candidate belongs had circulated addresses and papers of the candidate, it would be presumed that it was done with his knowledge, and that he would be held responsible for the illegal acts of the managers of the association.

In the Boston Case, 2 O'M. & H. 161, the court say, "The law says, that if a man chooses to allow a number of people to go about canvassing for him,—generally to support his candidature, to issue placards, to form a committee for his election, and to do acts of that sort,—he must, to use a colloquial expression, take the bad with the good. He cannot avail himself of these people's acts for the purpose of promoting his election, and then sit quietly by, and let them corrupt the constituency." In the case of Brassard v. Langevin, 1 Sup. Ct. Can. 145, the court say, "Decisions in England, the election law of which is identical with ours, and those rendered in Ontario and Quebec, lay down the principle, that every person who in good faith takes part in the election for a candidate, with his consent, becomes *ipso facto* an agent of the candidate."

In this country, as well as in England, when any person under the present system of affairs seeks an office of any importance, he does it by asking the nomination and support of a political party having an organization for the purpose of securing the election of its candidates. This party makes its nomination; and to elect its nominees, it works through its committees and officers, who are its agents; and a person, by becoming a candidate of the party,

impliedly asks the assistance of the party organization acting through its committee, and thus constitutes them his agents.

Money raised is disbursed by these committees, and they act as agents of the party; the candidate employs the party; but he is rather to be regarded as the servant of the party than its employer. If, then, the individual, being compelled to make his canvass through an organization, is made to suffer for the illegal acts of the party managers, it may be an individual misfortune, but it is one which is inseparable from the system; and no idea of individual hardship should be allowed to interfere in protecting the people from fraud, corruption, and violence, and maintaining the purity and freedom of the elective franchise. This doctrine is upheld by Mr. Bushby, —El. Law, 120,—who, with good reason, distinguishes between the voluntary organizations, and regular political organizations. He says, "If a committee are *bona fide* volunteers, and not selected by the candidate, they are not to be considered as his agents, —Stayleybridge Case, 1 O'M. & H. 67; Westminster Case, 1 O'M. & H. 92,—but if they are persons who are intrusted by the candidate with the work of carrying out his election, they will be so considered. Westminster Case, *supra*; Blackburn Case, 1 O'M. & H. 200. "Again, if a political organization is formed for the purpose of furthering the election of a candidate of certain politics, and it appears that the candidate derived a certain degree of benefit from the efforts of the association, and did not hold them off or repudiate them, the candidate will be held responsible for any malpractices they may commit." See also North Ontario Case, Hodgins (Can. El. Cases), 3040; East Northumberland Case, *id.* 577.

Where a conservative association, with which the candidate had no connection whatever, had been charged with the registration of voters, and, to induce voters to attend, paid them a fee, this was *held* to be a corrupt practice; and also that the sitting member was responsible for the acts of this committee, although he had no connection with them, and was ignorant of what they were doing; and he was seated. Taunton Case, 1 O'M. & H. 183.

8. *Treating*. — In England and Canada, treating is made an offence, and will avoid an election; but in this country the authorities are not uniform upon this subject.¹

9. *Undue Influence*. — At common law an election may be avoided by an organized system of undue influence of any kind;² but all influence is not undue.³

10. *Undue Influence to secure Nomination*. — In some of the States it is made an offence to bribe a delegate at a nominating convention, or an elector at a party primary election; but in the absence of some statutory provisions, the use of the influence of officers of government to induce the party to nominate a person as their candidate will not constitute such undue influence as to avoid the election.⁴

And see Bristol Case, P. & K. (Eng. El. Cases), 574; Newry Case, id. 151.

On grounds similar to these, it has been held that when the clergy of a particular religious denomination in a district espouse the cause of a candidate, and that candidate acquiesces in their endeavors, he is liable for the acts of every one of the clergy so acting for him. Limerick Case, 1 O'M. & H. 263; Galway Co. Case, 2 O'M. & H. 53.

1. In Tennessee it was held that treating voters with intent to get their votes was an indictable offence. State v. Rutledge, 8 Humph. (Tenn.) 32.

In Kansas, when the lower court found that the successful candidate furnished money, while the election was pending, to a third person, to be used in procuring drinks of spirituous liquors for voters, generally with the intent to facilitate the election, it was held that, as it was not shown that any elector was paid or promised anything for doing any act as an elector, or that any election officer was paid for doing any act as such officer, the election should not be set aside for such treating. Moonlight v. Bond, 17 Kan. 351. This same view was taken in the Hubbardstown Case, Cush. El. Cases, 383, and Sanford v. Alford, id. 45; but in Fuller's Case, id. 346, it was held that to treat them on condition of their voting for a candidate is bribery.

2. Bradford Case, 1 O'M. & H. 40; Droggheda Case, id. 269; Galloway Case, 2 O'M. & H. 56.

3. Bradford Case, 1 O'M. & H. 40; Windsor Case, id. 6.

Spiritual influence is not undue unless the rights of the church are refused, or threats are made equivalent to such a refusal, — Galway Case, 1 O'M. & H. 307, — and a landlord may properly use his influence with his tenants to secure his vote by persuasion. Id. But turning out a tenant, or threatening to do so, — Norfolk Case, 1 O'M. & H. 240, — or discharging employees,

— Blackburn Case, 1 O'M. & H. 204; Westbury Case, 1 O'M. & H. 51; Norfolk Case, 1 O'M. & H. 240, — or threatening to give up a pew in church, — North Allerton Case, 1 O'M. & H. 168, — amounts to undue influence, as does threatening to withdraw custom if it is of any considerable amount, though not if small. North Norfolk Case, 1 O'M. & H. 241.

4. In the case of Chalmers v. Manning, 48 Cong. H. Rep. 1959, a contestee sought to show that there was such interference with the election, and the canvass leading to it, by the executive departments at Washington, and the federal authorities in the district, as to make the election void. The report of the committee, which was in favor of the contestant, stated, that, a short time before the election, he had been declared not elected to a seat which he occupied in the Forty-seventh Congress as a Democrat, and that up to that time he had for years been a Democrat; but that he had at once conferred with leading Republicans at Washington, and with members of the administration, and arranged with them to aid him in securing the support of the Republican party of the district in which he did not then reside. They reported that it was fairly proved that he had the active aid of the departments at Washington, and their subordinates in the district, in the work of securing the support of the Republican party organization, in his canvass. The report, while deprecating the use of federal patronage for such purposes, says that it could not be said that the election of Chalmers was secured by such undue influence in view of his large majority, etc., but that it was perhaps more instrumental in making him the candidate of the Republican party, and suppressing other aspirants for party support, but that with this, in their opinion, the House had no concern.

The legislature has authority to pass a law to punish bribery or fraud at a nominating election. Leonard v. Com., 112 Pa. St. 607.

XVII. Prima Facie Right to Office. — 1. *Given by Regular Certificate.* — As in cases of contest, the office ought to be filled by one of the claimants, while the action is pending, it frequently becomes a matter of importance to determine what evidence is sufficient to show which one should hold the possession of the office until the question of the right is settled. And the form of action to determine the right of an incumbent to hold the office depends upon this question. It is, however, well settled, that, when it is made the duty of certain officers to canvass the votes, and issue a certificate of election in favor of the successful candidate, a certificate of such officers regular upon its face, is sufficient to entitle the person holding it to the possession of the office during an action to contest the right, and is conclusive as to third parties, and in collateral matters.¹

And where the law requires a person to be commissioned, the effect of a commission is the same as the certificate of election.²

Where the law requires a commission to be issued in accordance with the determination of a canvassing board, the officer whose duty it is to issue the commission cannot be compelled to issue one in opposition to that determination, even if it is shown that the decision is not correct, and that it was based upon illegal evidence.³

2. *Certificate vitiated by its own Statements.* — While surplusage will not ordinarily vitiate an instrument, when, in addition to the matters required to be stated in an election certificate, statements are made which show affirmatively that the party holding it was not duly elected, it will not confer a *prima facie* title to the office;⁴ but a statement accompanying the certificate made by the officer who made the canvass will not vitiate the certificate,⁵

1. *Lurton v. Gilliam*, 1 Scam. (Ill.) 577; *People v. Callaghan*, 83 Ill. 128; *Magee v. Supervisors*, 10 Cal. 376; *People v. Jones*, 20 Cal. 50; *People v. Miller*, 16 Mich. 56; *People v. Vail*, 20 Wend. (N. Y.) 12; *Kerr v. Trego*, 47 Pa. St. 292; *Marshall v. Kerns*, 2 Swan. (Tenn.) 68; *State v. Avery*, 14 Wis. 122; *People v. Thatcher*, 7 Lans. (N. Y.) 274; *Com. v. Baxter*, 35 Pa. St. 263; *Swinburne v. Smith*, 15 W. Va. 483; *Crowell v. Lambert*, 10 Minn. 369.

The weight of authority is in favor of this doctrine, even though the certificate was wrongfully issued, — *People v. Miller*, 16 Mich. 56; *Crouse v. State*, 57 Md. 327; *State v. Churchill*, 15 Minn. 455, — or was issued dishonestly by the election officers, — *Kerr v. Trego*, 47 Pa. St. 292, — or even if the returns upon which the certificate was based were forgeries. *Hulseman v. Rens*, 41 Pa. St. 396. But see to the contrary, *Miller v. Lowry*, 5 Phila. 202; *Lee v. State*, 49 Ala. 43.

The validity of a regular certificate is so well recognized, that in Congress, and in

some of the State legislatures, the duty of making up the roll is committed to the clerk of the last House who passes upon the regularity of the credentials in the first instance, and places the names of those holding regular certificates upon the roll as a matter of course; but in 1840, there being two sets of claimants from five districts in New Jersey, the House, being nearly equal politically, refused to permit the clerk to place the names of either set of claimants upon the roll, although one set had the certificate of the governor regular in form, but the others had a certificate of the secretary of state that they had received a majority of the votes cast. *New Jersey Case*, 2 Cong. El. Cases, 19.

2. *State v. Jackson*, 27 La. Ann. 541.

3. *State v. Governor*, 25 N. J. L. 331.

4. *Harri v. Harvey*, 32 Barb. (N. Y.) 55.

5. Thus, where the county clerk was required to keep a record of the proceedings of the board of supervisors, and enter the same, and transmit a copy of such record as an abstract to the secretary of state, it

unless it should be accompanied with other documents offered by the party holding the certificate, which show that the certificate was improperly given, in which case it has been held that the political certificate is destroyed.¹

3. *Contesting the Prima Facie Case.* — In Parliamentary cases, when, by mistake or misconduct of the returning officer, a certificate had been given improperly, a candidate might petition against the return only, and have it considered separately from the merits of the election; and if the case was proved, the returns should be amended by substituting his name in place of that of the other party, thereby giving him the *prima facie* title to the seat, of which he had been deprived by the acts of the returning officer.²

Cushing, in "Law and Practice of Legislative Assemblies," sect. 144, says, "That the practice of considering and deciding upon the returns does not appear to have been anywhere introduced; and, unless the action of the House of Representatives in the case of *Hunt v. Chilcott* may be so considered, this seems to be true in so far as a separate trial is concerned in Congressional cases."³

But in the New York Assembly and the House of Representatives of Ohio the validity of the returns has been considered prior to the trial upon the merits.⁴

was held that the secretary must be governed by the record alone, and could not consider an additional statement which was not a part of the record, but was made up by the clerk, and sent by him as explanatory of the proceeding. *Pacheco v. Beck*, 52 Cal. 3; *Wigginton v. Pacheco*, 5 Cong. El. Cases, 5.

1. In the case of *Hunt v. Chilcott*, 3 Cong. El. Cases, 164, Mr. Hunt presented a certificate from the governor to the effect that an election was held on Aug. 7, 1866, and that A. C. Hunt had been duly elected. By the statute the secretary, auditor, and treasurer were required to canvass the votes in the presence of the governor, and the governor was required to give a certificate of election to the person having the highest number of votes.

Mr. Hunt also introduced a statement of the governor to the effect that he considered himself a member of the canvassing board, and that there was a division of the other members, two wishing to give the certificate of election to Mr. Chilcott, and one to Mr. Hunt; that he agreed with the latter, making a tie, whereupon he determined the matter himself. Among the papers was a statement signed by the majority of the board, showing that Mr. Chilcott had received the greatest number of votes, and a second certificate of election dated five months afterward, signed by the then acting governor, that Mr. Chilcott was duly elected; and the House adopted a minority

report seating Mr. Chilcott pending the contest by more than two-thirds vote.

2. *Rogers El. Committees* (5th ed.), 83.

Thus, in a case where an officer against whom there had been a complaint for gross partiality, had rejected the votes of a large number of voters for trivial reasons, the committee added such rejected votes, and amended the return by inserting the name of the contestant in place of that of the sitting member. *Canterbury Case*, K. & O. (Eng. El. Cases) 131; *Waterford Case*, Bar. & Aust. (Eng' El. Cases) 648; *Athlone Case*, id. 660.

In such cases, the House usually allowed the unseated person to contest the seat, and he may now do so by statute. 31 & 32 Victoria, ch. 125, § 53.

3. In the case of *Wallace v. McKinley*, 48 Cong. H. R. No. 1548, while the committee did not separate the evidence in the case, nor report on the *prima facie* case before the report was made on the merits, they added to the vote of the contestant all the votes which had been returned for other persons, which were proved or admitted to be intended for him; and this having given him a few plurality, it was held that the burden of the proof was cast upon the sitting member to maintain his right to the seat as against contestant.

4. Thus, in the New York Assembly, where enough votes cast for F. Baker, and Col. Baker, had been rejected from the count for Steven Baker, to have given him

4. *Effect of Irregularity of the Certificate.*—Where the law required a certificate to state certain facts, and they were omitted, but it contained other statements which would be sufficient were it not for the requirement of the statute, this will not prevent an inquiry in the *prima facie* right to the seat pending the contest, where other documentary evidence is offered to show that the other party received the largest number of votes.¹

5. *Form of Certificate for Representative in Congress.*—When no form of the credentials for representative in Congress is prescribed by the State law, it is enough to make a *prima facie* case, if the certificate comes from the proper State officer, and clearly shows that the person claiming under it, had been adjudged to be duly elected by the official, or board on whom the law of the State imposed the duty of ascertaining and declaring the result.²

6. *Effect of Conflicting Certificates.*—As the act of granting a certificate is merely ministerial, it would seem that, when a certi-

a majority, it was *held* that he was entitled to the seat pending the contest; and the sitting member was unseated with leave to contest, following the rule in the older Parliamentary cases. *Baker v. Gregory*, N. Y. Cont. El. Cases, 401.

In the Ohio legislature, in 1886, the seats of ten members from Hamilton County, who were elected upon a general ticket, were contested. The committee reported that an examination of the returns from one precinct showed such fraud on the part of the election officers, in adding fictitious names to the poll-book, and increasing the tally for the sitting members, as to render the returns from the precinct worthless, and that, by rejecting them, nine of the contestants were entitled to the seats *prima facie*; and they were seated with leave to the unseated members to continue the contest. Ohio House Journal, 1886, p. 38.

1. In the case of *Hunt v. Sheldon*, 3 Cong. El. Cases, 530, the State law required the governor, jointly with the secretary of state and a judge of one of the district courts, to ascertain from the records the person duly elected, to enter a certificate of this, and a copy to be given to the person, and another transmitted to the House of Representatives. The certificates issued from that State usually stated that the successful candidate had been duly elected; but in this case it declared that it had been ascertained that each candidate had received a certain number of votes, and that Mr. Sheldon had received a majority of the votes cast.

The committee received a statement signed by the governor and secretary of state, and given to Mr. Hunt, showing that more than nineteen thousand votes—of which more than fifteen thousand and five hundred were for contestant—had been

rejected for certain irregularities. The majority of the committee *held*, that, whatever might be the result of a contest upon the rejected votes, the returns as made were to be taken as *prima facie* evidence of the result of the election.

2. *Clarke Case*, 4 Cong. El. Cases, 6; *Hunt v. Chilcott*, 3 Cong. El. Cases, 164. In the case of *Covode v. Foster*, 3 Cong. El. Cases, 519, the committee gave Mr. Covode the seat during the contest upon very informal certificate. In the regular proclamation, the governor omitted the name of any person from the Twenty-first District. The following February he sent to the clerk of the house a letter attested by the secretary of state, under the seal of the State, as follows.—

“Sir, — I have the honor to transmit herewith additional affidavits and evidences of fraud submitted to me in regard to the election of member of Congress in the Twenty-first Congressional District of this State.

“These affidavits were taken before officers properly authorized to administer oaths of and indicate the election of Hon. John Covode.

“Most respectfully,

“Your obedient servant,

“JOHN W. GEARY,

“Governor of Pennsylvania.”

It was *held* that the letter, with the affidavits, was sufficient to establish a *prima facie* right to the seat. Where the certificate is regular, and is relied on by the sitting member, the house will not consider anything beyond it in the *prima facie* case. *Butler v. Lehman*, 2 Cong. El. Cases, 353.

It would be sufficient, where no legal form is prescribed, if the certificate conformed to the established custom or usage. See *Kerr v. Trego*, 47 Pa. St. 292.

ficate had been issued, the power of the board is to be considered at an end, and that the certificate would be irrevocable except by regular contest, and that a subsequent election or commission would have no validity.¹

But in Congress this view has not always prevailed.²

7. *Other Evidence.* — In the absence of a formal certificate when such is required by the State law, or in the absence of a commission or certificate issued by the governor, the House will consider the *prima facie* case upon other credentials presented by the claimants, and determine whether they are sufficient to give a *prima facie* right to the seat; although this evidence is secondary, yet it may be such as to show the right to a seat upon mere inspection, as where a certified copy of the abstract of the canvass is presented.³

1. *Ewing v. Thompson*, 43 Pa. St. 372, where the court held, that, when the executive had commissioned a person elected according to the forms of law, his duty was performed, and a right was vested in the person commissioned which nothing but a judicial decision could take away, or authorize the executive to recall.

2. Thus, in the case of *Morton v. Daily*, 2 Cong. El. Cases, 402, the governor, after having given one certificate upon the ground of fraud, afterward gave another in which he revoked as far as possible the first one, and the holder of the latter was awarded the seat pending the contest.

In the case of *Hoge v. Reed*, 3 Cong. El. Cases, 540, there was a certificate issued to Reed, signed by three of the four canvassing officers, stating that he had been duly elected by a majority of the votes, and he was commissioned to the governor. Mr Hoge presented a certificate made later in the day, signed by all the members of the board, one of whom stated that he had signed the Reed certificate under protest, and desired to have it treated as if his name had not been attached. And, following the decision in *Morton v. Daily*, the committee gave effect to the second certificate. In the case of *Wallace v. Simpson*, at the next session of the same Congress, however, an opposite conclusion was reached by the House. *Wallace v. Simpson*, 3 Cong. El. Cases, 552. In neither of these cases was the certificate such as the State law required to be issued, and, therefore, the cases are not precisely the same as *Morton v. Daily*. *Judge McCrary*, Am L. of El. sec. 212, says that the case of *Hoge v. Reed* must have been decided without due consideration.

3. Thus, in *Gunter v. Wiltshire*, 4 Cong. El. Cases, 130; and *Gause v. Hodges*, 4 Cong. El. Cases, 291, the governor of Arkansas in office at the time of the election failed to give a certificate to either

candidate; but afterward a new governor issued a proclamation containing an abstract of the vote of the district by counties, with a certificate that it was correct as shown by the returns on file in the office of the secretary of state. Upon this proclamation the House admitted the candidate shown by the abstract to have the greatest number of votes.

In the *Richards Case*, 1 Cong. El. Cases, 95, the House admitted the claimant upon an examination of the county return, where the governor had declined to issue a certificate; and in the *Clements' case*, after the passage of the Ordinance of Secession by the State of Tennessee, the claimant was seated upon secondary evidence of the votes cast at the various precincts with a certificate of the returning officers from one county only. 2 Cong. El. Cases, 366.

In the case of *Koontz v. Coffroth*, 3 Cong. El. Cases, 35, where the State statute required that the county returns should be canvassed by a district board, composed of one return judge, to be selected from each county, and that this board, after canvassing the vote, should make a certificate of election in favor of the successful candidate, and send the same to him within five days, and should send the returns to the secretary of state, and also required the governor to issue his proclamation based upon such returns declaring the result of the election, the governor omitted to name any person as elected from this district, and stated that no such returns had been received by the secretary of state from this district as would warrant him in proclaiming any person elected. Mr. Coffroth had, however, a certificate signed by four county return judges out of the five in the district, the fifth having failed to attend upon notice. The certificate showed that the board counted only the votes of four counties, and declared that Coffroth had received the majority of all votes cast as

8. *Conditional Certificates or Double Returns.* — In cases where questions of law have been presented to the returning officer which he was unable or unwilling to decide, a certificate has been given to each party stating that he was elected if the question of law was decided in his favor. In Parliament it seems that neither person could take the seat until there had been a report of the committee in his favor.¹

And this is the practice also in Congressional cases.² Where there are conflicting returns signed by different persons claiming to be the proper canvassing officers, it was the practice in Parliament first to dispose of the question as to the title of the returning officers, and adopt, or, if the return was made to a higher officer, to amend it properly.³

9. *Certificate does not settle Question of Eligibility.* — A certificate of election is only evidence that the holder has received votes sufficient to elect him, and does not preclude an inquiry into the question of his qualification prior to his taking the seat upon a *prima facie* title.⁴

10. *Effect of Certificate in Contest.* — While the certificate or commission confers an apparent title to the office which cannot be questioned collaterally, it does not preclude an investigation of the right of the office by a contest by another claimant, or an inquiry by the attorney-general in the name of the people; but in such a case the effect of the certificate is to cast the burden of proof upon the person excluding the right of a person having a certificate; and where the statute requires proceedings to contest the election to be commenced within a certain period, and no other method of trying the title is allowed, and there are no proceedings taken to contest the election within the statutory period, the certificate is held to be conclusive as against an adverse claimant.⁵

Where a person holding a commission was seeking to compel admission to the office, it seems that fraud upon his part in obtaining it may be set up as a defence.⁶

counted by the board. The majority report, which was approved, gave the seat to Cofroth pending the contest; although the principle of the minority report had been upheld by the early case of *Letcher v. Moore*, 1 Cong. El. Cases, 775, where one of the candidates had a certificate signed by three returning officers showing that the votes of four counties only out of five had been counted: and, after a lengthy debate, the House refused to admit either party until the committee had passed upon the questions involved in the contest.

1. 1 *Roe on El.* 803.

2. *West Virginia Case*, 4 Cong. El. Cases, 108; *Patterson v. Belford*, 5 Cong. El. Cases, 52.

3. 1 *Roe on El.* 798.

In Congress this same rule would prevail unless the House where the contest is

pending had previously recognized one of the rival governments as the legal one, in which case the seat would be awarded during the contest to the claimant holding the certificate from the recognized authority. *Sheridan v. Pinchback*, 4 Cong. El. Cases, 196; *Louisiana Cases*, Sen. El. Cases, 426.

4. In the House of Representatives it is the practice to make inquiries as to the eligibility of the party before he is sworn, unless another person claims the seat, and he will not be permitted to be sworn where objection is made until this question is determined. *Kentucky El. Cases*, 3 Cong. El. Cases, 327; *Smith v. Brown*, id. 395; *McKee v. Young*, id. 422.

5. *State v. Jackson*, 27 La. Ann. 541.

6. Thus, where a person commissioned as sheriff made application to compel the county board to approve his official bond,

It has been held that where the proper appointing power commissions a person to an office, upon a certificate from the proper officers to the effect that there is a vacancy in the office, the holder of the new commission is entitled to the possession of the office, and that the prior incumbent, and not the appointee, must resort to his action to determine the right of the office.¹

But the contrary view has been taken in another State, and it seemed to be better supported by principle.²

XVIII. Remedies in Election Cases. — 1. *Right must be tried in Direct Proceedings.* — One of the points which is well settled is, that the right of an officer in possession of an office under color of title, cannot be called in question in an action to which he is not a party, and that, as to the public and to third persons, his official acts are valid where he is in possession of the office *de facto*, even though he is not entitled to hold it as a *de jure* officer.³

But where the person is sued, and justifies as an officer, or attempts to enforce his rights as an officer, his right to the office may be determined in such an action;⁴ although in such a case the possession of a certificate of election, or a commission and proof of his qualification, will be sufficient proof of his title to the office; and questions of the qualifications of voters, or the correctness of returns, cannot be tried in such cases.

(A) **MANDAMUS.** — 1. *Definition of the Term.* — The writ of *mandamus*, as used in election law, may be said to be "A command issuing from a common-law court of competent jurisdiction,

it was *held* that the commission was merely *prima facie* evidence of its own recitals, and that evidence was admissible to show that it had been procured by fraudulent affidavits, varying a declaration of the board of canvassers, and the certificate of their clerk. *Boone Co. Comrs. v. State*, 61 Ind. 319. But see *State v. Dodson* (Neb.), 31 N. W. Rep. 788, where it was *held* that in *mandamus* to compel the delivery of official records, the court could not go behind the certificate.

1 *Beebe v. Robinson*, 52 Ala. 66; *Thompson v. Holt*, 52 Ala. 491; *Harris Ex p.* 52 Ala. 87.

But if the certificate shows on its face facts which, legally considered, show that there was no vacancy, the commission will have no validity. *Plowman v. Thornton*, 52 Ala. 559.

2. *State v. Jones*, 19 Ind. 359.

3. *Creighton v. Piper*, 14 Ind. 182; *McKim v. Somers*, 1 Pa. 297; *People v. Cook*, 8 N. Y. 67; *Baird v. Bank*, 11 S. & R. (Pa.) 414; *Pritchett v. People*, 1 Gilm. (Ill.) 529; *People v. Ammons*, 5 Gilm. (Ill.) 105; *Greenleaf v. Low*, 4 Denio (N. Y.), 168; *McGregor v. Balch*, 14 Vt. 428; *Cooper v. Moore*, 44 Miss. 388; *State v. Lewis*, 2 La. Ann. 33; *Sudbury v. Heard*, 103 Mass. 543.

It has been *held* that the right of the clerk of the court could not be tested by a motion to quash a summons issued by him in a suit pending in the court, — *Eaton v. Harris*, 42 Ala. 491; — nor could the right of a person be tried by raising a question as to his power to swear a person to an affidavit when the affidavit was offered in a suit, — *Kaufman v. Stone*, 25 Ark. 336; — nor in a *mandamus* against an auditor to compel him to draw a warrant for the salary of relator when another person had the commission, — *State v. Mosely*, 34 Mo. 375; — nor in a suit against a county or town for the fees of an office when another was in possession. *Hunter v. Chandler*, 45 Mo. 452.

4. It has been *held* that the title to an office may be determined in a suit against an incumbent for money had and received when there had been a wrongful intrusion upon the plaintiff in possession. *Glasscock v. Lyons*, 20 Ind. 1; *Allen v. McKeen*, 1 Sumn. (U. S.) 287. And in an action of trespass the legality of the election and the right to the office may be tried. *Shepherd v. Staten*, 5 Heisk. (Tenn.) 79. And where a person sues in his official capacity, his title to the office may be put in issue in the suit. *People v. Weber*, 86 Ill. 283.

directed to some officer, or body of officers, in the name of the sovereign, the people, or the State, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, and an expressed or implied command of the law."

But in some States the writ is only allowed where the duty is specially enjoined by law.¹

The scope of the writ is not so broad as that of *quo warranto*; nor can all matters be determined in this action which could be settled in a statutory contest. The writ is only issued to require the performance of a ministerial act, which it was the duty of the respondent to perform, or to compel a tribunal having judicial discretion to act in the matter without attempting to control its discretion.²

2. *To compel Call of Election.*—Where it is the duty of an officer or board to order an election for any purpose, and they neglect or refuse to do so, they may be compelled to make the order by a writ of *mandamus*.³ But in Illinois it was held that *mandamus* will not lie to compel the governor to call an election.⁴

3. *To compel Registration of Qualified Voters.*—Where the duty of the register is merely ministerial, he may be compelled by *mandamus* to enter upon the registry the name of one entitled to be registered who has complied with the statutory conditions.⁵ But if the board is authorized by law to decide upon qualifications of electors, and they have decided the question, and refused to enter the name, *mandamus* will not lie to compel them to do so.⁶

4. *To compel giving Certificate of Election.*—The duty of giving a certificate of election is merely ministerial, and the board may be compelled to grant such certificate by this action.⁷

5. *To compel Issue of Commission.*—The award of a commission has generally been considered as a ministerial act; and where the

1. *Dalton v. State*, 43 Ohio St. 652.

2. High on Extr. Rem. § 24.

3. *People v. Fairbury*, 51 Ill. 149; *McConihe v. State*, 17 Fla. 338; *State v. Rahway*, 33 N. J. L. 110.

The fact that there are not funds enough in the treasury to pay the expenses of an election, it was held not to be a sufficient defence to an alternative writ to compel the officer whose duty it was, to call such election. *Gibbs v. Bartlett*, 63 Cal. 117.

When the duty depends upon the presentation of a petition signed by a certain number of legal voters, and it is the duty of the board to determine the facts, if they have acted officially, and refused to make the order for lack of proper names, *mandamus* will not lie to compel them. *State v. Commissioners of Eureka*, 8 Nev. 309.

4. *People v. Cullum*, 100 Ill. 472.

This seems to be based upon the doc-

trine which prevails in that State, that the courts have no power to coerce the head of the executive departments of the government by *mandamus*. *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126.

5. *Davies v. McKeeby*, 5 Nev. 369.

6. *Freeman v. Selectmen of New Haven*, 34 Conn. 406.

7. *State v. Judge*, 9 Ala. 338; *State v. Judge*, 13 Ala. 805; *Clark v. McKenzie*, 7 Bush (Ky.), 523; *Kisler v. Cameron*, 39 Ind. 488; *State v. County Judge*, 7 Iowa, 186; *State v. Bailey*, 7 Iowa, 390; *Strong, Petitioner*, 20 Pick. (Mass.) 484.

Where a court has to judicially determine that a candidate was legally elected, and a certificate is necessary for the purpose, the proper officers may be compelled to issue it. *Burke v. Monroe Co.*, 4 W. Va. 370.

officer whose duty it is to issue the commission can be coerced by this writ, it will lie to compel him to issue the commission.¹

But in Missouri it was held that the act of the governor in issuing is not ministerial, and that it could not be compelled by *mandamus*, and that he might look beyond the certificate of election, and determine for himself who was elected to the office.²

6. *To compel Complete Canvass.*—The powers of canvassing officers being merely ministerial, they may be compelled by *mandamus* to canvass all the votes certified to them;³ and, even where the decisions of the canvassing board are made conclusive of all questions of law and of fact, it may be compelled to proceed with the canvass; and it is no excuse for a refusal of the proper officers to act, that the returns had been canvassed by other persons.⁴

A canvassing board cannot be compelled to reject any genuine returns for alleged fraud, and the court has no authority to command the canvassers to decide that any part of the returns was invalid by reason of fraud.⁵

7. *To compel Rejection of Illegal Returns.*—Where an officer, in making the canvass, compiles the figures from other documents than the returns sent as required by law, he may be compelled to canvass and compile the returns sent him from the returning officers, and promulgate the result as shown by them.⁶

8. *At what Time awarded.*—It has been held that a writ of *mandamus* will not be awarded to compel a board of canvassers

1. *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572.

2. *State v. Fletcher*, 39 Mo. 388; *State v. County Court of Howard Co.*, 41 Mo. 247.

In *Arkansas* it is also held that the governor cannot be compelled to issue a commission,—*Hawkins v. Governor*, 1 Ark. 570;—and in *Florida*, that he cannot be compelled to commission one declared elected by a member of Congress. *State v. Drew*, 17 Fla. 67.

It has been held in *Missouri* that the relator must show a good title to the office, in order that he should be entitled to a writ to order a commission. In this case, it was held that, where the laws in regard to registration had not been complied with, the writ would not be issued to compel the granting of the commission. *State v. Albin*, 44 Mo. 346.

3. *People v. Hilliard*, 29 Ill. 413.

4. *Batman v. McGowan*, 1 Metc. (Ky.) 533.

5. *Fells Case*, 11 Abb. Pr. N. S. (N. Y.) 203; *State v. County Judge*, 7 Iowa, 186; *Dalton v. State*, 652; *People v. Supervisors*, 58 How. Pr. (N. Y.) 141.

In *Kansas* it was held, in a case to compel the canvass of the vote for choice of a county-seat, that evidence was admis-

sible to show that a large portion of the votes cast was illegal. *State v. Marsten*, 6 Kan. 524; *State v. Stevens*, 23 Kan. 456.

In *Ohio* it was held, where an election had been held for an office, when there was no vacancy, that the canvassing boards, although their duties were ministerial, and they had no right to consider the question of a vacancy, yet the court would consider it, and not compel the performance of an act that was useless. *State v. McGregor*, 44 Ohio St. 628.

In *Missouri*, where the return of the alternative writ stated that there was an alteration in one of the returns, but that the board did not know whether the alteration had been made before, or after, the return had been filed with the clerk, the court held that, although the board had no power to hear evidence on that point, the court could determine the matter, and order the canvass to be made in accordance with its decision. *State v. Garesche*, 65 Mo. 480.

In the case of *Dalton v. State*, 43 Ohio St. 652, the case of *State v. Garesche* is said to stand alone; and it seems to be unsupported by any principle of the law of *mandamus*.

6. *State v. Secretary of State*, 32 La. Ann. 579.

to canvass the returns in a certain manner, before they have taken any action in the matter, even if they have made threats or indicated their determinations to act in a certain way;¹ but where they have decided a question of the regularity of the returns, and have announced their decision in which they count or reject any of them, the writ will be awarded to compel them to make the canvass legally, at any time before they have issued the certificate.²

Where an officer is required to perform a duty by a certain time fixed by the law, and before that time he gives notice that he will not do it, it has been held that *mandamus* will at once lie to compel him.³

9. *Effect of Prior Certificate.*—Upon the question as to whether *mandamus* will lie to compel a recount, or to compel the issue of a certificate to the relator, when one has been already issued to the opposing candidate, there is a decided conflict of authority. Mr. High says (Ex. Rem. § 62), "Ordinarily the fact that the canvassing officers have given a certificate of election to another person will not prevent the granting of the writ to certify the election of the relator, he appearing to be properly entitled thereto;" and a number of cases were cited in support of this rule.⁴

On the other hand, it has been held by several courts that where the result of a election has been declared, a person should be left to his remedy by *quo warranto* or contest;⁵ and this doctrine is approved as the better rule by Judge McCrary.⁶

10. *Effect of Adjournment of Board.*—The same conflict of authority exists as to the power of the court to compel the board

1. *State v. Carney*, 3 Kan. 88.

2. *State v. Marks*, 6 Lea (Tenn.), 12. But this is not so where, by the law, the board is intrusted with discretion, or a judicial power, in making the canvass. *Grier v. Shackelford*, 2 Brev. (S. C.) 549; *Mayor of Vicksburg v. Rainwater*, 47 Miss. 547; *Arberry v. Bears*, 6 Tex. 457.

3. *Morton v. Comptroller Gen'l*, 4 S. Car. 430.

4. *Ellis v. County Commissioners*, 2 Gray (Mass.), 370; *State v. Avery*, 14 Wis. 122; *People v. Rives*, 27 Ill. 242; *People v. Hilliard*, 29 Ill. 419; *State v. Hodgman County Commissioners*, 23 Kan. 264; *State v. Lawrence*, 3 Kan. 95; *People v. Mattheson*, 17 Ill. 167.

5. *Magee v. Supervisors*, 10 Cal. 376; *State v. Rodman*, 43 Mo. 256; *State v. Stewart*, 26 Ohio St. 216; *Sherburne v. Horn*, 45 Mich. 160; *People v. Supervisors of Green County*, 12 Barb. (N. Y.) 217.

In the case of the *People v. Cover*, 50 Ill. 100, and which modifies the prior decisions in that State, it was held that a writ of *mandamus* would not be awarded to compel the issue of the second certificate where there was a provision for a statutory contest; and this agrees with the opinion

of the court of Ohio in *State v. Stewart*, 26 Ohio St. 216.

The Supreme Court of *North Carolina* has decided that where the canvassing board has given a certificate of election to a person as elected to the House of Representatives, the only remedy is by contest before the House. *O'Hara v. Powell*, 80 N. Car. 103.

Where the person has availed himself of the right to appeal from the decision of the board, he cannot compel a canvass where the certificate has been issued to the opposite party. *Ingerson v. Berry*, 14 Ohio St. 315.

In New York it was held, that, where the canvassers had rejected an informal return without giving an opportunity to correct it, they might be compelled to send it back for correction, although they had granted a certificate. *People v. Green County Canvassers*, 12 Abb. N. Cas. (N. Y.) 95; *People v. Payne*, 12 Abb. N. Cas. (N. Y.) 103.

In Arizona it has been held that *mandamus* is not the proper remedy to contest an election for a county-seat after the board has declared the result. *Territory v. County of Mohave* (Ariz.), 12 Pac. Rep. 730.

6. Am. Law of El. 2d ed. § 385.

to reconvene and canvass the vote after it has made the canvass, announced the result, and adjourned. The courts of five or six States have decided in favor of this power,¹ but a number of cases hold the other way.²

11. *Mistake of Law as to Jurisdiction.* — An honest belief that they have no authority to do the act demanded will not prevent the allowance of the writ, when there is a mistake of law as to the preliminaries necessary to confer jurisdiction on the board.³

When, however, their jurisdiction is dependent on a matter of fact, of which such board is a judge, its decision is final, unless appealed from.⁴ But where the question of fact is one that the board has no jurisdiction to determine, and they make a mistake of law, it is no defence.⁵

12. *Canvass of Votes at Illegal Elections.* — The same conflict of authority exists as to the power of the canvassing board to consider the question of the legality of the election, and of the courts to compel them to canvass the votes regardless of that question.⁶

13. *For what Office Canvass may be compelled.* — There is a difference of opinion in the courts as to the authority to compel the

1. *Moore v. Jones*, 76 N. Car. 182; *State v. Gibb*, 13 Fla. 55; *Lewis v. Comrs. of Marshall Co.*, 16 Kan. 102; *State v. Peacock*, 15 Neb. 442; *People v. Wayne County Canvassers*, 12 Abb. N. C. (N. Y.) 77; *People v. Nordheim*, 99 Ill. 553.

2. *Oglesby v. Sigman*, 58 Miss. 502; *Myers v. Chalmers*, 60 Miss. 772; *Clark v. Buchanan*, 2 Minn. 346; *Swain v. McRae*, 80 N. Car. 711; *People v. Supervisors of Greene Co.*, 12 Barb. (N. Y.) 217.

In Missouri it was *held*, that when the returns are still in the hands of a member of the board, and the time for making the canvass had not expired, the board may be required to re-assemble and canvass the vote. *State v. Berg*, 76 Mo. 136.

3. *Reg. v. Goodrich*, 19 Law Jour. Q. B. 413; *Reg. v. Leicester*, 15 Q. B. 671.

4. In the same cases, where there was proof of the personal service required to give the board jurisdiction, but the meeting considered the witnesses unworthy of credit, and refused to go into the question of contest, the court *held* that the board having decided a question of fact over which it had jurisdiction, the decision was final, and the court could not interfere.

5. Thus, where the board of canvassers refused to count and return the vote cast at a town-meeting for justice of the peace, upon the ground that there was no vacancy, and that the election was unauthorized by law, the court, having decided that the election was properly held, granted a *mandamus* to compel the board to re-assemble and canvass the votes after they had adjourned after canvassing the votes for

the other officers. *People v. Schielein*, 95 N. Y. 124. But in a case where the court determined there was no vacancy, it refused to order the canvass made. *State v. McGregor*, 44 Ohio St. 628.

6. Thus, in *Kisler v. Cameron*, 39 Ind. 488, the court *held* that it was the duty of the inspectors simply to cast up the returns, declare the result, and issue the certificates as required by statutes, and refused to consider the question of the legality of the election in the *mandamus* proceedings.

But in Nebraska it was *held*, that, where the election was not authorized by law, the canvassing officers could not be compelled to canvass the votes. *State v. Whittemore*, 11 Neb. 175. And the same doctrine was *held* in Kansas. *State v. Robinson*, 1 Kan. 17; *Peters v. Board State Canvassers*, 17 Kan. 365.

Where a petition shows that there was a general election for officers, and at the same election the question of the adoption of a local law was properly submitted to the vote of the people in about one-half of the election districts, and that in the remaining districts there was no legal submission, but the people voted on the question, and there was a majority against the adoption if the whole vote was counted, but in favor of it if the vote was counted only in the precincts where the question was properly submitted, the court refused the writ to require the canvassers to canvass the vote in the precincts where the question was properly submitted, and to declare the result from the vote in those precincts alone. *People v. Solomon*, 46 Ill. 415.

canvassing board to make a legal canvass, in cases where the seats of members of Congress, or the State legislature, are concerned.¹

14. *To whom the Writ may issue.* — Except in cases where the writ is sought against the head of the executive department, against whom the writ will not generally issue, it seems to be immaterial what are the general functions of the office filled by the person whose duty it is to issue a certificate, or commission, provided it is made his duty by law to issue such certificate, or commission.²

The incumbent of an office to which another person has been elected, may be compelled by this writ to issue a certificate to the relator, where the office is in dispute.³

It is not probable that the writ would issue against a mere trespasser to compel the delivery of the books of the office to the rightful officer, as in such a case the same remedy would have to be sought as in cases of trespass, or theft of private property.⁴

15. *Will compel Forwarding of Returns.* — The writ may be awarded to compel an officer to forward returns to the proper custodian, where he fails or refuses to do so.⁵

16. *Not Proper Action to try Title to Office.* — The weight of authority is overwhelmingly in favor of the doctrine, that *mandamus* is not the proper action to try the title to an office where

1. In Congressional Cases, the cases of *Pacheco v. Beck*, 52 Cal. 3; *State v. Alachua Co. Canvassers*, 17 Fla. 9; *State v. State Board of Canvassers*, 36 Wis. 498, uphold this power; while it is denied by *O'Hara v. Powell*, 80 N. Car. 103; and *Myers v. Chalmers*, 60 Miss. 772, in case the board has adjourned.

The power over canvass in legislative cases is affirmed in *O'Ferrell v. Colby*, 2 Minn. 180; *State v. Lawrence*, 3 Kan. 95, by the Supreme Court of Pennsylvania, — *Cont. El. of Senator Re*, 2 At. Rep. 341, — where it was said that a court merely decides which candidate has received the most votes, and is entitled to a certificate, and that the conclusion of the Supreme Court in *certiorari* is not binding on the House. But in *Dalton v. State*, 43 Ohio St. 652, the Supreme Court of Ohio held that the constitutional provisions, that each House shall be judge of the election returns and qualification of its own members, confers exclusive jurisdiction, and that a pretended judicial determination of any other tribunal in form deciding that a candidate for either House is elected is a nullity. But the House of Representatives in Congress has held that a certificate of election made in obedience to a writ of *mandamus* from a State court has the same legal effect as if made without such orders. *Bisbee v. Hull*, 5 Cong. El. Cases, 315.

Of course, no court has any authority to call in question the decision of either branch of the legislature in the case of the election of its members. *State v. Jarrett*, 17 Md. 309; *People v. Mahoney*, 13 Mich. 481.

2. Thus, *mandamus* has been issued against boards of canvassers, — *Clark v. McKinzie*, 7 Bush (Ky.), 523; *Ellis v. County Comrs.*, 2 Gray (Mass.), 370; *State v. Gibbs*, 13 Fla. 55, — against county clerks, — *People v. Rives*, 27 Ill. 242, — clerks of court, — *Brower v. O'Bryan*, 2 Ind. 423, — secretary of state, — *State v. Lawrence*, 3 Kan. 95, — and, in Maryland, even against the governor, to compel him to commission a candidate. *Groome v. Gwin*, 43 Md. 572.

But the weight of authority is to the effect that the governor cannot be compelled to perform any act by *mandamus*. *State v. Governor*, 39 Mo. 388; *State v. Governor*, 1 Dutch (N. J. L.) 331; *Hawkins v. Governor*, 1 Ark. 570; *People v. Cullum*, 100 Ill. 472.

The fact that there are other persons joined with the governor in the performance of the duties of a canvassing board, will not render him amenable to the writ. *Dennett Re*, 32 Me. 508.

3. *Brower v. O'Bryan*, 2 Ind. 423.

4. *Hursey v. Hamilton*, 5 Kan. 462.

5. *State v. Nerland*, 4 S. Car. 485.

another person is in possession, as an officer *de facto*, under a *bona fide* claim to the office,¹ although in few States this is held to be the appropriate remedy.²

Where, however, the title of the incumbent is clearly void, or clearly colorably only, the writ to obtain possession of the office may be allowed.³

While, however, the permanent right cannot be tried in a *mandamus* proceeding, the *prima facie* right may be tested in an application for the writ, to secure possession of the office, or the books, records, or other insignia; and in this proceeding the legality of the election of relator, and his right to the office, may be tested, though even in such a case the incumbent's right cannot be tried where it is doubtful;⁴ and where there is a special method to obtain possession of the books of the office, such remedy must be pursued, and *mandamus* will not be avoided.⁵

In England the cases do not seem to be entirely consistent, as to when *mandamus* will be avoided.⁶ And in some of the States where the returns to an alternative writ could not be traversed, it was held, that, where the return set up a defence which would have been valid in a contest on the merits, the peremptory writ would be denied, until the return was proved false in an action for a false return.⁷

17. *To enforce Duties growing out of Election.*—Where a relator has been regularly elected and commissioned, and is entitled to the possession of public buildings by reason of his election, their

1. *Anderson v. Colton*, 1 Neb. 172; *Duane v. McDonald*, 41 Conn. 517; *Fitch v. McDiarmid*, 26 Ark. 482; *Underwood v. White*, 27 Ark. 382; *People v. Stevens*, 2 Abb. Pr. N. S. (N. Y.) 348; *People v. Stevens*, 5 Hill, 616; *People v. Corporation of New York*, 3 Johns. Cases (N. Y.), 79; *People v. Dikeman*, 7 How. Pr. (N. Y.) 124; *Gardener's Case*, 68 N. Y. 467; *Bonner v. State*, 7 Ga. 473; *People v. Detroit*, 18 Mich. 338; *State v. Churchill*, 15 Minn. 455; *Denver v. State*, 10 Nev. 28; *Warner v. Myers*, 4 Oregon, 72; *Meredith v. Supervisors*, 5 Cal. 433; *State v. Johnston*, 29 La. Ann. 399; *State v. Dunn*, Minor (Ala.), 46; *Reg. v. Derby*, 7 A. & F. 423; *Rex v. Winchester*, 7 A. & E. 215; 2 N. & P. 274; *Rex v. Colchester* (Mayor), 2 Term R. 259; *State v. Co. of Coahoma* (Miss.), 3 So. Rep. 143.

2. *Strong*, Petitioner, 20 Pick. (Mass.) 484; *Conlin v. Aldrich*, 98 Mass. 557; *Barton v. Wilson*, 4 Tex. 400; *Lindsey v. Luckett*, 20 Tex. 516; *Harwood v. Marshall*, 5 Md. 83.

3. *Dew v. Judge*, 3 Hen. & M. (Va.) 1; *State v. Ely*, 43 Ala. 568; *People v. Kilduff*, 15 Ill. 492; *People v. Head*, 25 Ill. 325; *Atherton v. Sherwood*, 15 Minn. 221.

4. *Beal v. Ray*, 17 Ind. 554; *Crowell v. Lambert*, 10 Minn. 369; *Atherton v. Sher-*

wood, 15 Minn. 221; *State v. Layton*, 28 N. J. L. 244; *Burr v. Norton*, 25 Conn. 103; *King v. Owen*, 5 Mod. 314; *King v. Payn*, 1 Nev. & P. 534; *King v. Ingham*, 1 W. Blacks. 50; *Rex v. Chapham*, 1 Wils. 305; *Kimball v. Lamprey*, 19 N. H. 215; *Walter v. Belding*, 24 Vt. 658; *State v. Pitot*, 21 La. Ann. 336; *State v. Williams*, 25 Minn. 340; *State v. Meeker*, 19 Neb. 444.

5. *People v. Stevens*, 5 Hill (N. Y.), 616.

6. In one case, upon affidavits that some of the votes cast for the opposite party were illegal, and that the relator had a majority of the legal votes cast, a *mandamus* was granted to compel the returning officer to seal the certificate of election for the relator, although a certificate had been issued to the other candidate. *Rex v. York* (Mayor), 4 Term R. 699. And in another case upon affidavits, that one of the candidates had a majority only by means of illegal votes, a *mandamus* was awarded to admit and swear in the relator, who appeared to have the majority of the legal votes, although the incumbent had already been admitted and sworn into the office. *Rex v. Bedford Level* (Corporation), 6 East, 356.

7. *Howard v. Gage*, 6 Mass. 462; *Dane v. Derby*, 54 Me. 95.

surrender may be compelled by *mandamus*,¹ and no evidence is admissible except his commission.²

Officers may be compelled to approve the bond of an officer elect, when it is sufficient in form, and the securities are adequate; and in such case the decision of the canvassing board is conclusive as a fact of the relator's election.³ And where a person must take the oath of office before a particular officer, in order to be in a position to claim the office, this officer may be compelled by *mandamus* to administer the oath.⁴

Where the consent of other persons is necessary to enable a person to perform the duties of any office, they may be compelled by *mandamus* to recognize him as such officers, unless they are the final judges of the election to the office.⁵

Where a person has been unlawfully removed from office, he may compel a restoration by the writ of *mandamus*.⁶ And when the performance of any duty is required by law of any officer as a result of a vote at an election, such officer may be compelled by *mandamus* to perform the duty.⁷ And in such a case, if there is a statutory method of contesting such an election, no such defence as that of fraud or illegal voting can be made.⁸

But where no such provision is made, it seems that any defence will be allowed which would show that the election was illegal and corrupt.⁹

The fact that an election was not authorized by law, may be a defence, where an officer is sued to compel the performance of a duty, enjoined as a result of the election.¹⁰

And where it appears that the relator is not eligible to the

1. *Felts v. Major*, 2 Head (Tenn.), 650; *Burr v. Norton*, 25 Conn. 103; *State v. Layton*, 28 N. J. L. 244.

2. *State v. Hyams*, 12 La. Ann. 719.

3. *State v. Board of Freeholders*, 35 N. J. L. 217; *State v. Falconer*, 44 Ala. 696; *State v. Ely*, 43 Ala. 568.

4. *King v. Clark*, 2 East, 75; *Queen v. Hereford* (Mayor of), 6 Mod. 309; *King v. Knowlton*, 2 Keb. 445; *Heath Ex p. 3 Hill* (N. Y.), 43.

This, however, does not create any title in the relator, but only consummates such title as he may already have. *King v. Clark*, 2 East, 75.

5. *State v. McCollough*, 3 Nev. 202; *Reg. v. Leeds*, 11 A. & E. 512; *Robinson v. Cheboygan Co. Supervisors*, 49 Mich. 321; *Doran v. DeLong*, 43 Mich. 552. But where the city charter made the council the final judges of the election of the alderman, it was held that *mandamus* would not lie to compel them to re-admit a person whom they had excluded without proper hearing on the merits. *People v. Fitzgerald*, 41 Mich. 1; *Alteo v. Simpson*, 46 Mich. 138.

6 C. of L. — 25

6. *Dew v. Judge*, 3 Hen. & M. (Va.) 1; *Geter v. Comrs.*, 1 Bay (S. Car.), 354; *Singleton v. Comrs.*, 2 Bay (S. Car.), 705; *People v. Schrugham*, 20 Barb. (N. Y.) 302; *State v. Common Council of Watertown*, 9 Wis. 234; *People v. Board of Police*, 35 Barb. (N. Y.) 535.

When a person applies for a writ to restore him to an office, he must show a clear, legal title to it, as the writ will only be granted in favor of the person clearly entitled to the office *de jure*. *Justices of Jefferson Co. v. Clark*, 1 T. B. Mon. (Ky.) 82; *Justices of Spencer Co. v. Harcourt*, 4 B. Mon. 499; *High, Ex. Rem.*, sec. 70.

7. *State v. Marston*, 6 Kan. 524; *State v. Saxton*, 11 Wis. 27.

8. *State v. Stockwell*, 7 Kan. 98.

9. *State v. Saxton*, 11 Wis. 27; *State v. Avery*, 14 Wis. 122; *McWhirter v. Brainard*, 5 Oregon, 426. But see *Leigh v. State*, 69 Ala. 261, and *Clark v. Rogers*, 81 Ky. 43.

10. *People v. Logan Co.*, 63 Ill. 338; *People v. Cline*, 63 Ill. 394.

office, this may be a ground for refusing a writ in his favor to compel the issue of a certificate of elections.¹

(B) QUO WARRANTO. — 1. *Common-law Remedy to test Right to Office.* — In the absence of special statutory provisions, the proper remedy at common law to test the right of a person to an office was a writ of *quo warranto*, or an information in a nature of a writ of *quo warranto*, which took the place of the original writ; and in most of the States of this country, the right not only of the respondent may be tried, but the title of the relator may also be investigated in the same proceeding. Prior to the Statute of 9 Anne, chap. 20, the information in the nature of a *quo warranto* had only been used as a prerogative remedy to punish a usurpation upon the franchises or privileges granted by the crown; and it is said by Selwyn, *Nisi Prius* (18th ed. 1112), that before that statute a private person could not interpose in *quo warranto*, and that the information could only be filed on behalf of the crown by the attorney-general.² Under this statute an information could be filed only by leave of the court, and it seems that for a time the court was not inclined to grant leave to file an information to test the right to corporate offices.³

It seems, however, that the same rule now prevails in England as in most of the United States, and that where there has been a *de facto* election, and the person has qualified and taken possession of his office, the proceeding by way of *quo warranto* is the only common-law method of trying his title to the office.⁴

It seems doubtful whether the provisions of this statute of Anne extended to any other than officers of municipal corporations.⁵

But it was not necessary that the office should have been created by royal charter, but the title to an office created by act of Parliament could be investigated.⁶ And in this country it is generally extended to all public offices where no provision is made for another method of contest.⁷

1. *State v. Aldermen of Pierce City* (Mo.), 3 S. W. Rep. 849.

2. This opinion seems to be based upon the statement of Lord Mansfield and Justice Wilmot, in case *R. v. Trelawney*, 3 Burr, 1615; but, in a later case, Lord Mansfield asserts that the information had been filed by the coroner before that statute. *R. v. Gregory*, 4 T. R. 240, note.

3. Thus, in an early case, where two sets of church-wardens had been sworn in for a parish, application for leave was refused, the court stating that they would leave the parties to settle their rights by action. *Rex v. Daubeney*, Stra. 1195; *R. v. Shephard*, 4 T. R. 381. And see *R. v. Justices of Herefordshire*, 1 Chit. 700; *R. v. Thatcher*, Dow. & Ry. 426.

4. *R. v. Chester* (Mayor of), 2 Jurist N. S. 114.

5. The language of the statute seems to be limited to such cases; and this construction is given to it by Mr. Tancred (*Quo. War.* 15), and the same limitation is placed on the statute of Louisiana. *Perry v. Stouffer*, 17 La. Ann. 306.

6. *Darley v. Queen*, 12 El. & Fin. 520.

7. High, Ex. Rem. § 623; *Newsom v. Cocke*, 44 Miss. 352; *Bowen v. Hixon*, 45 Mo. 340; *People v. Galesburgh*, 48 Ill. 485; *Com. v. County Comrs.*, 5 Rawle (Pa.), 75; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *Sudbury v. Stearns*, 21 Pick. (Mass.) 148; *People v. Holden*, 28 Cal. 123; *State v. Clerk of Passaic*, 25 N. J. L. 354; *Saunders v. Gatling*, 81 N. Car. 298; *State v. Owens*, 65 Tex. 261.

2. *Character of Office.*—An office such as can be properly tested by *quo warranto* information has been thus defined by Mr. High: "A public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public."¹ But neither in England nor this country are there many offices of the legislative character which can be said to be within the reach of a *quo warranto*. About the only officers of this kind are members of the city councils;—the legislatures of the various States, both Houses of Congress, and the English Parliament, being the sole judges of the election returns and qualifications of their members;—and where a legislative body has adjudged a person to be entitled to a seat, a court has no jurisdiction in *quo warranto* to oust him.²

Aside from the legislative offices, and in the absence of special statutory remedies, it makes no difference whether the office is an elective one, or filled by appointment; but in some States the right to appointive offices may be tested where elective offices must be contested by statutory proceedings.³

The magnitude of the office does not affect the question; though where it is a petty one, and of little importance, the court may decline to grant leave to file the information.⁴

It applies to judicial as well as executive offices;⁵ and also to military offices,⁶ but will not lie when the office is a mere employment.⁷

3. *Presidential Electors.*—In 1877 it was held by a district court in Florida that the courts of that State had jurisdiction to test the right to the office of presidential elector, in a suit by the State upon the relation of a private individual, when the attorney-general of the State refused to file the information.⁸

1. High, Ex. Rem. § 625.

2. State v. Tomlinson, 20 Kan. 692.

3. State v. Seay, 64 Mo. 89; Com. v. Towler, 10 Mass. 290; Com. v. Douglas, 1 Binn. (Pa.) 77.

4. Anon. 1 Barnardiston K. B. 279.

On the other hand, the court may determine the right to the office of governor of the State. Thus, in the case of the Attorney-General v. Barstow, 4 Wis. 567, the court held that this was no interference by the judiciary with the executive department of the government; that there was a plain distinction between the office and the person claiming to fill it; and that the question before the court, and of which it had jurisdiction, was, whether the respondent was the governor, or was usurping the functions of the office; and that the court could sit, and decide upon the rights of contestant to the office of governor, and give judgment against one, and in favor of another, without breaking down or disturbing the executive department of the government.

5. U. S. v. Lockwood, 1 Pinney (Wis.), 359; State v. Taylor, 15 Ohio St. 137; State v. Harmon, 31 Ohio St. 250; Grant v. Chambers, 34 Tex. 570.

But in Alabama, where the legislature was the proper body to appoint to a judicial office, it was held that the Supreme Court had no power to inquire into the constitutionality of the appointment of a judge by the legislature. State v. Paul, 5 Stew. & P. (Ala.) 40.

6. State v. Brown, 5 R. I. 1; Com. v. Small, 26 Pa. St. 31; State v. Utter, 44 N. J. L. 14. But where there is a special military court, or tribunal, having exclusive jurisdiction over questions arising under the militia laws of the State, it is held that this remedy cannot be used. State v. Watkins, 1 Rich. (S. Car.) 42.

7. Reg. v. Fox, 4 Jurist, N. S. 410; Bradley v. Sylvester, 28 Law Times, N. S. Q. B. 459; State v. Champlin, 2 Bailey (S. C.), 220.

8. Report of Electoral Commission, p. 78.

But in South Carolina it was held that the State court had no jurisdiction in a suit by the State, upon the ground that, while the elector was appointed by the State, in performing the duties of his office he acted under the authority conferred by the Constitution of the United States; and it was intimated, that, if the State court had any jurisdiction in the matter, it could only exercise it when the suit was brought by the United States.¹

4. *City Councils*.—Where, by the statute, the common council is made the final judge of the election and returns of its members, this operates to divest the jurisdiction of the courts in such cases.²

But where the law only provides that the council shall be judges of the election of its members, the authorities are in conflict as to whether such jurisdiction is exclusive.³

5. *When brought*.—The writ or information in *quo warranto* tests the right of the respondent at the time the information is filed, and not his right to take the office in the future. The proceeding cannot therefore be brought until after the commencement of the term.⁴ And a claim by a person that he is entitled to an office, without any attempt to exercise it, will not be sufficient grounds for the writ.⁵

Taking the oath of office is a sufficient evidence of user, although the oath is defective;⁶ but a claim to be allowed to take the oath will not be treated as a user.⁷

In this country leave to file an information will not ordinarily be granted when the term will necessarily expire before the suit can be determined.⁸ But when there has been an erroneous judgment in favor of respondent, it may be reversed in the appellate court, though no judgment of ouster will be allowed.⁹

1. *State v. Bowen*, 8 S. Car. 400.

2. *Sellack v. Common Council*, 40 Conn. 359; *Com. v. Garriques*, 28 Pa. St. 9; *Com. v. Leech*, 44 Pa. St. 332; *Com. v. Henszey*, 81 Pa. St. 101.

3. In the cases of the *People v. Metzker*, 47 Cal. 524; and *McVeaney v. Mayor*, 1 Hun (N. Y.), 35, it was held that this jurisdiction was exclusive; but the contrary view was held in *State v. Fitzgerald*, 44 Mo. 425; *Echols v. State*, 56 Ala. 131; and *State v. Kempf (Wis.)*, 34 N. W. Rep. 223. And in *State v. Dowlan*, 32 Minn. 536, the court was equally divided. Where there had been no ordinance passed to provide for the trial of cases before the council, it was held in Iowa that the person could resort to the statutory contest. *State v. Funck*, 17 Iowa, 365. But an ordinance may be passed after the election has been held. *State v. Johnson*, 17 Ark. 407.

4. *People v. McCullough*, 11 Abb. Pr. N. S. (N. Y.) 129.

5. *Tancred, Quo War.* 34; *Rex v. Whit-*

well, 5 T. R. 85; *R. v. Ponsonby Sayer*, 245.

6. *R. v. Harwood*, clk. 2 East, 176; *R. v. Tate*, 4 East, 337; *People v. Callaghan*, 83 Ill. 128.

7. *R. v. Whitwell*, 5 Term R. 85.

8. *Com. v. Reigart*, 14 S. & R. (Pa.) 216; *State v. Schneierly*, 5 Rich. (S. Car.) 299; *Morris v. Underwood*, 19 Ga. 539; *People v. Sweeting*, 2 Johns. (N. Y.) 184; *State v. Jacobs*, 17 Ohio, 143.

But in North Carolina it was held that an information may be filed after the expiration of the term, where the conviction is necessary to invalidate the acts of the officers, if such acts were of public concern, and intended to confer rights on others. *Burton v. Patton*, 2 Jones, L. 124.

9. *State v. Taylor*, 12 Ohio St. 130. But in *Com. v. Smith*, 45 Pa. St. 59; *State v. Pierce*, 35 Wis. 93; *Hunter v. Chandler*, 45 Mo. 435, it was held, that, when the action had been brought within the term, the case might be tried, although the term had expired.

6. *What may be tested in Quo Warranto.*—The eligibility of a party to hold an office,¹ and his qualification for the office, may be tested in these proceedings,² as well as the legality of the appointment.³ And the authority of the electoral or appointing body may also be questioned.⁴ The qualifications of voters are also subjects of inquiry in this proceeding.⁵

7. *Effect of Statutory Contest.*—Where such questions may be considered by a proceeding under the statute which is final, they cannot be tried in *quo warranto*.⁶ And where a statutory tribunal for a contest of election is invested with power to hear and determine questions of law as well as of fact, it has been held that its acts were conclusive, when within its jurisdiction.⁷ But

1. *State v. Gardner*, 43 Ala. 234; *State v. Beecher*, 15 Iowa, 723; *People v. Curtis*, 1 Idaho, N. S. 753.

2. Persons acting without having taken the oath, or without giving bond, are liable to be ousted. *Mayor of Penryn*, Stra. 582; *Hyde v. State*, 52 Miss. 665; *Thomas v. Owens*, 4 Md. 189; *Howell v. Com.*, 97 Pa. St. 332.

In Alabama it was *held*, that where a person who was properly qualified, was eligible to hold the office at the time he was elected, and was legally elected, and duly inducted into the office, he could not be ousted by a *quo warranto* proceeding for things subsequently happening. *State v. Gardner*, 43 Ala. 234. But this is contrary to the current of authorities, both in England and America. See *Rex v. Richardson*, 1 Burr, 517; *R. v. Heaven*, 2 Term R. 772; *R. v. Blizard*, 1 Day. 397; *Milward v. Thatcher*, 2 Term R. 81; *R. v. Pateman*, 2 Term R. 777; *R. v. Lawrence*, 2 Chitty, 371; *People v. Mayworm*, 5 Mich. 146; *State v. Beecher*, 15 Ohio, 723; *People v. Hanifin*, 96 Ill. 420; *State v. Delward*, 33 La. Ann. 1229; *State v. West*, id. 1261.

3. *State v. Gammon*, 73 Mo. 421; *R. v. Mayor of Shrewsbury*, Cas. Tem. Hard. 151; *Musgrave v. Nevinston*, 2 Ld. Ray. 1358; *R. v. Theodorick*, 8 East, 542; *R. v. Grimes*, 5 Burr. 2598.

4. In Ohio and North Carolina it has been *held* the appointment of a person to an office by a *de facto* officer is valid, even though the *de facto* officer may subsequently be ousted from his position. *State v. Alling*, 12 Ohio, 16; *People v. Staten*, 73 N. Car. 546.

The early English cases, however, have *held*, that, where the persons exercising the elective power had been ousted afterward, their votes would be rejected. *Rex v. Hebdon*, 2 Stra. 1090; *R. v. Smith*, 5 M. & S. 271. But where no proceedings had been taken against the electors, it was *held* that their right, which they possessed by virtue of holding corporate offices, could not be questioned in proceedings against their appointees.

5. Where the electors are indefinite in number, and do not exercise their franchise by virtue of an official position, the English courts, as far back as the time of Lord Mansfield, have *held* that the qualifications of the electors might be questioned in this proceeding. *Symes v. Reg.*, Cowper, 503; *Rex v. Mein*, 3 Term R. 596. This has been the unquestioned practice in the Parliamentary elections, and in contests before the legislative bodies in this country; and although it was said by Judge Cooley in the 4th ed. of his work on Constitutional Limitations, p. 792, to be a question of difficulty upon which there was very little judicial authority, it will be found, by an examination of the cases, that the practice of considering this question is nearly universal. See *People v. Pease*, 30 Barb. (N. Y.) 588, and 29 N. Y. 45; *People v. Cicott*, 10 Mich. 283; *State v. Ward*, 17 Ohio St. 543; *Sinks v. Reese*, 19 Ohio St. 306; *Renner v. Bennett*, 21 Ohio St. 434; *Sturgeon v. Korte*, 34 Ohio St. 525; *Dale v. Erwin*, 78 Ill. 170; *Beardstown v. Virginia*, 76 Ill. 34, and 81 Ill. 540; *Clark v. Robinson*, 88 Ill. 498; *Fry's Case*, 71 Pa. St. 302; *Dishon v. Smith*, 10 Iowa, 212; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246; *People v. Holden*, 28 Cal. 124; *Preston v. Culbertson*, 58 Cal. 198; *Griffin v. Wall*, 32 Ala. 149; *State v. Stumpf*, 26 Wis. 630.

6. *State v. Vale*, 53 Mo. 99; *Hyde v. Trewwhitt*, 7 Coldw. (Tenn.) 57; *Dickey v. Reed*, 78 Ill. 261; *State v. Mason*, 77 Mo. 189; *Davidson v. Woodruff*, 63 Ala. 432; *State v. Lewis*, 51 Conn. 113; *State v. Harmon*, 31 Ohio St. 250; *People v. Goodwin*, 22 Mich. 496; *Baxter v. Brooks*, 29 Ark. 173. But in *People v. Holden*, 28 Cal. 123, it was *held* that the fact that a provision was made for a contest did not prevent a suit by the people in their sovereign capacity. And see *State v. Kempf* (Wis.), 34 N. W. Rep. 226, and *Tarbox v. Sughrue*, 36 Kan. 225.

7. *Batman v. McGowan*, 1 Metc. (Ky.) 533; *Com. v. Jones*, 10 Bush (Ky.), 725; *Bonner v. Lynch*, 25 La. Ann. 267.

if such board goes outside of its jurisdiction, its findings do not bind the courts.¹

8. *The Real Right tried.*—From these cases it will be seen, that, while the commission or certificate of the proper officer is *prima facie* evidence in favor of the person holding it, the court may go back of them, and examine the returns or the ballots, and determine who has the majority of the legal votes cast.² But where the statute makes the certificate of the returning board *prima facie* evidence before all courts and before all officers until set aside by a contest, it seems that the only way it could be overcome is by such a contest; and where, in a particular case, there is no provision for a contest, it has been held that the certificate is final.³ And where a person holding over is sued in *quo warranto*, it has been held that he cannot assail the certificate of the relator.⁴

9. *Legality of Election tested.*—Where the title to a person in office depends upon the question of the legality of the election, the proper remedy is by *quo warranto*, and it cannot be settled in a contested election proceeding.⁵

(C) STATUTORY REMEDIES. — I. *Judicial Powers of Special Tribunal.*—Where the power to investigate the questions arising in a contested election embraces the questions of law and of fact, such as the qualification of voters, etc., it would seem as though these powers were judicial; but in many States we find such powers conferred upon other bodies than the courts. Thus, in Ohio the court upheld the authority of the legislature to confer the power of trying contested elections of State officers and judges upon the Senate, upon the ground that it was not such an exercise of the judicial power as was meant in the constitution, which provided that the judicial power should be vested in the various courts therein named.⁶ And in Louisiana and Texas it was held that the decision of the contested election cases properly belonged to the political department of the government.⁷ On the other hand, in Arkansas and California it was held that such powers were judicial in their character.⁸

2. *Contests before Legislative Bodies.*—By the law of Parliament, which was a part of the common law of England, the House of Commons was the sole judge of the election of its members; and the election could be contested by the defeated candidate, or by an elector of the borough or county in which the election was

1. *Com. v. Jones*, 10 Bush (Ky.), 725.

2. *State v. Towers*, 8 Ga. 360; *State v. Steers*, 44 Mo. 223; *People v. Van Slyck*, 4 Cow. (N. Y.) 297.

3. *State v. Dubuclet*, 28 La. Ann. 698.

4. *Parmenter v. State*, 102 Ind. 90.

5. *Ellingham v. Mount*, 43 N. J. L. 470; *State v. Douglas Co.*, 18 Neb. 506; *State v. Kennon*, 7 Ohio St. 547; *People v. Blake*, 49 Barb. (N. Y.) 9.

6. *State v. Harmon*, 31 Ohio St. 250.

7. *Collins v. Knoblack*, 25 La. Ann. 363; *Rogers v. Johns*, 42 Tex. 339; *Williamson v. Lane*, 52 Tex. 335. And see *Marmaduke v. Halloway*, 2 Ala. 31; *Baxter v. Brooks*, 29 Ark. 173.

8. *Baxter v. Brooks*, 29 Ark. 173; *Stone v. Elkins*, 24 Cal. 125. And see *State v. Sheldon*, 2 Kan. 322; *Buckland v. Gail*, 23 Kan. 327.

held: and until 1868 the contest was tried before a committee of the House; but in that year an act of Parliament was passed, which provided for the trial of all English and Irish cases before judges of the Courts of Common Pleas, and of the Scotch cases before judges of the session. The law allowed an appeal from the decision of the judge to the full court, upon questions of law, and made his certificate final upon the question of the validity of the election.¹ And the same system prevails at present in the cases in the Parliament of the Dominion of Canada and the Legislative Assembly of Ontario.² By the Constitution of the United States, it is provided that each House of Congress shall be the judge of the election returns and qualifications of its own members; and by the constitutions in the different States, each House of the State legislatures has the same power over the election of its members as the Houses of Congress. This jurisdiction over the election of members excludes the jurisdiction of the court,³ although the canvassers may be compelled by *mandamus* to conduct the canvass, and declare the result in accordance with law, thus giving the person holding a certificate the *prima facie* right to the seat, and compelling the other party to begin the contest.⁴

(D) EQUITABLE REMEDIES. — 1. *Courts of Equity cannot try Contest for Office.* — A court of equity has no authority to determine a case of contested elections for an office;⁵ and the fact that there is no provision made by statute for a contest, will not confer such jurisdiction.⁶

2. *Injunction not Proper to obtain Possession of Office.* — Where a person is kept out of an office to which he has been elected, an injunction is not the proper remedy, even though the term of the incumbent has expired, and the complainant has been duly elected and qualified as his successor.⁷

3. *May lie to prevent the Collection of Fees.* — While the general rule is, that equity will not interfere to prevent a party in possession from discharging the duties of his office,⁸ in special cases an injunction has been granted for this purpose, upon showing the insolvency of the defendant;⁹ but, unless it is shown that

1. Wolferstan, Law & Pr. of El. Petitions, 2; Cox & Grady, Law & Pr. of Registration and Elections, 353.

2. Brough on El. Laws, 55.

3. Garrard v. Gallagher, 11 Nev. 382.

4. O'Ferrell v. Colby, 2 Minn. 180.

5. Cochran v. McCleary, 22 Iowa, 75; Hagner v. Hayberger, 7 Watts & S. (Pa.) 104.

It was held, in one case in Alabama, that an injunction might be granted to enjoin the use of a certificate of election fraudulently obtained. Reid v. Moulton, 51 Ala. 255. But upon a subsequent hearing of the same case this was overruled, and it was held, that, where there was no statutory

remedy, *quo warranto*, and not a bill in equity, was the proper remedy. Moulton v. Reid, 54 Ala. 320.

6. Moore v. Hoisington, 31 Ill. 248.

7. Markle v. Wright, 13 Ind. 548.

8. Sneed v. Bullock, 77 N. Car. 280; Jones v. Comrs. of Granville, 77 N. Car. 282; Coulter v. Murray, 15 Abb. Pr. N. S. (N. Y.) 129; People v. Draper, 24 Barb. (N. Y.) 265; Terry v. Stauffer, 17 La. Ann. 306; Potter v. Hobbs, 65 N. Car. 119; Campbell v. Taggart, 10 Phila. 443; Kilpatrick v. Smith, 77 Va. 347.

9. Ewing v. Thompson, 43 Pa. St. 372; Tappan v. Gray, 3 Edw. Ch. (N. Y.) 450.

an action at law against the incumbent for the collection of the fees would be abortive, an injunction will not be allowed to prevent their collection by the defendant.¹

4. *Will not enjoin Issue of Commission, or Acting under it.*—A court of chancery has no authority to enjoin the issue of a commission, nor its acceptance, nor to restrain the performance of official acts, because the election was not properly held.²

5. *Will not enjoin Holding of an Election.*—The power to hold elections is a political one, and a court of equity has no jurisdiction to enjoin the proper officer from holding an election for any reason.³ An injunction issued in such a case is void, and gives no ground for an attachment for contempt.⁴

6. *Will not enjoin Canvass of Votes.*—A court of equity will not interfere by an injunction, to prevent the election officers or canvassing officers from doing their duty as required by the law, nor prevent them from canvassing the votes in a certain way.⁵

7. *Will not enjoin Use of Certificate.*—A court of equity has no authority to enjoin the use of a certificate of election because it is alleged that it was based upon fraud or forged returns, even though there was no provision for a statutory contest.⁶

8. *Will not enjoin Contest.*—Where the statute authorizes the contest of an election, a court of chancery has no power to enjoin the prosecution of a contest because the office was the clerkship of that court; and a violation of such an injunction is not punishable as a contempt of court.⁷

9. *May enjoin Acts based upon Fraudulent Elections.*—While the court will not enjoin the holding of an election, or the canvass of the vote, yet when the election is held to determine questions such as the removal of the county-seats, or subscribing to capital stock of corporations, and there is no provision for contesting the election, it has been held that an injunction may be granted to prevent the officer from doing the act authorized by the election, where it is alleged that the majority was caused by fraudulent or illegal voting.⁸

1. Callon v. Price, 50 Ala. 424.

2. Beal v. Ray, 17 Ind. 554; Sanders v. Metcalfe, 1 Tenn. Ch. 419.

3. People v. Galesburg, 48 Ill. 485; Harris v. Schryock, 82 Ill. 119; Smith v. McCarthy, 56 Pa. St. 359. A bill for an injunction cannot be maintained in the courts of the United States, to restrain the election officers in a city from holding an election in pursuance of the State statute and city charter. Holmes v. Oldham, 1 Hughes (C. C.), 76.

4. Walton v. Develing, 61 Ill. 201; Darst v. People, 62 Ill. 306.

5. Lawrence v. Knight, 1 Brews. (Pa.) 67; Brightly, El. Cases, 617; Peck v. Weddell, 17 Ohio St. 271; Dickey v. Reid, 78 Ill. 261; Kemp v. Ventulet, 58 Ga. 419;

Smith v. Myers, 109 Ind. 1; Weil v. Calhoun, 25 Fed. Rep. 865.

But in *Kansas* it was held that an injunction would lie to prevent canvass of vote for the removal of a county-seat, where the petition for the election was illegal. State v. Egleston, 34 Kan. 714.

6. Hulseman v. Rems, 41 Pa. St. 396; Moulton v. Reid, 54 Ala. 320; Rink v. Barr, 14 Phila. 154. Such an injunction had been granted in the early case of Miller v. Lowry, 5 Phila. 202.

7. Wimberly Re, 57 Miss. 437.

8. Boren v. Smith, 47 Ill. 482; People v. Wyant, 48 Ill. 263; Shaw v. Hill, 67 Ill. 455; Maxey v. Mack, 30 Ark. 472.

This power is based upon the fact, that, as a *quo warranto* would not lie, there

(E) HABEAS CORPUS. — 1. *Right to Office not tried in Habeas Corpus.* — The right of a judge or magistrate, who is an officer *de facto*, cannot be tested in a habeas corpus proceeding at the suit of a person who had been imprisoned by his order;¹ but it seems that the question as to whether the party is a *de facto* officer may be heard in such a proceeding.²

2. *Legality of Elections tried by Habeas Corpus.* — The constitutionality of an act of Congress may be tested in a proceeding in *habeas corpus*,³ and it has also been held that the court would inquire into the validity of an election held to determine as to the adoption of a local option law in this proceeding.⁴

(F) PROHIBITION. — 1. *Will not lie to restrain Usurpation of Office.* — The writ of prohibition is but little used in election cases, as it cannot be used merely to prevent ministerial acts;⁵ nor would it lie to prevent a person from usurping an office to which he is not entitled.⁶

2. *May issue to Canvassing Boards.* — Where a canvassing board attempts to exercise judicial powers, and examine witnesses to determine whether the returning officers have returned votes which ought not to be counted, it has been held that the writ of prohibition will lie to restrain such action.⁷

3. *Power of the Supreme Court of the United States.* — It has been held that the Supreme Court of the United States cannot issue a writ of prohibition to restrain a circuit court from exercising the jurisdiction conferred by section 23 of the act of May 31, 1870, to enforce the rights of citizens of the United States to vote in the several States, until after an appeal from a final decision of the circuit court had been taken.⁸

4. *Prohibition against Injunction.* — It has been held that this

would be no remedy against fraud and illegal voting in such cases, unless a court of equity could inquire into the matter. In *Leigh v. State*, 69 Ala. 261, it was held, however, that although *mandamus*, or *quo warranto*, would not lie, that there was no remedy where there was a *prima facie* majority in such elections, where there was no provision for a statutory contest. And under the laws in Texas, it has been held that courts of equity cannot try cases of election for county-seat. *Carothers v. Harnett*, 67 Tex. 127; *Carothers v. Slaughter*, 2 S. W. Rep. (Tex.) 526.

1. *Strall Ex p.* 16 Iowa, 369; *Wakker, Matter of*, 3 Barb. (N. Y.) 162.

2. Thus, in *South Carolina*, there were two persons claiming to be governor of the State, and a writ of *habeas corpus* was sued out against the warden of the penitentiary, in behalf of a person who had received a pardon from one of the claimants; and the court held that it was its duty to determine whether the person granting the pardon was a *de facto* governor, — *Smith Ex p.* 8

S. Car. 495, — but that, if he was governor *de facto*, the pardon was valid, regardless of his not having a perfect title to the office, or evidence of his title. *Norris Ex p.* 8 S. Car. 408.

3. *Clark Ex p.* 100 U. S. 399.

4. *Kramer Ex p.* 19 Tex. App. 124. And see *Karney Ex p.* 55 Cal. 212.

5. High, Ex. Rem. § 769. It is held that it will not issue to restrain the governor from issuing a commission, — *Grier v. Taylor*, 4 McCord (S. Car.), 206, — nor to prevent the proper officers from calling an election. *People v. San Francisco El. Comrs.*, 54 Cal. 404.

6. *Buckner v. Veuve*, 63 Cal. 304; *State v. Peers*, 33 Minn. 81.

7. *Brazie v. Fayette Co. Comrs.*, 25 W. Va. 213.

But in Georgia it was held that prohibition would not lie to control the election officers where there is a statutory remedy for the contest of an election. *Kemp v. Ventulet*, 58 Ga. 419.

8. *Warmouth Ex p.* 17 Wall. (U. S.) 64.

writ will not issue to prevent a chancellor from issuing an injunction to prevent the use of a certificate of election alleged to have been obtained by false and fraudulent returns; ¹ and that it would not issue at the suit of the defendant in a bill for injunction in a contested election case, on the ground that the chancery court had no jurisdiction of the subject-matter, when it appeared that the petitioner was under attachment for violating the injunction, but had not answered the bill, or moved to dismiss it, or sought any other remedy in the court of chancery. ²

XIX. Pleadings in Election Cases. — I. *Scope of Chapter.* — In treating of this subject, it is not intended to discuss the general rule of pleading, but only to state the principal points arising in actions for the settlement of election contests.

(A) **MANDAMUS.** — I. *Who may be Relator.* — Where *mandamus* is sought to compel the performance of an act in which the public at large have an interest, such as the removal of the county-seat, in conformity with the vote of the people, the writ may be asked for as a matter of course, upon the relation of the attorney-general or the prosecuting attorney of the proper county; and in most of the States any private person who is a resident of, and a taxpayer in, the district is considered as having sufficient interest in the matter to become the relator. ³

2. *Parties Defendant.* — It is necessary to use great care to see that the alternative writ is directed to the proper party. If the power to act is in more than one person or body, and is joint, the peremptory writ will be denied, if it appear that all whose duty it is to perform the act are not joined. ⁴

On the other hand, where the proceeding is by alternative writ, and improper parties are joined, the peremptory writ will not issue to those who were proper parties. ⁵

1. Reid *Ex p.* 50 Ala. 439.

2. Hamilton *Ex p.* 51 Ala. 62.

3. Union Pacific R. Co. *v.* Hall, 91 U. S. 343; Cannon *v.* Janvrin, 3 Hous. (Del.) 27; State *v.* Doyle, 40 Wis. 175; Moses *v.* Kearney, 31 Ark. 261; State *v.* Gracey, 11 Nev. 223; Ottawa *v.* People, 48 Ill. 233; Hamilton *v.* State, 3 Ind. 452; People *v.* Collins, 19 Wend. (N. Y.) 563; State *v.* County Judge, 7 Iowa, 186.

But in *California* it was held, that, to support an application for a writ of *mandamus* by a private party, his interest must be distinguishable from that of the mass of the community; so that one who is only an elector could not apply in his own name for a writ to compel the board of supervisors to order an election for a vote on the question of the removal of a county seat. Linden *v.* Alameda Co., 45 Cal. 60.

And in Michigan and Pennsylvania it has been held that the writ will not issue to enforce a mere public right, upon the

relation of one whose only interest is that of a citizen, but that it must be upon the relation of the proper law officer. People *v.* Regents of University, 4 Mich. 98; People *v.* Inspectors of State Prison, 4 Mich. 187; Com. *v.* Park, 9 Phila. 481; Heffner *v.* Com., 28 Pa. St. 108.

In the States where the writ may issue upon the relation of a private person, he must be interested in the matter as a citizen, resident of, or taxpayer in, the district; and one who has no interest in the subject-matter cannot be a relator. School Trustees *v.* Ball, 71 Ill. 559.

4. People *v.* Yates, 40 Ill. 126.

5. Thus, in *R. v. Mayor of Norwich*, Stra. 55, where a writ was directed to the mayor, aldermen, and council of a corporation, to compel them to elect a town clerk, it was held to be bad when the power of election was in the mayor and aldermen only, and that, when the misjoinder appears on the face of the alternative writ, it will be quashed, and no return required.

When the proceeding, however, is by rule to show cause, the writ may issue against those who are shown to be the proper parties.¹

Where the object of the writ is to require the performance of an official duty by a public officer, the writ should be directed to him in his official capacity, and not as an individual.²

3. *Statement of Alternative Writ or Petition.* — At common law, the first pleading in this action was an alternative writ, which set forth the facts, and stood in the place of a declaration, and required the respondents to perform the act specified, or show cause why they should not do it; but in some of the States a petition takes the place of an alternative writ.

When the suit is upon the relation of a private person, the interest which he has in the subject-matter should be stated, whether it be matter of public or private right.³ The official position occupied by the defendant should be set forth; and the duties which by law are attached to the position, and the facts upon which the right sought depends, should be clearly stated;⁴ and these facts must show that there is no adequate legal remedy aside from the writ.⁵ And the refusal of the officer upon demand, or, if no demand is required, his neglect, must appear.⁶ As the law presumes that sworn officers have performed, or are willing to perform, their duty, it must clearly appear that this is not so, and therefore the necessary facts must be set forth affirmatively;⁷ and if the existence of the right depends upon any condition, the performance of the condition must be specifically alleged.⁸

The writ should carefully specify the duty which it is sought to enforce, because the peremptory writ must only order the performance of the act, as it was required to be done by the alternative one.⁹

4. *Return or Answer.* — Where the relief sought depends upon each one of a number of allegations in the writ, the return will be sufficient if it deny any one of the allegations.¹⁰ But the traverse must be either of all or some of the material facts, and not of the legal conclusion drawn from the facts.¹¹

1. *State v. Supervisors of Beloit*, 20 Wis. 79.

2. *Chance v. Temple*, 1 Iowa, 179.

3. *School Trustees v. Ball*, 71 Ill. 559; *Hamilton v. State*, 3 Ind. 452; *State v. State Canvassers*, 17 Fla. 29.

4. *Commonwealth Bank v. Canal Comrs.*, 10 Wend. (N. Y.) 25.

5. *People v. Hilliard*, 29 Ill. 413.

6. *People v. Romero*, 18 Cal. 89; *Crandall v. Amador*, 20 Cal. 72.

7. *Canal Trustees v. People*, 12 Ill. 248; *Gill v. State*, 72 Ind. 266; *Lavalle v. Soucy*, 96 Ill. 467; *Boone Co. Comrs. v. State*, 61 Ind. 379; *State v. Elwood*, 11 Wis. 17.

8. *People v. Glann*, 70 Ill. 232.

9. *Chance v. Temple*, 1 Iowa, 179; *Price v. Howard*, 1 Iowa, 473; *State v. County Judge*, 12 Iowa, 239.

Even if the relator was entitled to a part

of the relief, the peremptory writ cannot be allowed. *Reg. v. East & West India Docks R. Co.*, 2 El. & Bl. 466; *People v. New York Supervisors*, 10 Abb. Pr. (N. Y.) 233; *Hartshorn v. Assessors of Ellsworth*, 60 Me. 276; *State v. Gibbs*, 13 Fla. 55.

But where the practice allows the amendment of the alternative writ, it has been held that part of the command of the writ might be stricken out, and the peremptory writ issue in accordance with the amended one. *State v. Aldermen*, 18 S. Car. 30.

10. *People v. Alameda Co.*, 45 Cal. 395.

11. Thus, where the writ set forth in detail the proceedings of the election, and concluded with an allegation, that, by reason of the premises, the relator was elected by a majority of the persons present who had a legal right to vote at the election, and demanded that the respondents should

Where a matter is alleged by way of confession and avoidance, allegations should not be made which present a mixed question of law and facts.¹

5. *What Defences are sufficient.* — A return which shows facts from which it can be seen that obedience to the command of the alternative writ is impossible, is, of necessity, sufficient.² The fact that the impossibility is the result of prior acts of the defendant himself will not affect this rule.³ A return which sets up acts of the defendant which are unauthorized will constitute no defence, unless they have made the matter impossible.⁴

Canvassers cannot decline to act because of irregularities in the conduct of the election, nor refuse to canvass votes, unless there has been such an irregularity in their transmission as to vitiate them.⁵

An injunction by a court of competent jurisdiction against the removal of a county-seat will, if unreversed, be ground for a refusal of the writ.⁶

Fraud in a county-seat election may be a good defence to a *mandamus*, to compel the county officers to hold their offices at the new place.⁷

In *mandamus*, to compel the delivery of the records to one holding a certificate, no defence which goes back of the certificate is valid, unless it shows that the office could not be properly filled at the election.⁸

certify his election, a return which merely alleged that the relator was not elected to the office was *held* bad as being a denial of a conclusion, which could only be traversed by a denial of the particular allegations of fact. *Rex v. Mayor of York*, 5 Term R. 66. And see *People v. White*, 11 Abb. Pr. (N. Y.) 168; *Lyman v. Martin*, 2 Utah, 136; *State v. Hodgeman Co. Comrs.*, 23 Kan. 264.

1. Thus, where an alternative writ commanded the corporate authorities of a city to restore an officer whom they had removed from office, and they made a return that the relator had obstinately and voluntarily refused obedience to the orders of the municipal authorities, contrary to his duty, the return was *held* too general to constitute a defence. *Rex v. Mayor of Doncaster*, Ld. Raym. 1565.

A general statement that the election is fraudulent was *held* to be no answer to an alternative writ commanding county officers to remove a county-seat as required by vote of the people. *State v. Thatch*, 5 Neb. 508; *Hunter v. Patterson*, 14 Neb. 506.

2. Thus, where the writ ordered the inspectors of election of a certain precinct to return the votes cast, and the answer showed that they had forwarded them by a messenger, from whom they had been stolen, that they had not yet been recovered, and that they had no means of making another return, it was *held* sufficient. *State v. Madison Co. Inspectors*, 17 Fla. 26.

3. *Price v. Walker*, 44 Iowa, 458.

4. Thus, where a writ issued to compel the canvass of the returns from certain precincts, and the answer stated that they had rejected them in the canvass because there were certain marks upon the ballots which they deemed illegal, it was *held* to constitute no defence. *State v. Alachua Co. Canvassers*, 17 Fla. 9. And where a *mandamus* was asked to compel the secretary of state to compile the returns forwarded to him by the returning officers, as the law required, an answer setting up that he had already promulgated them from other returns, not prescribed by law, was *held* to be no defence. *State v. Sec. of State*, 32 La. Ann. 572.

But where the action was one which required the exercise of discretion, a statement that they had already acted, as where they had rejected a scratched ballot from the count, was *held* to be a sufficient defence. *State v. Deane* (Fla.), 1 So. Rep. 698.

5. *Maxwell v. Foley* (S. Car.), 1 S. E. Rep. 160; *Atty.-Gen'l v. Board of Co. Canvassers* (Mich.), 31 N. W. Rep. 539; *State v. Randall*, 35 Ohio St. 64.

6. *Golden v. Elliott*, 13 Kan. 92.

7. *State v. Hamilton Co.* (Kan.), 11 Pac. Rep. 902.

8. *State v. Dodson* (Neb.), 31 N. W. Rep. 788.

6. *Subsequent Pleadings.* At common law, the return to an alternative writ was not traversable; and if sufficient in law, the peremptory writ was refused until the return was set aside in an action for a false return: but by the statute of the 9th of Anne, sec. 20; and 1st Wm. IV. sec. 21, the privilege was granted to deny any or all the allegations of the return; and in this country this same rule prevails, although the proceedings are not governed by the code rules in the absence of special provisions to that effect.¹

(B) QUO WARRANTO.—I. *Pleading at Common Law.*—The method of commencing an action of *quo warranto* at common law was by an original writ, issuing out of chancery, which was very brief, and commanded the sheriff to summon the defendant to appear before the King, at his next coming into the county, or before the justices at the first assizes, when they should come into those parts, and show by what warrant they exercised the franchise mentioned.²

In the time of Edward I., the proceeding by information took the place of the original writ of *quo warranto*. This was a proceeding by way of an inquest; and the presentments were in writing, and upon these presentments summons were issued. At first this information was merely a statement that the person was exercising certain franchises, and requiring him to show by what authority he claimed them.³

When the circuit of the justices in eyre ceased, the summons in *quo warranto* was returnable into the King's Bench, and the information, which was criminal in form, was presented to the court by the attorney-general; but after the statute of 4 & 5 Wm. & M. c. 18, they might also be presented by the coroner, or master of the crown office, by leave of the court.⁴

By the statute of 9 Anne, c. 20, provision was made for the filing of informations on the relation of private persons by leave of the court; and the provisions of this statute have been substantially embodied into the laws of nearly all the States, and, in some, the proceeding is a civil action under the code.

2. *Parties Plaintiff.*—In England, the proceedings are in the name of the sovereign; and in this country, in the name of the State, commonwealth, or people; and they may be brought by the attorney-general in his official capacity, and generally by the prosecuting attorney of the proper county in the local court, and upon their own relation without leave of the court; and in such cases it is considered a strictly public prosecution.

When the matter is one which is of private as well as public right, the proceedings may be upon the relation of a private person by leave of the court, and may be prosecuted for the purpose of testing, not only the right of the respondent, but also that of

1. *People v. Finger*, 24 Barb. (N. Y.) 341.

2. *Tancred, Quo War. v.*

3. *Tancred, Quo War. xiv.*

4. *R. v. Marsden*, 3 Burr. 1818.

the relator to the office; and, in some of the States, where the relator claims the office, he may file the information upon his own relation, as a matter of right, without joining the attorney-general or prosecuting attorney.¹

3. *Interest of Relator.* — Where the information is filed on the relation of a private person, the question of his interest in the office is a matter of importance; and the authorities are not entirely in harmony upon this subject. It may be stated, as a general rule, that no information can be filed, unless the relator has at least the interest of a resident, or taxpayer, of the district.² But probably the weight of authority would be in favor of the view, that if the relator was a voter, or, in some instances, a resident and taxpayer, of the district, his interest would be sufficient; but it is necessary to examine the cases in detail, to find the interest required by the courts of the different States.³

1. Where the legality of the appointment of a judge in a Territory where he holds his office under the law of the United States is to be tested, the suit should be brought in the name of the United States, and not in that of the Territory. *Territory v. Lockwood*, 3 Wall. (U. S.) 236.

2. *State v. Tuttle*, 53 Wis. 45; *Com. v. Lexington Turnpike Co.*, 6 B. Mon. (Ky.) 397; *Com. v. Union Ins. Co.*, 5 Mass. 230; *Com. v. Burrell*, 7 Pa. St. 34; *Wright v. Allen*, 2 Tex. 158; *Miller v. Palermo*, 12 Kan. 14.

3. In *England*, it was held that an inhabitant of a borough was competent to become a relator against municipal officers, even if he was not a Burgess. *R. v. Davies*, 1 M. & Ry. 539; *R. v. Perry*, 2 N. & P. 414; 6 A. & E. 810; *R. v. Quayle*, 11 A. & E. 508; *Rex v. Hodge*, 2 B. & A. 344, note.

In *Georgia* and *New Jersey*, it is held that any citizen of a town has such an interest in the municipal offices as to qualify him to become a relator, to test the right of an incumbent to the office. *Churchill v. Walker*, 68 Ga. 681; *Staley v. Hammer*, 42 N. J. L. 435.

In *Pennsylvania*, it is held that any citizen and taxpayer has sufficient interest to become a relator, to test the right of a tax-collector to his office, — *Com. v. Comrs.*, 1 S. & R. (Pa.) 383, — and that a private person might file an information against the mayor, or against a councilman, in a municipal corporation. *Com. v. Jones*, 12 Pa. St. 365; *Com. v. Meeser*, 44 Pa. St. 341. But in the same State it was held that where the question involved is a matter of public right, a private person cannot prosecute where he has no individual grievance. *Com. v. Cluley*, 56 Pa. St. 270; *Com. v. McCarter*, 98 Pa. St. 607.

In some of the States this interest must be greater than that of the mass of the citi-

zens. *Demarest v. Wickham*, 63 N. Y. 320. And in *State v. Stein*, 13 Neb. 529; *Barnum v. Gillman*, 27 Minn. 466, it was held that a private person cannot become a relator unless he makes a claim to the office.

In *South Carolina*, *North Carolina*, and *Mississippi*, the action must be brought in the name of the State, and by the attorney-general, where the office is a public one. *Patterson v. Hobbs*, 65 N. Car. 119; *Loftus v. Sowers*, 65 N. Car. 251; *State v. Delie-selline*, 1 McCord (S. Car.), 52; *State v. Schnierlee*, 5 Rich. (S. Car.) 299; *Harrison v. Greaves*, 59 Miss. 453.

Where the action is begun by the attorney-general or the prosecuting attorney in the name of the State, the fact that there is no relator named does not make a defect of parties plaintiff, and the mention of a name of any person as relator is surplusage. *Bartlett v. State*, 13 Kan. 99; *Com. v. Allen*, 118 Mass. 308; *State v. Harding*, 1 Ired. L. (N. Car.) 42; *Lake v. State*, 18 Fla. 501. This applies only when no judgment of induction is asked. *State v. Heinmiller*, 38 Ohio St. 101.

Where the information is applied for, the question of the policy of the prosecution may be considered, and leave may be refused in favor of a relator who is stopped by his own conduct from bringing the action. *State v. Schre*, 7 Rich. (S. Car.) 234; *R. v. Mortlack*, 3 Term R. 301; *R. v. Payne*, 2 Chitty, 369. Leave will also be refused if the relator has concurred in the election of the defendants, or in the election of the parties from whom defendant claims title. *R. v. Stacey*, 1 Term R. 1; *People v. Moore*, 13 Ill. 132; *R. v. Slythe*, 6 Barn. & Cres. 240.

It has been held in *Rhode Island*, that, after leave has once been granted to file an information on the relation of the attorney-general, the court must enforce the law,

4. *Parties Defendant.* — Where a number of persons have joined in usurping the same joint office, one information can be filed against all of them ; but when the office is not a joint one, different persons cannot be made defendants except by express statutory provisions ;¹ nor can two persons join as relators, each claiming a different office, held either by one or two defendants, though the duties of the office might be similar.²

5. *Form and Sufficiency of Information.* — Unless otherwise required by statute, where the information is filed by the attorney-general, it is sufficient to charge that the defendant is unlawfully exercising the duties of the office, which must be described with sufficient definiteness to require defendant either to disclaim or assert his title.³

But where the claim of the relator may be determined in the same proceeding, if he seeks to have this settled, he must set up the facts upon which he relies to support his claim.⁴

It is not necessary, however, to state that the relator is entitled to the office ;⁵ and, in the absence of a statute to permit it, the title of the relator cannot be inquired into, except so far as it incidentally affects that of the defendant.⁶

Where the relator claims the office, it has been held, that, in a statutory proceeding in the nature of a *quo warranto*, if the claim of title on the part of the relator is not set forth with the requisite certainty, a demurrer may be sustained to those allegations ; but this will not affect the judgment on the allegations, that the defendant usurped the office.⁷

The authorities are not uniform as to the degree of strictness required in setting forth the allegations in the information. In some of the States the courts require the same strictness at pleading as required in an indictment ; while in others the rules of civil pleading prevail.⁸

and has no further discretion in the matter. *State v. Brown*, 5 R. I. 1.

But in *Pennsylvania* it was held that the practice is analogous to that under the statute of Anne, and the matter is at all times under the control of the court, which may dismiss the proceeding if it appears that the information has been improvidently filed. *Gilroy v. Com.*, 105 Pa. St. 484.

1. *Symes v. Regem*, Cowper, 489.

2. *R. v. Warlow*, 2 M. & S. 75.

In case, however, an information against one person for exercising the office of mayor, and against others for exercising that of aldermen, was allowed. *R. v. Whitehorn*, Mayor of Portsmouth, 10 Mod. 65.

3. *People v. Miles*, 2 Mich. 348 ; *People v. Woodbury*, 14 Cal. 43 ; *People v. Abbott*, 16 Cal. 358 ; *Com. v. Commercial Bank*, 28 Pa. St. 383 ; *Coke's Entries*, 527 & 564.

4. *State v. Price*, 50 Ala. 568.

5. *State v. Palmer*, 24 Wis. 63.

6. *State v. Vail*, 53 Mo. 97.

7. *State v. Price*, 50 Ala. 568.

8. In *Illinois*, where a charge was made that the defendant was unlawfully exercising the duties of supervisor of the village, without specifying the particulars in which the use was unlawful, and did not allege usurpation, the information was held bad. *Lavalle v. People*, 68 Ill. 252. And where the office alleged to have been usurped had been created by a private law, of which the courts would not take judicial notice, and the existence of the law was not set forth in the information, this failure was held to be ground for demurrer. *Minck v. People*, 6 Bradw. (Ill.) 127.

The courts of New York have held that the complaint in *quo warranto* need not state the specific facts necessary to prove the general allegation that the relator was

6. *Double Pleading*. — At common law, the defendant could set up but one defence in his plea to the information, nor was he allowed to plead double under the statute of 9 Anne, c. 20.¹

But the statute 32 George III. c. 58, sect. 1, allowed double pleading in cases of corporate offices.²

Where this proceeding is treated as a criminal one, it is held that the statutes allowing double pleadings in civil actions do not apply, and but one plea can be pleaded.³ But in some of the States where the action is treated as a civil one, but not governed by the code, it has been held that several matters might be pleaded in justification.⁴

7. *Respondent must disclaim or justify*. — When the information is good in law, the defendant cannot plead not guilty, or *non usurpavit*; he must either disclaim or justify;⁵ but where he is charged with usurping several matters, he may disclaim in part, and justify in part.⁶

8. *Sufficiency of Pleading*. — A plea should not be argumentative, but should directly deny the allegations of the information.⁷

Where the information sets forth the facts upon which the alleged usurpation rests, it has been held sufficient after trial, if

by the greatest number of votes elected to the office. *People v. Nolan*, 63 How. Pr. (N. Y.) 271.

And in *North Carolina* it was held that an allegation that the relator received a majority of votes, without saying that they were legal, was sufficient. *State v. Stimson*, 3 S. E. Rep. 490. And that, where the petition alleged that there was a certain designated number of votes, of which relator received a certain number which was a majority, it was held that this was admitted by the demurrer, although there were also certain evidentiary statements which would indicate the contrary. *Hancock v. Hubbs* (N. Car.), 3 S. E. Rep. 489.

In *Georgia*, however, where the petition alleged that there were a certain number of illegal votes cast for respondent, and that the petitioner was defeated thereby, stating that the votes were illegal for ten different reasons, it was held that the petition was demurrable for not stating what number were illegal for each particular reason, and that it was the better practice to give the names of the voters whose votes were questioned. *Collins v. Huff*, 63 Ga. 207.

An allegation, that, "for the space of two days last past, the defendant has usurped," was held sufficiently certain as to the date when the usurpation commenced, as the time would be considered from the date of filing the information. *People v. Miller*, 15 Mich. 354.

Where the relator seeks to obtain the office, it has been held in *Indiana* that the information must show that he was eligi-

ble, or it would be considered defective. *State v. Lang*, 91 Ind. 351.

1. *R. v. Grimes*, 5 Burr. 2598; *R. v. Blatchford*, 4 Burr. 2147; *R. v. Newland*, Sayer, 96; *R. v. Archbishop of York*, Willes, 533; *R. v. Leigh*, 4 Burr. 2143.

2. *R. v. Autridge*, 8 Term R. 467. But this privilege was limited to cases of corporate offices. *R. v. Richardson*, 9 East, 469.

3. *People v. President, etc.*, 9 Wend. (N. Y.) 351; *People v. Jones*, 18 Wend. (N. Y.) 601; *State v. Rowe*, 26 N. J. L. 215.

4. *State v. McDaniel*, 22 Ohio St. 354; *State v. Stratton*, 28 Cal. 382.

5. *Tancred*, Quo War. 283; *Sir Gervase Clifton's Case*, 3 Leon. 184; *R. v. Blagdon*, 10 Mod. 297; *State v. Olcott*, 6 N. H. 74; *Atty.-Genl. v. Foote*, 11 Wis. 14.

6. *Tancred*, Quo War. 279; *Comyn, Dig. Quo War. c. 4*.

Where he has never used any of the offices, it was held, in *New York*, that it was sufficient to deny the user without denying the claim. *People v. Thompson*, 16 Wend. (N. Y.) 655. But the English practice was to deny both the user and the claim. *Coke's Entries*, 527 b.

Under the English practice, where there was a denial of the user, and a disclaimer, judgment of *oust* was rendered. *Tancred*, Quo War. 367.

But in *Mississippi* it was held, that, where there was a disclaimer and a denial of the user, the State was not entitled to judgment without proof of the allegations of user. *State v. Brown*, 34 Miss. 688.

7. *R. v. Hughes*, 4 Barn. & Cres. 368.

the material allegations are denied generally, without showing title to the office.¹ But where it does not set forth the facts, the defendant must justify, and, to do so, must set forth in his plea all the facts necessary to establish a lawful right to the office.²

Where the right to an office depended upon an election, it is not sufficient to aver that respondents were duly elected; but the plea should set forth the holding of an election in accordance with law, and the fact that they received votes sufficient to elect them.³

It is no defence to plead that the relator has no right to the office. The defendant must show that he himself is rightfully in the office.⁴

Where the information sets forth a continued usurpation, the plea must not only show an election and qualification for the office, but the continued existence of every fact necessary to uphold the right to the present possession of the office.⁵

9. *Conclusion of Plea.* — To avoid being argumentative in denying a charge of usurpation by affirmatively stating the facts to show a good title, the plea concluded with a traverse,⁶ which was as follows: "And by this warrant he has used during the time in the said information mentioned, and he still doth use, the office of ———, as he well might, and still may, *without this*, that he did, or doth, usurp upon our said lord the King, the said office, in manner and form as by said information is above supposed."⁷

The issue must be taken on the allegation of title, and not on the traverse; the only use of the traverse being to permit a reply of misuser, if one had occurred.⁸

10. *Replication.* — At common law, the crown had the right to deny and put in issue every part of the plea, and also introduce new matter;⁹ but the new matter must not be inconsistent with the plea.¹⁰

A statement in a single replication of a number of distinct facts, which all tend to make out the ultimate fact of a misuser, will not make the replication bad for duplicity.¹¹

11. *Effect of Code.* — The adoption of the code of civil procedure, without a special provision making it applicable to proceedings in *quo warranto*, does not change the rules of pleading in this action.¹²

1. *Com. v. McWilliams*, 11 Pa. St. 61.

2. *Leak v. Crawford*, 28 Mich. 88.

3. *Com. v. McGill*, 3 Whart. (Pa.) 228.

It is not sufficient to allege that the respondents were declared elected by the canvassers, or that they received a majority of the votes as counted by the canvassers, as a certificate of the canvassers is only *prima facie* evidence of the fact of having the majority of the legal votes. *People v. Van Cleve*, 1 Mich. 362. But if the plea shows that respondent was duly elected, it need not aver his qualifications. *Atty-Gen'l v. McIvor*, 58 Mich. 516.

4. *People v. Clark*, 13 Ill. 213.

6 C. of L. — 26

5. *People v. Mayworm*, 5 Mich. 146;

People v. Beecher, 15 Ohio, 723.

6. *State v. Olcott*, 6 N. H. 74.

7. *Tancred*, Quo War. 281, 308.

8. *State v. Olcott*, 6 N. H. 74; *Reg. v. Blagden*, *Gilb. Cases in Law and Equity*, 159.

9. *Reg. v. Deplack*, 10 B. & S. 174.

10. *Reg. v. Knight*, 4 Term R. 424.

The crown might also demur to the plea, and reply at the same time. *Reg. v. Deplack*, 10 B. & S. 174.

11. *Coon v. Plymouth Plank Road Co.*, 31 Mich. 179.

12. *Reg. v. Leale*, 5 El. & Bl. 1; *State v. McDaniel*, 22 Ohio St. 354.

(C) PLEADINGS BEFORE LEGISLATIVE BODIES. — I. *Pleadings in Parliament.* — Before the act of 1868, the method of commencing a contest for a seat in the House of Commons was by filing a petition, which was required to be done by a candidate or one of the electors of the constituency from which the member was returned; and considerable strictness was required of petitioners in proving their qualifications; ¹ though where the allegation was, that petitioner had been a candidate, it was held that he had a *prima facie* right to petition, unless his disqualification was obvious.²

In stating the charge, it was sufficient if it was in general terms, and no technical form was required; but the facts must have been stated directly, and not by way of recital.³

Since the act of 1868, petitions are required to be presented to the courts of Common Pleas in England or Ireland, and to the Court of Session of Scotland; and the petition is required to contain a statement, first, of the right of the petitioner to petition; second, of the holding and the result of the election; third, of the facts and grounds relied on to sustain the prayer: and it is required to be divided into paragraphs, which are to be numbered consecutively, each of which is to be confined to a distinct portion of the subject.⁴

It was never necessary to state the names of alleged illegal voters in the petition; but, in cases of scrutiny, each party was required to furnish a list of alleged illegal voters, with the grounds of objection to each.

2. *Pleadings in Congressional Cases.* — Before the passage of the act of 1851, contests for seats in the House were commenced by petition to the House, and copies were served on the sitting member with notice of the intention to contest the seat: and when it was intended to assail the legality of any of the votes, it seems that the names of the voters were required to be given; though this might have been done by furnishing the list, as required by the Parliamentary practice.⁵

The petition was required to contain direct and specific charges, which would enable the House to judge whether, if proved, it would be sufficient in law to vacate the seat.⁶

3. *Notice under Act of 1851.* — By the act of 1851, now sections 105 *et seq.* of the Revised Statutes, it is provided that the person intending to contest an election of any member of the House of Representatives, shall, within thirty days after the result of the election shall have been determined by the officer or board of

1. *Lisborn Case*, W. & B. (Eng. El. Cases) 3; *Wolverstan*, Law and Practice of Cases) 222; *North Cheshire*, 1 P. R. D. El. Petitions, 10.
(Eng. El. Cases) 215.

2. *Montgomery Case*, P. & K. (Eng. El. of El. Petitions, App. xxii.
Cases) 169, n.; *Londonderry Case*, W. & 5. *Varnum's Case*, 1 Cong. El. Cases, 112
B. (Eng. El. Cases) 214. *Easton v. Scott*, 1 Cong. El. Cases, 272.

3. *Petersfield Case*, 3 Doug. (Eng. El. 6. *Martin Leib*, 1 Cong. El. Cases, 165.

canvassers authorized by law to determine the same, give notice in writing of his intention to contest the same, and in such notice *shall specify particularly the ground upon which he relies in the contest*; and the member elect shall, within thirty days, answer such notice, admitting or denying the facts alleged therein, and stating specifically *any other grounds* upon which he rests the validity of his election.

By sect. 121 it is provided that the testimony taken by either party shall be confined to the proof or disproof of the facts alleged or denied by the notice or answer. Under this notice, it has been held that the name of the illegal voters need not be set forth in the answer.¹

It is doubtful what degree of minuteness is necessary in stating the grounds of contest or defence, but it would seem that the notice should specify with reasonable certainty the class of objections of the election. If it is such that the contestee can tell the reasons for the contest, the committee hesitate to reject the evidence offered; so that, while in many cases the committees have found fault with the laxity of the pleading, they have very seldom ruled out the evidence for this reason.²

4. *Waiver of Sufficient Notice.* — If the specifications are vague and indefinite in their character, they will not be rejected in the absence of special objections to them. The defect is considered

1. *Otero v. Galegos*, 2 Cong. El. Cases, 176; *Vallandigham v. Campbell*, 2 Cong. El. Cases, 228.

In the first case, the notice stated that, in the various precincts of one county, — naming them, — there were eight hundred persons whose votes were received, who were not qualified to vote because of alienage; that in the various precincts in another county the votes of six hundred persons, which were illegal for the same reason, were cast and counted for the sitting member; and that, at the various precincts of one of these counties, five hundred votes had been cast which were illegal, on account of the persons casting them being aliens, minors, and persons not qualified to vote; and the committee held that the notice was quite sufficient to authorize the taking of the testimony, and the report was agreed to without a division.

2. In the case of *Kline v. Verree*, 2 Cong. El. Cases, 381, where the allegations of the notice were so vague that the committee were unanimously of the opinion that the notice was in no just sense a conformity with the requirements of the statute, or the well-settled rules which should govern all contests of this kind, it was said in the report, that, "The committee were induced, from a desire that no injustice might by any possibility be done the contestant, to permit him to 'orally specify' and particu-

larize the grounds upon which, under the last clause of the tenth specification, his contest is based."

In the case of *Boynton v. Loring*, 5 Cong. El. Cases, 346, where the report says, "That a glance at the notice of contest disclosed its utter insufficiency, and non-compliance with the statute, and that it would be unnecessary to examine any other points raised in the case." They further say, "Fearing, however, that, unless the merits of the case are taken up and examined, injustice may be done, the committee have, at the expense of much inconvenience and loss of time, examined the questions raised, and present their views specifically on each point."

In the later case of *Buchanan v. Manning*, 6 Cong. El. Cases, 287, the committee decided that the allegations of the notice, with the exception of one specification, which was not proved, were clearly insufficient; but the report stated that the committee preferred not to rest the decision upon the sufficiency of the pleadings, for the reason that, if the testimony should develop the fact that the sitting member was not elected, it would be their duty so to report, although the contestant might not be entitled to the seat on account of having failed to comply with the law as to the sufficiency of notice.

a matter of form; and if the contestee answers the notice, instead of objecting to it, the objection will be considered as waived.¹

And it may also be waived by an agreement that evidence taken under it might remain in the case, in consideration that the time for taking the evidence of the sitting member might be extended.²

5. *Notice must demand Relief.*—The party should not rely merely upon the statements of facts, but should demand the relief to which he claims to be entitled, or the committee may refuse to grant it upon the hearing;³ although votes at a precinct have sometimes been rejected, when it was not asked in the pleading.⁴

6. *Variance.*—The committees are somewhat more strict in requiring that the pleadings should contain some kind of a statement in regard to the matters to be proved.⁵ And still the practice has not been uniform; and in a number of cases, evidence has been considered which decided the contest upon points not made in the pleading.⁶

Before the passage of the statute regulating contests, it had been held that evidence ought not to be admitted of any fact not substantially averred in the petition;⁷ and this has always been the rule in Parliamentary cases.⁸

7. *Failure to answer.*—Failure of the contestee to answer will not authorize a default, or warrant the committee in considering the allegations of the notice as confessed, without evidence of their truth; though he would not be permitted to set up affirmative matter to uphold his election.⁹

1. *Knox v. Blair*, 2 Cong. El. Cases, 521; *Kline v. Verree*, 2 Cong. El. Cases, 381; *Bromburg v. Haralson*, 4 Cong. El. Cases, 356.

2. *Duffy v. Mason*, 5 Cong. El. Cases, 364.

3. In the case of *Van Wyck v. Greene*, 3 Cong. El. Cases, 646, the committee reported that the irregularities and misconduct of the officers of election in a number of precincts were sufficient to warrant the rejection of the whole vote of the districts, but that they did not recommend doing so because the contestant did not demand it in his notice.

4. In the case of *Knox v. Blair*, 2 Cong. El. Cases, 521, under an allegation that four hundred illegal votes had been cast for contestee at one precinct, and upon evidence showing great fraud at the polls, the whole vote of the precinct was rejected without a demand in the notice.

5. *Reid v. Julian*, 3 Cong. El. Cases, 825; *Gause v. Hodges*, 4 Cong. El. Cases, 300.

In the first case, the contestant claimed in the notice that two votes should be counted, because they had been improperly rejected for a certain reason, and asked at the hearing that they should be counted because they had been improperly rejected for another alleged reason. The committee refused to allow the credit, saying, "A

plaintiff cannot be permitted to sue for a farm, and, when defendant proves on the trial that he has paid for the farm, to change his ground, and ask to recover the price of a lot." And in the case of *Gause v. Hodges*, the committee refused to consider evidence of the lack of qualification of the election officers under an allegation that a thousand spurious votes had been counted which had not been cast, and that the ballot-box from one precinct had been removed from the State, and tampered with.

6. *Knox v. Blair*, 2 Cong. El. Cases, 524; *Niblack v. Walls*, 4 Cong. El. Cases, 105.

In the case of *Knox v. Blair*, under an allegation that four hundred illegal votes had been cast in one precinct by persons who were named, the committee allowed the contestant to offer evidence to support a claim that the officers had been concerned in such irregularities, and that the voting had been of such a fraudulent character as to involve all concerned in it, and rejected the vote of the precinct, and the contestant was seated.

7. *Leib Case*, 1 Cong. El. Cases, 165.

8. *Wolfershan*, Law and Practice of El. Petitions, 10.

9. *Sheridan v. Pinchback*, 4 Cong. El. Cases, 196; *Follett v. Delano*, 3 Cong. El. Cases, 113.

(D) PLEADINGS IN STATUTORY CONTESTS. — I. *Degree of Certainty in Petition on Notice.* — The method of contesting elections under the statutes of various States is usually by notice served upon the opposite party, or by petition addressed to the proper tribunal; and it would seem that the same degree of certainty would be required in such notices or petitions as would be required in declarations or petitions in civil actions.

In Illinois, it has been held that such a proceeding is in the nature of an action in chancery, and the certainty required in a bill in equity would be sufficient; and the technical allegations of an information in *quo warranto*, or even in the common-law declaration, would not be required.¹

2. *Statements required.* — In the absence of a special statute, it would not be necessary to give the names of alleged illegal voters, nor the reason why they were illegal;² but where illegal voting is the only ground of contest, it ought to appear that the number of illegal votes cast and counted exceeded the majority of the contestee;³ although, in Kansas, it has been held that it is not necessary to state in the notice that the cause of complaint changed the results.⁴

The statement of contestant's right to make the contest should appear;⁵ but it is not necessary to state that he was eligible, where the notice shows that he was a candidate,⁶ although this might be required in an information.⁷

The result of the election, number of votes cast, and declaration of the result by the canvassing board, should be stated, although these facts might not be necessary in those States where the

In this last case the committee say, "If the contestant and the sitting member were the only parties interested in the representation of this district, it might not be unfair to hold that the sitting member, upon service of notice upon him according to law, must answer as the law requires, or, by neglect or refusal, be taken as confessing the truth of the allegations made in conformity to law against his right to his seat, and abide by the judgment of the House upon such confession. But the contestant and the sitting member are by no means the only parties interested in this representation. The electors of the district, each and every one of them, have a vital interest in that question; and no one of them can be precluded, by any laches not his own, from insisting that the choice of the majority shall be regarded. No confession of the sitting member, however it might bind him personally, can place the contestant in the seat, unless he is the choice of the majority, nor deprive that majority of its rightful representation. The sitting member may well be deprived, by his neglect to answer, of reliance upon 'any other grounds upon which he rests the

validity of his election,' for he has never given notice of any such ground; but the committee are of the opinion that the House should require proof that he has not, and that the contestant has the majority of the legal votes before unseating the one and admitting the other, however the sitting member may have seen fit to conduct his own case in a contest.

1. *Talkington v. Turner*, 71 Ill. 234; *Dale v. Irwin*, 78 Ill. 170.

2. *Wheat v. Ragsdale*, 27 Ind. 191; *Garratt v. Higgins*, id. 162.

3. *Zerby v. Snow*, 107 Pa. St. 183.

4. *Steele v. Martin*, 6 Kan. 430.

5. *Edwards v. Knight*, 8 Ohio, 375; *Rules of Court*, rule 2, pt. 1; *Hardcastle, El. Petitions*, xxii.

Where the statute only allowed electors to petition, a description of petitioner as a resident and citizen was held not to be sufficient. *Blanck v. Pausch*, 113 Ill. 60.

6. *Montgomery Case*, P. & K. (Eng. El. Cases) 169; *Londonderry Case*, W. & B. (Eng. El. Cases) 214; *Ledbetter v. Hall*, 62 Mo. 422; *Rounds v. Smart*, 71 Me. 380.

7. *State v. Beiler*, 87 Ind. 320.

statute declares what shall be necessary in the petition, as in such cases it is sufficient if the statute is followed.¹

The decisions of the courts of the different States vary so much upon the question as to the certainty required in stating the grounds of a contest, that no general rule can be laid down which will apply to all the States; and it will be necessary to examine the cases in the different States to determine the question in each particular jurisdiction.²

1. *Ledbetter v. Hall*, 62 Mo. 422; *Rounds v. Smart*, 71 Me. 380.

2. In *Ohio*, where the points of the contest were required to be specified by the statute, it was *held* that a notice was sufficient which apprised the contestee of the general nature of the objections to be made, so as to enable him to meet them without unnecessary expense and labor. *Shields v. Howard*, 16 Ohio St. 184.

In this case the objections to the notice were twofold,—first, it does not show, if true, a good case; second, the points relied on are not sufficiently definite. *Welsh, Justice*, says, “We think the notice is sufficient. It contains all that the statute requires,—notice that the election will be contested, and a specification of the points relied upon. There is no analogy between such a notice and a declaration at law. The object of the notice is not to set forth a case, but to set forth the fact generally that a case will be made, and to indicate the *kind* of evidence, not the *result* or *effect* of the evidence, by which it is to be made. The points to be specified are not required for the purpose of setting forth ‘a good case,’—not for the purpose of informing the contestee that the attack will be *successful*,—but to advise him *at what points* the attack will be made, in order that he may fortify, and not be taken by surprise.”

In this State the evidence is taken before two justices, and the witnesses are not produced in court.

In *Nebraska*, under a similar statute, it was *held* that a notice which states the rights of the contestor, the office to be contested, the date at which its duties commence, with the points of contest and names of the officers before whom evidence will be taken, will be sufficient. *State v. Peniston*, 11 Neb. 100.

The courts of *Pennsylvania*, in the earlier cases, went to the other extreme; and it was *held* that it is the duty of a party complaining of an election or return, to set forth the facts on which the complaint is founded plainly and distinctly, and that, before the court will proceed with the case, the facts alleged should exhibit a case, which, if sustained by the proof, would render it the duty of the court either to declare the election void, or to declare that

another person, and not the party returned, was duly elected to the office. *Skerrett's Case*, 2 Pars. (Pa.) 509; *Brightly, El. Cases* (Pa.), 320.

This doctrine has been substantially followed in the *nisi prius* courts since that time. *Carpenter's Case*, 2 Pars. (Pa.) 537; *Lelar's Case*, 2 Pars. (Pa.) 548; *Batturs v. Megary*, 1 Brews. (Pa.) 162; *Thompson v. Ewing*, 1 Brews. (Pa.) 68.

But in the case of *Gibbons v. Shepherd*, 65 Pa. St. 36, it was *held* by the Supreme Court of the State that some of the earlier decisions were too stringent, and that certainty to a common intent was all that was required; that the rule must not be held so strictly as to afford protection to fraud, nor, on the other hand, so loosely as to permit the acts of sworn officers, chosen by the people, to be inquired into without adequate and well-defined cause.

In *Louisiana*, where the statute required that the specific grounds of the contest should be set forth, certainty to a common intent was required. *Augustine v. Eggleston*, 12 La. Ann. 366. And, where irregularities were complained of, it was necessary to aver that the result had been changed thereby. *Lanier v. Gallatas*, 13 La. Ann. 175. And, where the election was contested on account of violence, it was *held* that the absence of an allegation that a sufficient number were prevented from voting to have changed the result, was fatal to the suit. *State v. Mason*, 14 La. Ann. 505.

The same rule prevails in *West Virginia*, where it is *held* that a notice which did not show the number of votes cast for either party, nor give any facts from which the court could determine that the irregularities complained of would prevent the true result from being ascertained, was defective. *Harrison v. Loomis*, 6 W. Va. 713; *Halstead v. Rader*, 27 W. Va. 806.

When the notice is required to state the points or grounds of contest, it will not be sufficient to allege that the majority of the votes cast were in favor of contestant; but the grounds must be set forth to show that the contestee can tell the particulars upon which the contest is based. *Taylor v. Taylor*, 10 Minn. 107.

But it is not necessary to set out the

3. *Amendment to Petition or Notice.* — When the course of proceeding in the contest is regulated by the practice in civil actions, it seems that the courts have the power to permit amendments to be made in petitions or notices when the statements are informal or defective.¹ And where the matter is in the discretion of the court, an amendment may be allowed *nunc pro tunc*, after the evidence has been closed.²

In such cases, amendments should only be allowed in matters consistent with the original charge. New matter ought not to be permitted by way of amendment;³ and if the time for filing the petition or notice has passed, and the original notice was not sufficient to confer jurisdiction, it cannot be acquired by an amendment setting up new matter.⁴

Where an amended complaint is filed which does not make new parties, or change the cause of action, it will relate back to the commencement of the suit.⁵

4. *Misjoinder of Parties or Causes of Action.* — Where the proceeding is by notice, that is the foundation of the contest, and if there are different parties, and different causes of action in which all the contestants or all the defendants are not interested, they should not all join, or be joined, in one action, as no proper judgment could be rendered in such a proceeding.⁶

5. *Default.* — The same rule does not prevail in courts in cases of default as that adopted in Congress, where it is provided that allegations not denied shall be taken as confessed;⁷ but, in the absence of such a provision, proof of the allegations must be made.⁸

minutiæ of the various transactions. See *Minor v. Kidder*, 43 Cal. 229, where it was held that a notice which alleged that there had been a miscount of the votes did not need to state the reasons nor the manner of the miscount.

In *Alabama*, the statement that a number of illegal votes had been cast and counted for contestee, which, if taken from him, would reduce his legal votes below the number of legal votes received for complainant, and that a number of legal votes offered for plaintiff had been rejected, was held sufficient. *Griffin v. Wall*, 32 Ala. 150.

Argumentativeness will not vitiate a notice, if, from the facts alleged, the court can see that the result of the election has been affected, or that there has been a sufficient reason for a contest. *Raney v. Ratcliffe*, 81 Ky. 468; *Nichols v. Ragsdale*, 28 Ind. 131.

Where the statute required the names of illegal voters to be stated in the notice, it was held this did not apply when the objection was not to the votes, but the allegation was that officers had counted certain blanks as votes for defendant. *Moffatt v. Montgomery*, 68 Mo. 162.

In *Indiana* the rule seems to require a certainty to a common intent; but an examination of the cases of *Hadly v. Gutridge*, 58 Ind. 302; *Wheat v. Ragsdale*, 27 Ind. 191; *Dobyns v. Weadon*, 50 Ind. 298, seems to indicate that a much less degree of strictness is required in that State than in Pennsylvania; and this is true in *Minnesota* — *O'Gorman v. Richter*, 31 Minn. 25 — and in *Nevada*. *Greely v. Holland*, 14 Nev. 320.

1. *Kneass Case*, 2 Pars. (Pa.) 553; *Brightly's El. Cases*, 337; *Gibbons v. Shepherd*, 65 Pa. St. 20; *Marshall v. Baldwin*, 11 Phila. 383; *Buckland v. Goit*, 23 Kan. 327; *Dale v. Irwin*, 78 Ill. 170.

2. *Gibbons v. Shepherd*, 65 Pa. St. 20.

3. *Hardcastle*, Pr. of El. Petitions, 12; *Mann v. Cassidy*, 1 Brews. (Pa.) 32; *Thompson v. Ewing*, 1 Brews. (Pa.) 63, 97, 101.

4. *Witti, Ex p.*, 3 W. N. of C. (Pa.) 165; *Division Inspector Election*, 1 W. N. of C. (Pa.) 326.

5. *Preston v. Culbertson*, 58 Cal. 198.

6. *Vance v. Gaylor*, 25 Ark. 32.

7. *Bull v. Southwick*, 2 New Mex. 321.

8. *Kellar v. Chapman*, 35 Cal. 635.

(E) PLEADINGS IN CIVIL ACTIONS. — I. *Parties Plaintiff.* — Where a statute provided that an action might be brought against the secretary of state for the failure to open returns, and cast up the result, it was held that this action could be maintained by the plaintiff, although he had received only a minority of the votes, as the object was to punish misfeasance in office, rather than to compensate a party injured for loss of the office.¹

2. *Action for Penalty.* — In an action for a penalty under a statute, against a judge of election, for appointing a minor as clerk of the election, it was held to be sufficient to charge that he did so knowingly, wilfully, wrongfully, and contrary to the statute, without alleging that he acted corruptly and maliciously; and in a count for taking the ballots from the box, and counting them before the polls were closed, and the poll-book signed, the allegations that he did so intentionally, knowingly, and contrary to the form of the statute, were held sufficient; and in a count for permitting a person to vote twice, it was held that it was sufficient to state that he did so intentionally, wrongfully, and from motives of partiality, and that it was not necessary to state the name of the candidate for whom the person voted.²

XX. Practice. — (A) IN COURTS AND BEFORE STATUTORY TRIBUNALS. — I. *Civil Jurisdiction of the Courts of the United States.* — By section 2010 of the Revised Statutes of the United States, it is provided that whenever any person is defeated or deprived of his election to any office, except elector of President or Vice-President, representative or delegate in Congress, or member of a State legislature, by reason of the denial to any citizen of his right to vote on account of race, color, or previous condition of servitude, his right to the office shall not be impaired by such denial, and that he may bring any appropriate suit to recover possession of the office; and that, where the sole question arises out of such denial, the circuit or district courts of the United States, in the district in which the plaintiff resides, shall have concurrent jurisdiction with the State courts.

This section is not broad enough to cover the case where one has been elected to, and inducted into, a State office, from which he has been subsequently ejected, and the federal court will have no jurisdiction of a suit to recover the office.³

The circuit and district courts cannot take jurisdiction in any case of contested elections, except where the sole question of the title arises out of the denial of the right of persons to vote on account of their race,¹ color, or previous condition of servitude, their jurisdiction being limited to those cases in which it is expressly conferred by act of Congress.⁴

2. *Tribunal having Original Jurisdiction in the States.* — To determine what tribunals have jurisdiction under the statutes of

1. Switzler v. Rodman, 48 Mo. 197.

2. Kirkpatrick v. Stewart, 19 Ark. 695.

3. Johnson v. Jumel, 3 Woods (C. C.), 69.

4. Harrison v. Hadley, 2 Dill. (C. C.) 229.

the various States, it will be necessary to examine the cases of the different States where that question has been decided.¹

In 1872, in the circuit court of *Louisiana*, a bill in equity was filed by one who had been a candidate for governor, against the governor and those claiming to be the returning board and the opposing candidate, charging that, by the acts of the governor, at least ten thousand voters had been refused registration, and denied the right to vote on account of race, color, and previous condition of servitude, and asking that the defendants might be required to deposit copies of all documents, affidavits, tally-sheets, etc., which were in their possession, and asking an injunction to restrain the governor from canvassing the votes except in the presence of another returning board, and from delivering the returns to the other defendants, and to restrain them from canvassing them; and *Durrell, District Judge*, held that the court had jurisdiction, and entered an interlocutory decree restraining the defendants from canvassing or promulgating the returns, and ordered that they should deliver them to the other returning board, which he determined was the legal board; and as the governor — pending the hearing of the application to show cause — had had the returns canvassed by another board appointed by him, and issued a proclamation announcing the result of the election, the court ordered the marshal to take possession of the State House, and prevent the assembling of the legislature declared to be elected by such canvass. *Kellogg v. Warmouth*, Sen. El. Cases, 439.

In the *Louisiana* Case, Sen. El. Cases, 439, the report of the committee characterized this as an irregular, illegal, and in every way an inexcusable, act on the part of the judge.

1. In *Arkansas*, circuit courts have jurisdiction in cases of contested elections for sheriff, — *Lambert v. Gallagher*, 28 Ark. 451, — and the Assembly has exclusive jurisdiction of contests for the office of governor. *State v. Baxter*, 28 Ark. 129.

The board of supervisors has no jurisdiction in county-court contests. *Maxey v. Mack*, 30 Ark. 472.

In *California*, the county judge has the authority to decide cases of contested elections, — *Saunders v. Haines*, 13 Cal. 145, — and the district courts have jurisdiction in cases of *quo warranto*. *People v. Holden*, 28 Cal. 123.

The board of supervisors is the proper tribunal to canvass the vote cast at a special election for a county-seat, and to declare the result. *Calaveras Co. v. Brockway*, 30 Cal. 325. But a statute authorizing this board to try cases of contest for the office

of county judge, was held to be unconstitutional. *Stone v. Elkins*, 24 Cal. 125.

In *Florida*, the Supreme Court has authority to proceed by information to try the right to the office of lieutenant-governor. *State v. Gleason*, 12 Fla. 190. But it has no jurisdiction to determine whether the election of a United States senator conforms to the regulations of Congress or is void. Executive Communication, 12 Fla. 686.

In *Illinois*, the county court must try cases of the election of constable, — *Talkington v. Turner*, 71 Ill. 234, — and of city officers in cities incorporated under the general act, — *Winter v. Thistlewood*, 101 Ill. 450, — but cannot try cases of election for aldermen in cities organized under that law, — *Linegar v. Rittenhouse*, 94 Ill. 209, — and cannot try cases of elections for city officers unless the city is organized under the general law. *Young v. Adams*, 74 Ill. 480; *Brush v. Lemma*, 77 Ill. 496.

In *Indiana*, the circuit court has jurisdiction of an information brought by a private person in the name of the State, on his own relation, where he claims the office. *State v. Adams*, 65 Ind. 393.

In *Maryland*, the circuit court may decide a contest for the election of a sheriff in the county. *Anderson v. Lavelly*, 58 Md. 192.

In *Missouri*, the circuit court has no jurisdiction over contested elections for county collector. *State v. Sherwood*, 42 Mo. 179. But it has exclusive jurisdiction of an election contest for justice of the peace in the city of St. Louis, — *State v. Lobsinger*, 7 Mo. App. 106, — and the proceedings should be brought in that court, in a *quo warranto*, for the contest of an office between private persons. *State v. Buskirk*, 43 Mo. 111.

In *Nebraska*, the district court is the proper forum in which to contest an election in a city, upon the question of granting aid to construct a railroad. *Foxworthy v. Lincoln, etc., R. Co.*, 13 Neb. 398.

In *New Hampshire*, the Superior Court has jurisdiction to re-examine the returns of the election of road commissioners, and declare the result. *Petition of Portsmouth*, 19 N. H. 115.

In *New Jersey*, in an early case it was held that the Supreme Court had jurisdiction to inquire into the proceedings of an election held under an act of the Assembly, and to declare it void if they were illegal. *State v. Justices of Middlesex*, 1 N. J. L. 244.

The courts of common pleas have jurisdiction in Pennsylvania under the act of

3. *Grounds of Contest.*—Any illegal action on the part of the opposite party, or the election officers, by which the result of the election has been changed, is sufficient ground to contest the election;¹ but a wrongful act of the contestee, not affecting the general result, will not be sufficient, in the absence of a special statute to that effect.²

4. *Time of filing Notice or Complaint.*—By the statutes of the various States, a party wishing to contest an election must serve the notice, or file the complaint, within the time allowed by law, or the court will have no jurisdiction to proceed;³ and it has been held that a court has no power in the absence of an express provision of law authorizing it to grant an extension of the time for filing any of the pleadings.⁴

It would not, however, be ground of exception if the notice was served before the final promulgation of the return.⁵

5. *Computation of Time.*—In computing time, the first day is to be excluded, and the last day included.⁶ And it is probable, that, if the last day falls on Sunday, the petition must be filed the day preceding.⁷

The party has until midnight of the last day in which to file the complaint.⁸ But where a certificate of election is given at a

1839, in contests of the election of clerks and prothonotaries, — *Skerrett's Case*, 2 Pars. (Pa.) 509, — and the quarter sessions in cases of other county or borough officers. *Gibbons v. Shepherd*, 2 Brews. (Pa.) 117; *Shepherd's El. Case*, 77 Pa. St. 295.

In South Carolina, the Supreme Court, in the exercise of its original jurisdiction, cannot issue a writ of *certiorari* to a board of election commissioners to remove the record of a contested election case into that court. *Carson Ex p.* 5 S. Car. 117.

In Tennessee, the circuit court has exclusive jurisdiction over contests for sheriff, and they cannot be tried by the court of chancery. *Conner v. Conner*, 8 Baxter (Tenn.), 11; *Anderson v. Gossett*, 9 Lea, 644. And where there is no provision in the statute for the contest of an election, the court having the authority to induct into office must determine the validity of the election; and the county court has this power in the case of school directors. *State v. Burchfield*, 12 Lea (Tenn.), 30.

In Texas, the district court has original jurisdiction in elections for the office of district judge. *McKinney v. O'Connor*, 26 Tex. 5.

In the absence of a quorum of the county court to determine a contested election for a county office, it was held that a decision of arbitrators, to whom the matter had been referred, which was recorded as a decision of the court, was a nullity.

The county or corporation courts in Virginia have power to determine contested

election cases. *Ellyson Ex p.* 20 Gratt. 10.

And in West Virginia, a petition to contest the office of judge must be addressed to the special court, but deposited with the governor, and remain in his office to justify his official action. *Loomis v. Jackson*, 6 W. Va. 613.

1. If the canvassers improperly reject the votes from a precinct, a contest may be maintained. *Dean v. Hook*, 4 Colo. 151.

2. In *Meredith v. Christy*, 64 Cal. 95, it was held that the fact that the contestee had unlawfully aided the registration officer in registering an illegal vote, was not ground of contest. See also *Ward v. Sykes*, 61 Miss. 649.

3. *Barberick v. Wagner*, 9 Minn. 232; *Farlow v. Houghham*, 87 Ind. 540; *Ingerson v. Marlow*, 14 Ohio St. 568; *State v. Hall*, 26 La. Ann. 58; *Costello v. St. Louis C. Ct.*, 28 Mo. 259; *Wilson v. Lucas*, 43 Mo. 290; *Bowen v. Hixon*, 45 Mo. 340; *Lindsay v. Luckett*, 20 Tex. 516; *Borer v. Kolars*, 23 Minn. 445; *Crisler v. Morrison*, 57 Miss. 791; *McMenamin Re*, 13 Phila. 422.

4. *Bull v. Southwick*, N. Mex. 321.

5. *Knight v. Ragan*, 31 La. Ann. 289.

6. *Batman v. McGowan*, 1 Metc. (Ky.)

533; *Misch v. Mahew*, 51 Cal. 514.

7. See *McLees v. Morrison*, 29 Ohio St. 155, where it was held that where the last day allowed for filing a transcript on appeal was Sunday, one filed the next day was too late.

8. *Zimmerman v. Cowan*, 107 Ill. 631.

second canvass, the time will be computed from the date of the canvass complained of.¹

Where a complaint is to be filed within a certain number of days after the election, one filed after that time will not be sufficient, although within that number of days from the issuing of the certificate.²

Where the canvassing officers are required to declare the result of the election, and deliver a certificate to the successful party, and a notice of appeal must be given within a certain number of days after such declaration, the date of the certificate is held to be the time of making the declaration.³

When the canvassing board are required to make their determination by a certain time, but may make it before that time, and there is no provision for a public proclamation announcing the result, the time will not commence to run until after the last day which the board has in which to declare the result, unless it is shown that notice of the fact of the determination is communicated to the candidate at an earlier date.⁴

6. *How Objection to Time of Filing taken.*—When the time of filing the paper, as well as of the date of the election or declaration of the result, does not appear in the body of the notice or complaint, the question as to whether the proceeding was commenced in time cannot be reached by demurrer to the complaint, as this goes only to the sufficiency of the pleading, and does not reach the question as to whether it is properly before the court.⁵

When the proceeding is by way of appeal, the remedy is by motion to dismiss;⁶ and where by complaint or petition, by motion to strike the petition or complaint from the files, or by motion to quash the petition.⁶

7. *Statutory Provisions as to Verification must be followed.*—Where the statute requires the petition to be signed or verified by certain parties, this must be done; and any variation in the matter will render it defective.⁷

1. *Day v. Jones*, 31 Cal. 261.

2. *State v. Tucker*, 54 Ala. 205; *Collings Case*, *Brightly's El. Cas.* (Pa.) 503.

In two other Pennsylvania cases, where all of the vote was not open to the inspection of the candidate until after the statutory time for filing the complaint had elapsed, and the majority for contestee was derived from that vote, it was held that the time when the judges made their certificate was the time from which the computation was to be made. *Thompson v. Ewing*, 1 Brews. 67; *Stevenson v. Lawrence*, id. 126. And in *Davis v. Maxwell*, 22 La. Ann. 66, it was held, that, as it cannot be determined officially who is defeated until after the declaration of the result, the time should be considered as commencing to run when the result is announced.

3. *Taylor v. Wallace*, 31 Ohio St. 151.

4. *Follett v. Delano*, 3 Cong. El. Cases, 116.

5. *Preston v. Culbertson*, 58 Cal. 198.

6. *Collings Case*, *Brightly's El. Cas.* (Pa.) 503.

7. Where a petition was not sworn to by the contestant as required by law, but by another person, it was held bad. *Holton v. Brown*, 46 Ind. 122. And where it was not sworn to by twenty-five voters who had voted at the election, as the law required, it was held bad. *Marshall v. Baldwin*, 11 Phila. 393. And a certified copy of a petition was held not to be sufficient where it was required that the petition should be signed by twenty voters. *Ducate v. Gremillion*, 32 La. Ann. 540.

Where there is a statutory form of affidavit, that form must be adopted.¹

8. *How Sufficiency of Affidavit tested.*—A general demurrer to a complaint will not raise a question as to the sufficiency of the affidavit.²

The proper practice would undoubtedly be, to move to strike the petition from the files, for want of sufficient verification.

9. *Court may adopt Rules of Practice.*—The legislature may constitutionally authorize the judge of the court, before whom contested election cases may be tried, to adopt rules of procedure and of taking testimony, and for adjudging costs.³ And in the absence of a statutory provision fixing the practice, the court which tries the case will have power to regulate the procedure.⁴

10. *Time of Trial.*—Where the statute requires a court to hear and determine a contested election case, at the next term after the election was held, such provision will be deemed directory only, and will not prevent a trial at a subsequent term, unless a clause is added prohibiting the trial at a later date.⁵

Where such continuance is granted without the proper affidavits, and against the objection of the defendant, it was held to operate as a discontinuance.⁶

Authority to try a contested election case before a judge at chambers, if not tried at a regular term, within thirty days after the election, does not prohibit the trial at the next term where it is not tried at chambers.⁷

11. *What the Courts may decide.*—Whenever any court, even of limited jurisdiction, has authority to try cases of contested election, its jurisdiction necessarily draws to it the right to determine all questions touching the regularity of the actions of the officers conducting the election, and making and canvassing the returns, and to examine all the returns, and correct all errors,⁸ and includes the power to declare the election void, when the result cannot be ascertained.⁹

12. *Tie Vote.*—In case it is declared that there is a tie vote, as both parties are defeated unless the election is to be decided by lot, as provided by law in some States, either party may contest

1. Division Inspector *Re*, 11 Phila. 380.

An affidavit upon information and belief, or one in the form of an ordinary verification, will be sufficient, where no form is provided. *Curry v. Baker*, 31 Ind. 151; *Kirk v. Rhoades*, 46 Cal. 398.

2. *Curry v. Miller*, 42 Ind. 320.

3. *Anderson v. Lavelly*, 58 Md. 192.

4. *Boring v. Griffith*, 1 Heisk. (Tenn.) 456.

5. *Stevenson v. Lawrence*, 1 Brews. (Pa.) 131; *Gibbons v. Shepherd*, 65 Pa. St. 20.

6. *Kellar v. Chapman*, 34 Cal. 635.

7. *Whallon v. Bancroft*, 4 Minn. 109.

8. *Loomis v. Jackson*, 6 W. Va. 613.

9. *Handy v. Hopkins*, 59 Md. 157.

The office should never be declared vacant where the poll can be purged, and the result ascertained by any method of proceeding. *Thayer v. Greenbank*, 1 Brews. (Pa.) 189. And in *Whitney v. Board of Delegates*, 14 Cal. 479, it was held that where the only matter alleged was the reception of illegal votes, a special tribunal should decide in favor of one of the candidates, and had no power to declare the election void; and that where it did this without objection on the part of the contestant, it was equivalent to a dismissal of the contest.

the election; and the notice in such a case should be to the other party, and not to the incumbent, who would hold over if there was no election.¹

Where the statute provides that, in case of a tie, there should be a decision by lot, this will not preclude the contest by the attorney-general, on the relation of the unsuccessful party, in which the legality of the votes counted for the winner could be determined.² And where in such a case the new election is held, the right of the successful party at the new election can be tested by the candidate at the first election,³ unless he has consented to the new election.⁴

13. *Right to Jury Trial.*—While jury trials were formerly allowed in election cases in *quo warranto* proceedings in New York and Michigan,⁵ but few of the States allow this in election contests.⁶

14. *Discontinuance.*—Where an election contest is under the control of the contestant, and he discontinues it, and his opponent is commissioned, he will not be permitted to renew the contest;⁷ but when the proceeding is in the name of the people, or is by petition filed by the electors, it cannot be discontinued, without the consent of the officer representing the people.⁸

15. *New Trial or Rehearing.*—The power of courts to grant a new trial in ordinary suits will not be construed to extend to election cases, unless the case is classed with other suits.⁹ But where the judgment of the trial court is final, it has been held that a rehearing might be granted, even after affirmance upon *certiorari*.¹⁰

16. *Appellate Jurisdiction.*—Where the jurisdiction of the appellate court is limited to civil actions or civil cases, no appeal can be granted in a statutory contest, as it is neither a suit, complaint, an action, or a criminal proceeding;¹¹ but it is a "special" proceeding, and may be removed under a statute authorizing appeals in such cases.¹²

A proceeding in *quo warranto* is a suit, and may be appealed.¹³

Where the statute made the decision of the lower court final, it was held that it could not be reviewed in the Supreme Court.¹⁴

But the practice has finally been settled in Pennsylvania, of issuing a *certiorari* from the Supreme Court, to review the question

1 Erdman v. Barritt, 89 Pa. St. 320.

2 People v. Robertson, 27 Mich. 116.

3 State v. Harndon (Fla.), 2 S. O. Rep. 4.

4 Sergeant's Case, 1 Cong. El. Cases, 516.

5 People v. Cook, 14 Barb. (N. Y.) 259; 8 N. Y. 67; People v. Cicott, 16 Mich. 283; People v. Robertson, 27 Mich. 116.

6 See Williamson v. Lane, 52 Tex. 335; Newell v. Newton, 26 Minn. 529; Carey v. Sugar, 62 Ind. 601; Kneass Case, 2 Pars. (Pa.) 599; Thompson v. Ewing, 1 Brews. (Pa.) 67; Ewing v. Filly, 43 Pa. St. 389; Pedigo v. Grimes (Ind.), 13 N. E. Rep. 263.

7 Borgstede v. Clark, 5 La. Ann. 291.

8 People v. Holden, 28 Cal. 139; Mann v. Cassidy, 1 Brews. (Pa.) 43; Kneass Case, 2 Pars. (Pa.) 570; Clinton Co. Election, 3 Penna. L. J. 166.

9 Cosgrave v. Howland, 24 Cal. 457; Dorsey v. Berry, 24 Cal. 449.

10 Shepherd's Case, 77 Pa. St. 295.

11 French v. Lighty, 9 Ind. 475; Rogers v. Johns, 42 Tex. 339; Williamson v. Lane, 52 Tex. 335.

12 Lehman v. McBride, 15 Ohio St. 573; Powers v. Reed, 9 Ohio St. 189.

13 State v. Owens, 63 Tex. 261.

14 Moore v. Mayfield, 47 Ill. 167; People v. Smith, 51 Ill. 177.

of the regularity of the proceedings, but not to rejudge the case upon the merits.¹

Technical objections cannot be raised for the first time in the appellate court.² As to the authority of the appellate courts in the various States, it will be necessary to examine the decisions bearing upon that question in the note.³

17. *Irregularity in Notice may be waived.* — A verbal notice of an appeal was held sufficient when contestee so treated it, and agreed for the custody of the ballots pending the appeal.⁴

(B) PRACTICE IN CONGRESS AND LEGISLATIVE BODIES. —

I. *Who may vote in Contest.* — In election contests it is held that no person can be a judge in his own case.⁵

1. *Chase v. Miller*, 41 Pa. St. 403; *Ewing v. Thompson*, 43 Pa. St. 372; *Gibbons v. Shepherd*, 65 Pa. St. 20.

2. *Knox Co. v. Davis*, 63 Ill. 415.

3. In *California* it is held that the Supreme Court has appellate jurisdiction in election cases. *Knowles v. Yeates*, 31 Cal. 82.

In *Illinois*, before the organization of the appellate courts, an appeal lay directly from the county court to the Supreme Court. *Webster v. Gilmore*, 91 Ill. 324. But since the organization of these courts, all appeals from a circuit court in *quo warranto* must first be taken to the appellate courts. *People v. Holtz*, 92 Ill. 426; *Graham v. People*, 104 Ill. 321.

In *Indiana*, an appeal from the county commissioners could be taken to the circuit court in elections in municipal corporations for internal improvements. *Goddard v. Stockman*, 74 Ind. 400.

In *Iowa*, the circuit courts had exclusive jurisdiction of appeals from the special tribunals under the statutes of 1860. *McKinney v. Wood*, 35 Iowa, 167.

In *Kansas*, a petition in error will lie from the decisions of a court or county board of canvassers, organized for the trial of an election contest. *State v. Sheldon*, 2 Kan. 322; *Buckland v. Goit*, 23 Kan. 327.

In *Missouri*, the Supreme Court had no appellate jurisdiction in cases of election contests in the court of appeal of St. Louis. *Britton v. Streber*, 62 Mo. 370.

In *Tennessee*, the Supreme Court could not review the decision of the special tribunal created to decide cases of contested election. *Wade v. Murray*, 2 Sneed (Tenn.), 50.

In *West Virginia*, it was held that a writ of error and *supersedeas* would not lie from the circuit court to the county courts in election cases, but that they might be reviewed on *certiorari*; but a writ of error would lie from the Supreme to the circuit courts where the office was of greater value than a hundred dollars. *Dryden v. Swinburn*, 15 W. Va. 234.

4. *McIntosh v. Livingston*, 41 Iowa, 219.

5. This rule is as old as the common law; and in England it has been said that an act of Parliament, which should be so contrary to natural equity as to make a man judge in his own case, would be void. *Davy v. Savidge*, Hobart, 87; *City of London v. Wood*, 12 Mod. 687. And this same view is taken in *Rice v. Foster*, 4 Harr. (Del.) 485, where it was said by *Chief Justice Booth*, "An act to make a man judge in his own case would not be valid, because it was never the intention of the Constitution to vest such power in the legislature, the exercise of which violates the plainest principles of natural justice." This same doctrine was laid down in the case of *Calder v. Bull*, 3 Dall. (U. S.) 386.

In *Com. v. McClosky*, 2 Rawle (Pa.), 369, the defendants were acting as part of a board of township commissioners, which had the authority to determine the question of the election of its own members; and, having been sworn in, they insisted upon the right of voting upon a memorial charging fraud and illegality in their election. It was held, that, "Unless the words of the act be plain and explicit, the court is bound in decency to conclude that the legislature had no intention to violate the principles of equity, or without necessity to contravene the first principles of the social compact; that it is against reason and justice, and the fruitful source of faction, corruption, and abuse, that the party interested should judge his own cause. It is not to be presumed, but directly to the contrary, that the legislature have invested the respondents with such extraordinary powers."

The same doctrine is held in the legislative bodies. *Brightly's El. Cas.* 212, note; *Gloucester Case*, *Cush. El. Cas.* (Mass.) 97.

In the Senate of the United States, where a resolution reported by the committee declaring a person entitled to a seat was passed by a vote of 22 to 21, the applicant himself voting, the Senate reconsidered the vote, and passed a resolution that he should

But a matter of greater difficulty, however, is presented as to the right of a person whose seat is contested, to vote upon the case of another person elected upon joint ballot from the same district, or to vote upon questions incidental to the main issue.¹

2. *Statutory Provisions for Congressional Contests.* — There having been some difficulty in regulating the proceedings in contests in the House of Representatives, in 1798 an act was passed to provide for the procedure in such cases, but it was continued in force only four years; and in 1851 there was another act passed, the provisions of which are found in the Revised Statutes, §§ 105 to 130.

As the Constitution of the United States provides that *each* House shall be the judge of the elections, returns, and qualifications of its own members,² such a statute cannot bind the House to an unqualified adherence to its provisions; yet, as a matter of expediency, rules which, by their statutory form, have become matters of general publicity, enabling those desiring to make a contest, to proceed in a regular and uniform manner, will not be departed from, unless it is necessary to prevent a failure of justice.³

3. *Time of giving Notice of Contest.* — Sect. 105 of the Revised Statutes provides that, "Whenever any person intends to contest an election of any member of the House of Representatives, he shall, within thirty days after the result of the election has been determined by the canvassing board, give notice in writing to the member, of his intention to contest the same."

While the language of the statute does not confine the right to contest the seat to parties claiming it, since the act of 1851, all cases have been commenced by defeated candidates, except where the objection was to the eligibility of the candidate; but before that time, memorials had been presented by electors of the district.⁴

There should be an announcement of the decision before the time will commence to run;⁵ and where there is no provision of

not be permitted to vote upon the resolution, which was amended so as to read that he was not entitled to the seat. *Stockton Case*, Sen. El. Cases, 264.

1. A question like this arose in the Senate of Ohio in 1886, where the seats of four senators elected from one county upon a single ticket was before the Senate, and, without the vote of these four members, neither political party had a quorum. The presiding officer refused to consider the vote of the contestees in any matter concerning the preliminary questions involved, but the matter was not decided by the Senate.

2. Art. 1, sec. 5.

3. *Brooks v. Davis*, 2 Cong. El. Cases, 244; *Williamson v. Sickles*, 2 Cong. El. Cases, 288.

In this last case the report said, "The

committee do not consider the law of 1851 as of absolute binding force upon this House; for by the Constitution, '*Each* House shall be the judge of the elections, returns, and qualifications of its own members,' and no previous House and Senate can judge for them. The committee, however, consider that act as a wholesome rule, not to be departed from except for cause."

4. *Lowell Case*, 2 Cong. El. Cases, 37; *Sergeant's Case*, 1 Cong. El. Cases, 516.

5. *McCrary* on El. § 394.

The statute of Arkansas required a proclamation of the result to be made, and a certificate of election to be issued to the successful candidate. In the case of *Gunter v. Wiltshire*, 4 Cong. El. Cases, 233, it was shown that the returns had been canvassed on Dec. 14, 1872, but no proclamation was made, or certificate of election

the State law prescribing the mode of declaring the result; but the time is fixed in which to canvass must be completed, the time will not begin to run until the last day allowed for the determination, unless notice of a prior determination was immediately given the defeated candidate.¹

Where there has been a determination as a matter of fact, but the date is uncertain, the contestant must show that the notice was served within the thirty days after the determination of the result.²

4. *Prematurity of Notice.* — The service of the notice before the promulgation of the return would be premature, but the defect would be waived if the contestee answers to the merits before the expiration of the thirty days allowed for serving the notice; as, if he had not done this; the contestant could have served a new notice.³

5. *Amended Notice.* — The power to serve notice is not exhausted by the giving of one notice, but an amended notice may be served at any time within the thirty days given by the act. This may be done by serving additional specifications, or by withdrawing the insufficient notice, and serving another in its place.⁴ And in one case, after the testimony was all taken, the committee reported that the contestant should be required to amend his notice, or, if he did not do so, that the contestee might serve a notice upon the contestant, and take the testimony unto the law.⁵

6. *Extension of Time for Notice.* — Where there are good reasons, the House will grant an extension of time, when necessary for the furtherance of justice.⁶

issued but afterward a new governor caused a new canvass to be made, and issued his proclamation and certificate of election as required by law; and it was *held* that a notice served within thirty days after the date of the last canvass was in time. In the case of *Sheafe v. Tillman*, 3 Cong. El. Cases, 905, the statute of the State provided that the governor and secretary of state should canvass the returns as soon as received, and declare the person having the highest number of votes duly elected. it was shown that there was no meeting of the two officers, but that there was a correspondence between them, and a publication in a newspaper, which purported to be a proclamation of the governor, stating that he had awarded the certificate to contestee; and it was *held* that the notice served within thirty days from the date of the proclamation was in time.

1. *Follett v. Delano*, 3 Cong. El. Cases, 113.

2. *O'Harra v. Kitchen*, 5 Cong. El. Cases, 398.

3. *Todd v. Jayne*, 2 Cong. El. Cases, 555.

4. *Daily v. Estabrook*, 2 Cong. El. Cases, 304.

5. *Sheriden v. Pinchback*, 4 Cong. El. Cases, 196.

6. In the case of *Williamson v. Sickles*, 2 Cong. El. Cases, 288, the State board of canvassers, on account of an informality in the returns, had failed to declare the result in that district as they did in the other districts, but gave an informal statement of the number of votes, and added, that, as the returns did not legally designate the office, they could not certify to the election of any person. They did not furnish this statement to the sitting member, or send it to the House. The committee did not decide whether these facts were sufficient to constitute a determination of the result, but held that the statute was not mandatory, and that the facts would warrant an extension of the time. In the case of *Thomas v. Arnell*, 3 Cong. El. Cases, 162, where the contestant had given a verbal notice, and there was a conversation from which a waiver of a written notice might be inferred, and the House had not admitted any of the members-elect from the State of Tennessee, and it was not

7. *Time extended after Decision in Prima Facie Case.* — Where there is a contest upon the *prima facie* case, and neither party holds a regular certificate, or where the *prima facie* right is not clearly in either party, it has been the practice, upon awarding the seat to one of the parties, to allow the unsuccessful candidate to serve notice, and contest the seat.¹

8. *Character of Notice.* — The notice to be given under sect. 105 of the Revised Statutes is required to be in writing; and this requirement is mandatory, and cannot be waived by agreement of the parties.²

9. *Service of Notice.* — Personal service should be made where it can be done by the use of reasonable diligence;³ but where this cannot be done, it is probable that service in the manner prescribed for the service of process by the State law would be held to be sufficient.⁴

10. *Proof of Service.* — Where no answer is filed, proof of the service of the notice should be made by deposition; and the certificate of a deputy sheriff or an *ex parte* affidavit of the service, either of notice or answer, is not sufficient.⁵

11. *Abatement.* — Death of the contestant, after the case is at issue and the testimony taken, will not abate the contest, as the House can proceed to the hearing, and declare the seat vacant.⁶ And where a person who has received the certificate of election has failed to take his seat, or has resigned, this will not defeat the contest.⁷

Where the candidate having the majority of the votes dies before the votes are canvassed, this will not entitle the minority candidate to the seat, nor will the fact that the majority candidate was ineligible; and the candidate elected at a special election will be admitted to the seat.⁸

Where the sitting member dies, after the issues are made up, and the testimony is taken, and a special election is held for the election of a successor, the successful candidate only steps in to the place occupied by his predecessor, and the House will proceed to the hearing on the testimony taken concerning the first election; and if the contestant was properly elected at that election,

known whether the delegation would be admitted until after the time for notice was passed, leave was granted to serve a written notice, and to take the testimony; and in the case of McCabe v. Orth, 5 Cong. El. Cases, 320, where notice had been served, but not filed, and no testimony had been taken under it, a report was made in favor of allowing a new notice under the facts in the case.

1. Coffroth v. Koontz, 3 Cong. El. Cases, 25; Foster v. Covode, id. 519; Hunt v. Sheldon, id. 707.

2. Thomas v. Arnell, 3 Cong. El. Cases, 162. But in this case, where there had been a conversation from which such an agree-

ment might be inferred by contestant, he was allowed to serve a written notice.

3. Follett v. Delano, 3 Cong. El. Cases, 113; Boyd v. Kelso, 3 Cong. El. Cases, 121.

4. McCrary Am. Law of El., § 394; Manzanares v. Luna, 48 Cong. H. Rep. 667.

5. Boyd v. Kelso, 3 Cong. El. Cases, 121; Follett v. Delano, 3 Cong. El. Cases, 113; Cook v. Cutts, 251; 6 Cong. El. Cases, 244.

6. Réeder v. Whitfield, 2 Cong. El. Cases, 185.

7. O'Ferrell v. Paul, 48 Cong. H. Rep. 1435.

8. Blakey v. Goladay, 3 Cong. El. Cases, 417.

he will be seated, and the person holding by virtue of the special election will be ousted.¹

12. *How Defects in Pleading or Service reached.*— Answering will be a waiver of any defect in the service, or proof of service, of notice; so that if there has been no proper service of notice, and respondent has no affirmative matter, he may refuse to file an answer, and note objections to taking of the testimony for want of proper service, and then move to dismiss for want of notice.² When the notice is so defective that it does not advise the respondent of the particular grounds upon which contestant relies, he may either refuse to answer, and object to the introduction of any evidence under the notice, or he may protest against the sufficiency of the notice in his answer, and object to the testimony for this reason; but if he answers without objection to the sufficiency of the notice, it is a waiver of the defect, and the objection cannot be made at the hearing.³

The committees have, however, in every case examined the questions upon the merits; but where the faults were upon one side only, they have found in every case that the evidence was not sufficient, so that they have never reported in favor of the party whose notice was not sufficient to advise the contestee of the particular grounds of contest.

13. *State Law and Construction followed.*— The House, when adjudicating upon any matter affecting the seats of its members, must be governed by the laws of the State in which the election was held, upon questions of the qualifications of the voters; and where there is no act of Congress providing for the method of conducting the election, the House is compelled to follow the State law upon that subject.⁴

It follows as a necessary conclusion, as the courts of a State are the proper tribunals to construe its statutes, that, when the highest court of a State has given a construction to a provision of the State constitution or statute, such construction should be followed by any other tribunal called upon to pass upon the same questions.

This doctrine is well settled in the courts of the United States and the different State courts,⁵ and has also been adopted as the correct rule by the committees of the House, although with some qualifications;⁶ and in some cases, they have extended it so as to

1. Mackey v. O'Connor, 6 Cong. El. (U. S.) 76; Johnson v. Bank, 3 Strob. Eq. Cases, 561.

2. Follett v. Delano, 3 Cong. El. Cases, 59; Hoyt v. Thompson, 3 Sanf. Ch. (N. Y.) 113; Sheriden v. Pinchback, 4 Cong. El. Cases, 196.

3. McKee v. Young, 3 Cong. El. Cases, 427.

4. Wright v. Fuller, 2 Cong. El. Cases, 152.

5. Elmendorf v. Taylor, 10 Wheat. (U. S.) 152; Harpending v. Dutch Church, 16 Pet. (U. S.) 455; Porterfield v. Clark, 2 How.

6. Tenn. El. Case, 4 Cong. El. Cases, 3. It seems that there are some limitations upon the rule as laid down by Judge McCrary in this case, and that, in order to bind the House, the decision, even of a State court, must have been upon the same point as that before the House, and not merely on an analogous one. Thus

follow the construction given by the executive authorities of the State where they had given such construction.¹

14. *Time of taking Testimony.* — By the act of 1873, amendatory of the act of 1851, it was provided that the testimony should be taken in ninety days, of which contestant should have the first forty days, the returned member the next forty, and the contestant ten days for rebuttal; and, by the amendment of 1875, this time was to begin on the day on which the answer of the sitting member was served on the contestant. Before 1873, but sixty days were allowed for taking testimony; and there was no division of time, and both parties could take testimony at the same time.²

Where there is no good reason for the delay, testimony taken out of the time will not be received,³ and testimony in chief taken after the close of the testimony of the sitting member should be rejected.⁴

If there is a good reason for taking the testimony after the expiration of the statutory time, it will be safer to serve notice and take it, rather than wait until the meeting of Congress, to ask an extension of the time.⁵

the Supreme Court of Michigan, in a case involving the election of local officers, decided that the State law authorizing soldiers to vote in their camps was unconstitutional. *Twitchell v. Blodgett*, 13 Mich. 127. But in *Baldwin v. Trowbridge*, 3 Cong. El. Cases, 46, the House counted the votes cast by soldiers in their camps, on the ground that the decision did not affect elections for representatives.

The Supreme Court of Illinois in *Freeport v. Stevenson Co.*, 41 Ill. 491, which was a case upon the question of the settlement of paupers, held that they could not become residents of the town in which the almshouse was situated; but the committee in *Le Moyne v. Farwell*, 4 Cong. El. Cases, 416, decided that the decision of the Supreme Court of the State in construing its police laws had no bearing upon the right of persons to vote, and counted the votes of paupers cast in the town where the almshouse was situated.

The decision of the court must have been necessary to the proper determination of the case, and not merely *obiter dictum*.

Thus, in the case of *Oglesby v. Sigman*, 58 Miss. 502, where the court, having determined that a writ of *mandamus* would not lie to compel the canvassing board to re-assemble and canvass the votes, determined also that certain ballots were illegal under the statutes of the State, the committee held, in the case of *Lynch v. Chalmers*, 6 Cong. El. Cases, 338, that, as this decision was merely *obiter dictum*, it was not binding on the House, and counted the same ballots. In this case there was another limitation expressed, to the effect

that the point must either have been settled by a line of decisions, or else by a decision rendered so long before the election, upon which the contest was pending, that it was a matter of notoriety in the State, so that the voters and officers would be presumed to have notice of it; and that where there had been but one decision, which was rendered so near the time of the election that it would not be known to the public, or where it was rendered after the election, the House would not be bound by it, if it was not in accordance with the weight of authority, or would work injustice.

1. *Burch v. Van Horn*, 3 Cong. El. Cases, 205; *Holmes v. Wilson*, 5 Cong. El. Cases, 322; *Bisbee v. Hull*, 5 Cong. El. Cases, 315; *Curtin v. Yocum*, 5 Cong. El. Cases, 346; *Boynnton v. Loring*, 5 Cong. El. Cases, 416.

2. *Vallandigham v. Campbell*, 2 Cong. El. Cases, 223.

3. *Bradley v. Slemmons*, 5 Cong. El. Cases, 296; *Bell v. Snyder*, 4 Cong. El. Cases, 247; *Reid v. Julian*, 3 Cong. El. Cases, 822; *Knox v. Blair*, 2 Cong. El. Cases, 521; *Todd v. Jayne*, 2 Cong. El. Cases, 555.

4. *Bromburg v. Haralson*, 4 Cong. El. Cases, 364.

5. This practice was indicated in *Vallandigham v. Campbell*, 2 Cong. El. Cases, 223. And in *Finley v. Walls*, 4 Cong. El. Cases, 367, where the parties had taken testimony by agreement, after the expiration of the time, it was received.

In the case of *Bisbee v. Finley*, 6 Cong. El. Cases, 193, where the contestee, against the objection of the sitting member, took

15. *Manner of taking Testimony.* — In the absence of the statutory provisions, depositions taken under notices given in accordance with the law and practice of the State where the election was held, were admissible;¹ but testimony taken *ex parte* was inadmissible;² though, where the proper notice has been given, the depositions will be considered, although the opposite party does attend and cross-examine.³

Where there is a statute requiring notice of taking testimony, it will be considered mandatory, unless the opposite party waives notice, or appears and cross-examines the witnesses.⁴

Where a party wishes to take a deposition, he must give the opposite party notice in writing of time and place of taking the same, the names of the witnesses, their places of residence, and the names of the officers before whom they will be taken. The notice must be served personally on the party, or his agent or attorney authorized to take testimony, if it can be done by the exercise of reasonable diligence, and if not, by leaving a copy at the usual place of abode of the party; and the service must be made so as to allow sufficient time to reach the place by the usual method of conveyance, and one day exclusive of Sunday and the day of service for preparation.⁵

Testimony may be taken in two or more places at the same time.⁶

It may be taken before any judge of the United States; any judge, chancellor, or justice of a court of record of any State; any mayor, recorder, intendant of any town or city; any register in bankruptcy, or notary public;⁷ or, if no such officer resides in the Congressional district, before two justices of the peace.⁸

evidence after the expiration of forty days, where the delay was caused by frivolous and dilatory cross-examination, the committee received the evidence, although the sitting member had refused to cross-examine, and had left.

It requires a very strong case to obtain an extension of time to take testimony after the case has been referred to the committee on elections, and committees are inclined to be technical in regard to such applications. *Thobe v. Carlisle*, 50 Cong. H. Rep. No. 48; *Boles v. Edwards*, 4 Cong. El. Cases, 18; *Mason v. Oates*, 6 Cong. El. Cases, 8.

Such an application on the part of the sitting member will be looked upon with greater disfavor than one made by a contestant. *Newland v. Graham*, 2 Cong. El. Cases, 5; *Giddings v. Clark*, 4 Cong. El. Cases, 91. But where the contestant has, by his own misconduct, prevented the sitting member from taking the testimony, or having it at the hearing, the time will be extended. *Bowen v. De Large*, 4 Cong. El. Cases, 99.

The provision as to the taking of testi-

mony applies only to the testimony of witnesses, and not to documentary evidence which proves itself; and such documents may be offered before the committee at the hearing. *Vallandigham v. Campbell*, 2 Cong. El. Cases, 223; *Cannon v. Campbell*, 6 Cong. El. Cases, 607.

1. *Loyal v. Newton*, 1 Cong. El. Cases, 520; *Newland v. Graham*, 2 Cong. El. Cases, 5.

2. *New Jersey Case*, 2 Cong. El. Cases, 20; *Hood v. Potter*, L. & R. (Mass. El. Cases) 217.

3. *Perry v. Montague*, L. & R. (Mass. El. Cases) 200.

4. *McFarland v. Purviance*, 1 Cong. El. Cases, 131; *Knox v. Blair*, 2 Cong. El. Cases, 524; *Blair v. Barrett*, 2 Cong. El. Cases, 308; *Hogan v. Pile*, 3 Cong. El. Cases, 281; *Wigginton v. Pacheco*, 5 Cong. El. Cases, 5.

5. Rev. Stat. U. S. sec. 108.

6. Rev. Stat. U. S. sec. 109.

7. Rev. Stat. U. S. sec. 110.

8. Rev. Stat. U. S. sec. 112.

Where the depositions are taken before an officer not authorized by this statute,

The testimony must be confined to the proof or disproof of the facts alleged or denied in the notice and answer.¹

While the statutory rules are only directory so far as the House is concerned, there is no case where they have been departed from, although the committees have recommended it in some instances.²

16. *Dismissal for Want of Prosecution.* — In an early case where the contestant declined to continue the contest, it was unanimously agreed that the inquiry should not abate, and the case was re-committed to the committee for further consideration;³ but in later cases the committee has reported in favor of dismissing the case for failure to take the evidence,⁴ and for a failure to file briefs after the evidence was submitted.⁵

17. *The House can declare the Seat Vacant.* — The House of Representatives has the same power to declare the seat vacant, as a court has to declare an office vacant, in a *quo warranto* proceeding.⁶ And this was done quite frequently in the early cases, but more recently the cases where this has been done have been where the majority candidate was ineligible to hold the seat.

Where the contestant is alleged to be ineligible, the practice is to investigate the matter during the contest, and, if his disability is established, to declare the seat vacant, if it is shown that he received a majority of the legal votes cast.⁷

XXI. Evidence. — (A) IN ELECTION CONTESTS. — 1. *General Principles.* — While, as a general thing, the rules of evidence which govern in the courts, in other cases, apply to contested election cases in the courts, and generally in the legislative bodies, yet in legislative contests it may be said that the rules are somewhat relaxed, in order to reach the truth where justice might be defeated

without consent, they cannot be read if objected to. See *Stolbrand v. Aiken*, 6 Cong. El. Cases, 603, where the testimony was taken before a United States commissioner; and *Stovell v. Cabell*, 6 Cong. El. Cases, 674, where it was taken before a county clerk.

It is not material whether the officer authorized by this statute to take testimony has the power by the State law to administer oaths or not. *Washburn v. Voorhees*, 3 Cong. El. Cases, 56.

When all the officers authorized to take depositions refuse to act, the testimony may be taken before the two justices. *Harrison v. Davis*, 2 Cong. El. Cases, 341. And also where none of those officers reside in the district, although their duties may lie in the district. *Todd v. Jayne*, 2 Cong. El. Cases, 555.

1. Rev. Stat. U. S. 121; *Stovell v. Cabell*, 6 Cong. El. Cases, 668.

2. *Brooks v. Davis*, 2 Cong. El. Cases, 244; *Carrigan v. Thayer*, 2 Cong. El.

Cases, 376; *Witherspoon v. Davidson*, 6 Cong. El. Cases, 163; *Jones v. Shelly*, 6 Cong. El. Cases, 681, where the committee reported, in case of an election to fill a vacancy, that the time for taking evidence would not expire before the session would terminate, and that, from the evidence before them, there were ten thousand votes returned to the county boards of canvassers which were counted out upon frivolous pretexts, and recommended that a special committee be appointed to go to the State, and take the evidence; but the House did not act upon the report.

3. *Kelly v. Harris*, 1 Cong. El. Cases, 260.

4. *Smith v. Robertson*, 6 Cong. El. Cases, 284.

5. *Herbert v. Acklin*, 5 Cong. El. Cases, 345.

6. *Newland v. Graham*, 2 Cong. El. Cases, 5; *Archer v. Allen*, 2 Cong. El. Cases, 169.

7. *Cannon v. Campbell*, 6 Cong. El. Cases, 607.

if the strict legal rules as to the introduction of evidence were followed.¹

In England the committees were not bound by the common-law rules of evidence as such, but in general they adopted them because they were based upon principles which are applicable to an inquiry into the truth of any ordinary fact; but in cases of necessity the committees allowed greater latitude than courts of law;² and an examination of the Congressional cases will show that, in many instances, evidence is admitted, and rules are laid down, as to the burden of proof, which are not warranted by the rules adopted by the courts; and even in the courts, in many instances, a greater latitude is allowed than would be allowed in civil proceedings between private persons.

2. *Who may and must testify.* — The general rules of evidence as to the competency of witnesses, and the privileges of exemption from testifying, prevail in election cases as in suits between private parties.³

3. *Effect of Return or Certificate.* — Where the returns of an election, or the certificate based upon them, are regular in form,

1. This doctrine was forcibly stated in the case of *Stimpson v. Breed, L. & R. (Mass. El. Cases) 260*, where the committee say, "Legislative bodies, in the performance of such judicial functions as belong to them, are not bound by the rules of pleading and evidence, except as they see fit; and the general opinion that investigations of this character, in which not only the parties, but the constituency, and indeed the entire commonwealth, have an interest, should be conducted liberally, and by such rules as will on the one hand afford no protection to irregularity and fraud by which the will of the people may be defeated, nor on the other permit the acts of sworn officers to be set aside without good cause."

2. *Bedford Case, F. & F. (Eng. El. Cases) 436.*

3. Thus, attorneys or counsellors will not be permitted to testify before election committees to any matters disclosed to them in professional confidence. *Dover Case, P. & K. (Eng. El. Cases) 417*; *Rye Case, 1 P. R. & D. (Eng. El. Cases) 116*. But this does not apply where the party is not an attorney, although acting as such. *Fountain v. Young, 6 Esp. 113*; *Aylesbury Case, 2 Peckw. (Eng. El. Cases) 263*. Nor where the attorneys are not acting in their professional character. *Evesham Case, F. & F. (Eng. El. Cases) 523*; *Middlesex Case, 2 Peckw. (Eng. El. Cases) 132*.

A witness cannot be compelled to answer questions which would show his vote to be illegal. *Second Ilchester Case, 2 Peckw. (Eng. El. Cases) 251*; *P. & K. 225*. But this is a privilege of the witness, and not of the party, and may be waived

by the witness. *Hull Case, K. & O. (Eng. El. Cases) 427*. A witness may testify that he was bribed, — *Oxford Case, C. & R. (Eng. El. Cases) 199*, — or that he had personated another. *Southampton Case, P. & K. (Eng. El. Cases) 225*; *Worcester Case, K. & O. (Eng. El. Cases) 243*.

A legal voter cannot be compelled to testify for whom he voted. *People v. Pease, 27 N. Y. 81*; *Respublica v. Ray, 3 Yeates (Pa.), 66*; *Easton v. Scott, 1 Cong. El. Cases, 272*; *People v. Cicott, 16 Mich. 283*; *Palmer v. Howe, L. & R. (Mass. El. Cases) 145*. And this is true where the right to vote is merely doubtful. *McDaniels Case, Brightly, El. Cases, 248*; *Locust Wood Election, 4 Penn. L. J. 349*; *People v. Cicott, 16 Mich. 283*; *State v. Hilman-tel, 23 Wis. 422*.

This exemption is a personal privilege, and the testimony will be received if the voter sees fit to give it. *Kneass Case, 2 Pars. 584*; *Brightly, El. Cases, 337*; *Washburn v. Voorhees, 3 Cong. El. Cases, 54*; *Reid v. Julian, 3 Cong. El. Cases, 832*; *People v. Thatcher, 55 N. Y. 525*.

The proof must be confined to the allegations in the pleadings, as was said by *Clerk, Law of El. 452*: "Neither in the examination-in-chief, nor in the cross-examination, will parties be allowed to examine a witness to other matters than those which are material to the points in issue before the committee;" but where the testimony has been taken without objections, and is before the committee, it will be considered, and such effect given to it as the law requires. *Stimpson v. Breed, L. & R. (Mass. El. Cases) 257*.

they are *prima facie* evidence of the facts stated upon the face of the returns; ¹ and in a proceeding in *mandamus* to compel a certificate to be given to another, ² or in a collateral proceeding, they are conclusive as to the title to the office. ³ But in a direct proceeding the court can go back of the returns, and see whether the returns are correct summaries of the returns from the inferior officers; ⁴ and there may be a full investigation of the election in *quo warranto*. ⁵ If the certificate shows on its face that the person declared elected did not receive the greatest number of votes, it destroys itself, and is not evidence for the person in whose favor it was given. ⁶

In Congressional cases the same rule prevails, and duly certified copies of returns are primary legal evidence of the votes cast; and, unless they are assailed, they are conclusive. ⁷

Where the returns are not made by the proper officers, or signed or sworn to, as required by law, ⁸ or when they do not state the required facts, they will be worthless. ⁹

4. *Informal Return corrected*. — When a return is accompanied by other papers which the law requires to be kept, if the return is informal, it may be corrected by such papers, or by the record kept by the officers, where a record is required; ¹⁰ or it may be corrected at the hearing of the contest, by parol evidence; and when thus corrected they become *prima facie* evidence of the result of the election. ¹¹

5. *Secondary Evidence of Contents of Returns*. — Where the original returns and tally-sheets have been lost or destroyed, evidence of their contents, and of the number of votes cast, is admissible; ¹² but where there is a charge that the returns used by the canvassers were forged, secondary evidence of the contents of the original will not be admitted until it is shown that the originals themselves were not in existence. ¹³

And where it was charged that the original returns had been fraudulently changed, their destruction or loss must be proved to admit proof of their contents. ¹⁴

6. *What will not impeach Returns*. — Where the document upon

1. *Magee v. Supervisors*, 10 Cal. 376; *People v. Thatcher*, 7 Lans. (N. Y.) 274; *Crouse v. State*, 57 Md. 327; *People v. Miller*, 16 Mich. 56; *Ewing v. Filley*, 43 Pa. St. 384; *Marshall v. Kerns*, 2 Swan. (Tenn.) 68; *Territory v. Pyle*, 1 Oreg. 149; *State v. Sherwood*, 15 Minn. 221.

2. *State v. Churchill*, 15 Minn. 455.

3. *Hadley v. City of Albany*, 33 N. Y. 603; *Moulton v. Reed*, 54 Ala. 320; *Smallwood v. Newbern*, 90 N. Car. 36.

4. *People v. Van Cleve*, 1 Mich. 362.

5. *State v. Passaic*, 25 N. J. L. 354; *People v. Vail*, 20 Wend. (N. Y.) 12; *Echols v. State*, 56 Ala. 131.

6. *Hart v. Harvey*, 32 Barb. (N. Y.) 55.

7. *Spaulding v. Meade*, 1 Cong. El.

Cases, 157; *Gause v. Hodges*, 4 Cong. El. Cases, 304; *Bisbee v. Hull*, 5 Cong. El. Cases, 315.

8. *Chrisman v. Anderson*, 2 Cong. El. Cases, 328; *Barnes v. Adams*, 3 Cong. El. Cases, 760; *Niblack v. Walls*, 4 Cong. El. Cases, 101; *McKinney v. O'Connor*, 26 Tex. 5.

9. *Hall v. Manchester*, 29 N. H. 295.

10. *Opinion Justices*, 70 Me. 560; *Rounds v. Smart*, 71 Me. 380.

11. *Powers v. Reed*, 19 Ohio St. 189; *Howard v. Shields*, 16 Ohio St. 184.

12. *Warren v. McDonald*, 32 La. Ann. 987.

13. *Knight v. Ragan*, 28 La. Ann. 289.

14. *Fletcher v. Jeter*, 32 La. Ann. 401.

which the canvassers are to act is regular, it will not be impeached because other documents required by law to be kept are informal or defective, if they do not contradict the statements in the returns; ¹ nor will it be impeached by other unofficial documents, kept by officers of the election.²

7. *How Returns may be impeached.* — The doctrine that a return is to be treated as *prima facie* evidence of the result of an election, is undoubtedly based upon three presumptions: first, that sworn officers will act honestly and in good faith; second, that they will perform their duties with care; and third, that the votes received by them will be legal votes.

The first presumption will be rebutted by proof, showing that the duties were so carelessly performed that there were opportunities for others to commit frauds, and that they had been probably committed, and may be partially rebutted by proof of mistake; but if this mistake can be corrected, the presumption of correctness will be destroyed only so far as the mistake is shown, and the return will stand with the mistake corrected.³

Presumption as to the legality of the vote can be partially rebutted by showing that particular votes cast were illegal; but unless the number of cases proved is so great as to amount to proof of fraud, the accuracy of the general return will not be affected, but it will be corrected by deducting the illegal vote.

8. *Effect of Recount of Ballot.* — Where the ballots are preserved, so that their identity is assured, and they can be counted during a contest, they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference.⁴ If the ballots are counted without the order of the court, or without notice to the opposite party, the presumption that the official count was correct should not be considered as rebutted; and where the time for counting the votes is past, and the return has been made, if there is a recount made by the election officers, it should not prevail over the official count, unless there is other evidence that the mistake was in the first count; ⁵ but where the evidence is taken upon notice, and the recount is made in the presence of both parties, and with such care that no objection can be taken to it, it should prevail, if the ballots had been properly preserved.⁶

In Pennsylvania a recount of the ballots will not be allowed, unless some reason is alleged which renders it probable that there

1. Howard v. Shields, 16 Ohio St. 184; 4. Newton v. Newell, 26 Minn. 529; Follett v. Delano, 3 Cong. El. Cases, State v. Judge, 13 Ala. 805; Reynolds v. State, 61 Ind. 392; Dorey v. Linn, 31 Kan. 113.

2. Echols v. State, 56 Ala. 131. 758; Owens v. State, 64 Tex. 500.
3. Turner v. Bayliss, 1 Cong. El. Cases, 234; Wright v. Fisher, id. 518; Root v. Adams, id. 271; Colden v. Sharpe, id. 369; 5. Ramsey v. Caloway, 15 La. Ann. 464; Gooding v. Wilson, 4 Cong. El. Cases, 79.
Williams v. Bowers, id. 263; Willoughby v. Smith, id. 365. 6. Acklin v. Darrell, 5 Cong. El. Cases, 124.

was either fraud or mistake in the official count;¹ and this view prevails in the legislature of Massachusetts.²

Before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the boxes had been kept so that there had been no opportunity for tampering with the ballots, and that those offered in evidence are the identical ones cast.³

But if it is shown that they have not been tampered with, their value as evidence is not destroyed by proof that they had been illegally opened, and counted by an official body.⁴

Where there is no statutory provision as to the preservation of the ballots, the party assailing the correctness of the return by a recount of the ballot should be required to show affirmatively that there had been no opportunity for tampering with them;⁵ but where the statute provides that the ballots shall be kept in a certain way, and they are in the hands of the proper officer, it is presumed that he has done his duty; and the burden of proof is upon those assailing them, to show that they might have been tampered with.⁶

On the other hand, when it is made to appear that the statutory provisions had not been complied with, the burden of proof is upon the person who asks the recount, to show that they had not been tampered with;⁷ but this question is a question of fact to be determined by the jury, or the court trying the issues.⁸

9. *Returns impeached by Fraud.*—The presumption of good faith on the part of the election officers may be rebutted; and when it is shown that they are parties to fraud, the value of the returns as evidence is destroyed; and the fact that a much larger number of votes are returned than are shown to have been cast by the poll-book, will be a circumstance tending to prove

1. *Lelar Case*, 2 Pars. (Pa.) 548; *Kneass Case*, 2 Pars. 599; *Thompson v. Ewing*, 1 Brews. (Pa.) 67 & 97.

2. *Austin v. Sweet*, L. & R. (Mass. El. Cases) 189; *Rice v. Welsh*, id. 128; *Taylor v. Carney*, id. 228; *State v. Green*, id. 226; *Harris v. Richardson*, id. 372; *Ames v. Beebe*, id. 346; *Clapp v. Sherman*, id. 307; *Morse v. Lonergan*, id. 288; *Haskell v. Closson*, id. 233; *Baker v. Hunt*, id. 378.

3. *Butler v. Lehman*, 2 Cong. El. Cases, 353; *Cook v. Cutts*, 6 Cong. El. Cases, 252; *Davis v. Murphy*, L. & R. (Mass. El. Cases) 172; *Powell v. Holman* (Ark.), 6 S. W. Rep. 505.

4. *Dorey v. Linn*, 31 Kan. 758.

5. *Gooding v. Wilson*, 4 Cong. El. Cases, 79.

6. *People v. Holden*, 28 Cal. 123.

7. *People v. Cicott*, 16 Mich. 283; *Kingery v. Berry*, 94 Ill. 515; *Coglan v. Beard*, 67 Cal. 303.

8. *People v. Livingston*, 79 N. Y. 279; reversing same case, 18 Hun, 59. But see *People v. Borden*, 45 Cal. 241, where the

statutory provisions in regard to forwarding the ballots were not complied with, and the evidence tended to show that they had been tampered with; and the court held that even a board of canvassers might treat the ballots as worthless, and declare the result from the returns, and that the court would adopt the result.

Where the statute required the ballots to be kept for a certain length of time, and provided that a recount might be had upon application during that period, and that they should be destroyed upon its expiration, it was held that, if the time passed without a recount, the ballots became absolutely worthless, and had no legal existence, and a recount made thereafter was an absolute nullity. *State v. Bate* (Wis.), 36 N. W. Rep. 17.

Parol evidence is competent to show that ballots have been changed, although all persons who had charge of them have testified that they were not disturbed, and that the seals were not broken. *Pedigo v. Grimes* (Ind.), 13 N. E. Rep. 700.

fraud.¹ Where the number is large, and the fact is unexplained, it will be conclusive.²

It has been held that evidence that frauds were attempted, but the attempts were unsuccessful, is not competent.³

Testimony showing that the officers acted with a gross disregard of the statutory provisions in the reception of votes; that they were intoxicated, and permitted great irregularities, — is admissible; and the proof of such charges will have the same effect as the proof of fraud.⁴

Proof that a large number of votes were cast for a candidate, which were not returned, may be offered to show fraud; and if this fact is proved, and is unexplained, it will warrant the rejection of the returns.⁵ And in such cases the testimony of the voters may be taken, for the twofold purpose of destroying the credibility of the returns, and for the purpose of having votes counted for the party for whom they were cast.⁶

10. *Return made from Improper Data.* — When a return is regular on its face, it may be impeached by showing that it is not made from the proper data.⁷

11. *Reception of Illegal Votes.* — The third presumption, which goes to make a return *prima facie* evidence of the result of an election, which is that the votes cast are legal, may be rebutted by showing such a total disregard of the statutory requirements in the reception of the votes as to warrant a conclusion of fraud, in which case the whole return will be rejected, or it may be partially rebutted by a scrutiny; and the votes of such individuals as are proved illegal may be rejected.

In this scrutiny, there are three things to be considered: first, what persons voted; second, is the vote legal; and third, for whom was the illegal vote cast.

1. Jackson v. Wayne, 1 Cong. El. Cases, 47; Lowe v. Wheeler, 6 Cong. El. Cases, 61.

2. Blair v. Barrett, 2 Cong. El. Cases, 308; Dodge v. Brooks, 3 Cong. El. Cases, 78.

In these cases, there was an unusual increase in the vote, with no perceptible increase in the population; and in the Senate and House of Representatives in Massachusetts, when there were one hundred and fifty-nine more votes returned than there were names on the list, it was held, that, where there was no corroborative evidence, the return would not be rejected for this reason. King v. Park, L. & R. (Mass. El. Cases) 155; Ordway v. Woodbury, id. 163.

3. Ward v. Sykes, 61 Miss. 649.

It may be doubted whether this is correct where there are other suspicious circumstances, and where the frauds were attempted by the election officers themselves, as this attempted fraud will destroy the presumption of honest intentions on their part.

4. Myers v. Moffatt, 3 Cong. El. Cases, 564; Covode v. Foster, 3 Cong. El. Cases, 600; Knox v. Blair, 2 Cong. El. Cases, 521.

5. Reid v. Julian, 3 Cong. El. Cases, 832; Washburn v. Voorhees, 3 Cong. El. Cases, 54; Lowe v. Wheeler, 6 Cong. El. Cases, 61; Smith v. Shelly, 6 Cong. El. Cases, 18.

As was said by the committee in the case of Bisbee v. Finley, 6 Cong. El. Cases, 187, "Any considerable number of votes proven for a candidate, in excess of the number returned for him, has always been regarded as an evidence of fraud, and a legitimate method of impeaching the returns."

6. Reid v. Julian, 3 Cong. El. Cases, 822; Clausen v. Van Brunt, N. Y. Cont. El. Cases, 407.

7. Thus, it appears in one case, that, in making up the returns from one county, the canvassing officer had none of the precinct returns or other documents before him, as required by law, they having been

12. *Proof of who voted.* — When poll-books showing the names of the voters are required to be kept, they are unquestionably the best evidence as to what persons voted, if they come from the proper custodian, and are properly authenticated.¹ And in case of formal defects in authentication, parol evidence is admissible to identify them.²

If the poll-lists are in existence, other evidence is inadmissible to show who voted.³ But where the law does not require the poll-books to be preserved as a record of the votes cast, it may be proved by other testimony.⁴ And where the poll-books are lost, the voters may swear how they voted, and officers may testify to the number of votes cast for each person.⁵ Poll-books may be rendered worthless as evidence by showing that the names of persons who had not voted were placed on the list, and that spurious ballots had been placed in the boxes.⁶

It has been held that circumstantial evidence may be sufficient to prove that certain persons voted.⁷

In many cases the rule that hearsay evidence is not admissible, has been departed from, where the question was, whether a certain person had voted, either in his own name or in that of another; and in many cases declarations of parties at or after the time of the election have been received.⁸

stolen from his office before he had made the abstract; and his certificate was founded upon the affidavits of the judges, from part of the precincts in the county; and it was *held*, that, in the absence of proof of the vote of the county, the return would be rejected. *Gause v. Hodges*, 4 Cong. El. Cases, 291.

1. *Newark Case*, 1 *Fras.* (Eng. El. Cases) 277; 1 *Peckw.* (Eng. El. Cases) 489.

2. 2 *Horsham*, 1 P. R. & D. (Eng. El. Cases) 86; *Orme on El.* 475.

In England it is *held*, that, even if the statute as to the keeping the poll-books was wholly disregarded, they would not be rendered inadmissible by the neglect. *Waterford Case*, 2 P. R. & D. 86; *Wolferstan*, *Law & Practice of El. Pet.* 83; *Rogers on El.* 11th ed. 310.

In such a case, the parties would be placed in the same condition as if there was no statute for their preservation, and could give the ordinary proof of their authenticity. *Tralee Case*, F. & F. (Eng. El. Cases) 322; *Cork Co. Case*, K. & O. (Eng. El. Cases) 394; *Kinsale Case*, 1 P. R. & D. (Eng. El. Cases) 19; *Langford Case*, *id.* 140. And in *People v. Pease*, 27 N. Y. 45, it was *held* that a poll-list not signed, having no heading, and never filed in the clerk's office, might be admitted, to prove that a person had voted, upon proving its genuineness.

3. *Olive v. O'Riley*, *Minor* (Ala.), 410.

In this same State, where the name of a

person who was indicted for illegal voting did not appear upon the poll-list, and it did not appear from the list that he had voted, either in his own name or in the name by which he had been indicted, or that there was a name on the list to represent the ballot alleged to have been cast by him, it was *held* that no other evidence could supply its place. *Wilson v. State*, 52 Ala. 299.

4. *New Jersey Case*, 2 Cong. El. Cases, 19; *Vallandigham v. Campbell*, 2 Cong. El. Cases, 323.

5. *Dixon v. Orr* (Ark.), 4 S. W. Rep. 774.

6. *Russell v. State*, 11 Kan. 308.

7. In *Abbott v. Frost*, 4 Cong. El. Cases, 594, it was *held* that the fact that men had been employed by the government in a navy-yard shortly before the election, and discharged shortly afterwards, was a circumstance to show a corrupt agreement on the part of the voters, to vote for the candidate of the party in power, and was sufficient proof that the number of voters so employed did afterward vote, and that the burden of proof was thereby cast upon such candidate to show that any of such voters did not cast their votes for him.

8. In the English Parliamentary Cases, the declarations of parties who were charged with illegal voting have been admitted. *Southampton Case*, P. & K. (Eng. El. Cases) 222; C. & R. 114. But

13. *Presumption of the Legality of the Vote.* — Where a vote has been received at an election by the officers who have complied with the forms of law in its reception, the law will presume that the vote is legal.¹ And this presumption is not rebutted by proof of suspicious circumstances;² but where such formalities have been disregarded, the authorities are so conflicting that no rule can be laid down; though it is probable that the weight of authority is in favor of the doctrine, that, where it is shown that the voter has not been required to comply with the law in proving his right to vote before the election officers, there is no presumption that his vote is legal.³

in Canada it was *held* that the statement of persons that they had voted was not admissible. *Lincoln El. Pet.* 4 *Ont. App. Cases*, 206.

Declarations of parties made at the time of the election, after voting, have been received as a part of the *res gesta*, to prove fraud and combination. *Patton v. Coates*, 41 *Ark.* 111. The general principle is, that the declaration of a party after the election, that he had voted one or more times, or under various names, will not be received in a contested case. *Gilleland v. Schuyler*, 9 *Kan.* 569. And the same principle is adopted in Congressional cases. *New Jersey Case*, 2 *Cong. El. Cases*, 19; *Cessna v. Myers*, 4 *Cong. El. Cases*, 60.

1. *Cirencester Case*, 2 *Fras. (Eng. El. Cases)* 448; *Orme on El.* 405; *Porterfield v. McCoy*, 1 *Cong. El. Cases*, 261; *Loyal v. Newton*, 1 *Cong. El. Cases*, 520; *New Jersey Case*, 2 *Cong. El. Cases*, 19; *Whittaker v. Cummings, L. & R. (Mass. El. Cases)* 360.

2. Proof of facts, which would have placed the burden of showing the legality of the vote upon the voter, if he had been challenged at the polls, will not be sufficient to require evidence to sustain the vote in the contest. *Gooding v. Wilson*, 4 *Cong. El. Cases*, 79.

Thus, in a civil case, involving the right to property, it was *held* that proof that a person was alien born, in the absence of proof to show his naturalization, will cause the presumption of the continuance of his alienage. *Howenstein v. Lynham*, 100 *U. S.* 483. And while this would undoubtedly justify the officers of election in refusing the vote, it has been *held* that it will not justify the rejection of his vote in a contest.

New Jersey Case, 2 *Cong. El. Cases*, 19; *People v. Pease*, 27 *N. Y.* 45; *Beardstown v. Virginia*, 76 *Ill.* 34. But these same cases hold that but slight additional proof of the alienage will be required, where there is no proof that he had been naturalized. And see *Whittaker v. Cummings, L. & R. (Mass. El. Cases)* 360.

Proof that a person who lives in the precinct, and has the same name as one of the names on the poll-list, is a minor, is not sufficient to require proof of the legality of the vote, without further evidence that there is no such person in the precinct who was a legal voter. *Letcher v. Moore*, 1 *Cong. El. Cases*, 749.

3. There are three opinions upon this question. The Supreme Court of Illinois *held*, that when the statute required a person, whose name was not on the register, to prove his right to vote by his own affidavit, and that of another person, who was a voter in the district, and an unregistered person voted without challenge, and without the proof required by law, the presumption that his vote was legal would still prevail. *Dale v. Irwin*, 78 *Ill.* 170.

On the other hand, in Michigan and Wisconsin, and in the later cases in Pennsylvania, the rule seems to be, that when it is shown that a person voted, without complying with the legal requirements, a presumption is raised that the vote was illegal, which cannot be rebutted by proof that the party was in fact a legal voter. *People v. Koppelcorn*, 19 *Mich.* 342; *State v. Hilmantel*, 21 *Wis.* 566; *McDonough Case*, 105 *Pa. St.* 488; *Gibbons v. Shepherd*, 2 *Brews.* 129.

In the *Kneass Case*, 2 *Pars. (Pa.)* 553, and in the House of Representatives, the view prevailed, that the presumption of the legality of the vote is overcome by proof of the failure to comply with the law before voting, but that the vote may be counted upon proof of its legality. *Myers v. Moffatt*, 3 *Cong. El. Cases*, 564; *Covode v. Foster*, *id.* 600; *Finley v. Bisbee*, 5 *Cong. El. Cases*, 94.

Where, however, the votes have been refused because the requisite proof was not offered at the time the votes were tendered, they cannot be counted, by showing at the trial that the persons were legal voters. *McLean v. Broadhead*, 48 *Cong. H. Rep.* 2613.

14. *Proof that Vote was cast by Non-resident.* — When the names of voters appear on the poll-books, it is competent to show that no such persons lived in the precinct.¹

15. *Declarations of Voter as to Incapacity.* — In England, the weight of authority has been in favor of receiving the declarations of voters against their right to vote, although the earlier cases were in conflict.²

In this country the Congressional cases are somewhat in conflict, although the weight of authorities seems to be in favor of admitting the declaration;³ and in the courts the authorities are also in conflict.⁴

1. This may be shown by testimony of persons who are acquainted in the precinct; but where the district is large, the testimony of more than one witness should be required in order to reject the vote. *Letcher v. Moore*, 1 Cong. El. Cases, 749.

Testimony has been admitted, that a person had canvassed the district, and failed to find 109 names out of 389 on the poll-book, — *Dodge v. Brooks*, 3 Cong. El. Cases, 78, — and also to show that persons whose names are on the poll-book, had never voted in the precinct before, were strangers to the older residents of the district, and to persons who had acted as officers of election for many years; that they had no place of business there, and were not found by the census-takers a short time afterward; and the census reports of a city census taken a few days after the election, which were on file in the city archives, were held to be competent to prove that persons whose names were on the poll-lists, were not residents of the district. *Blair v. Barrett*, 2 Cong. El. Cases, 308.

Muster-rolls of companies made at or near the time of the election, were admitted to show whether persons who had voted were members of the company; but those made a long time before were rejected for that purpose, but were admitted to show the ages of the persons who had voted. *Knox v. Blair*, 2 Cong. El. Cases, 521.

The votes of persons were rejected, in one case, upon proof that there were no buildings upon the lots given on the register as their residence, or that the buildings were unoccupied, and also that the names were those of former residents of the precinct who had died or removed. *LeMoynes v. Farwell*, 4 Cong. El. Cases, 410.

2. In the *Leominster Case*, 2 Peckw. 395; *Ipswich Case*, K. & O. 387; and in a number of other cases cited in *Rogers on Election Committees*, 122, the declarations were received in cases of scrutiny.

In the *Shaftesbury Case*, 2 Doug. 308, and some of the earlier cases from the Parliamentary Journals, this kind of evidence was rejected; and in the *Southamp-*

ton Case, P. & K. 223, where the declarations were made after the committee was balloted for, and in the *Middlesex Case*, 2 Peckw. (Eng. El. Cases) 141, where they were made some time after the election, they were rejected.

Evidence of the declarations of a person, that he was not the person whose name was on the register, have been received in cases of personation, — *Southampton Case*, P. & K. 225; *Taunton Case*, F. & F. 295, — as well as evidence of declarations of a person that he had no freehold, — *Yorkshire Case*, 2 Doug. 309 and 315, — and statements of voters, that they had been bribed, have also been admitted. *Galloway Case*, 14 Law Times, N. S. 810; *Huddersfield Case*, id. 346; *Bridgenorth Case*, 2 P. R. & D. 18; *Chatham Case*, id. 37; and in the *Kidderminster Case*, 1 P. R. & D. 266, the declarations of the wife of the voter, that her husband had received money for his vote, were received.

3. In the case of *Letcher v. Moore*, 1 Cong. El. Cases, 715, the committee unanimously resolved that all declarations or statements of voters after the election, relating to their right of suffrage, be rejected; but in *Vallandigham v. Campbell*, 2 Cong. El. Cases, 230, and in *Blair v. Barrett*, 2 Cong. El. Cases, 316, the doctrine of the English cases was upheld.

4. The courts of Wisconsin held, that, when a person who had voted refused to testify as to his qualification, his declaration that he was not naturalized should be admitted, — *State v. Olin*, 23 Wis. 309, — and this view was also taken in *People v. Pease*, 27 N. Y. 45. In *Beardstown v. Virginia*, 76 Ill. 81, the court permitted evidence to be given of the declarations of the voter, made at, or immediately after, the election, but rejected them when made some time afterward. In *Griffin v. Wall*, 32 Ala. 149, the courts refused to admit evidence of reputation, common report, or the declaration of the voter as to where he had lived, but admitted those made when starting upon a journey upon the question of intent. In Colorado the declarations of

16. *Proof of how Voter voted.*—Circumstantial evidence to prove how a person whose name is shown to be on the poll-book, voted, has been continually admitted in Congressional cases;¹ and the statements of the voter himself are competent to prove this fact, where the returns are impeached, or the poll-books and returns are lost.²

The authorities are not uniform as to whether declarations made after the election by the voters, as to how they had voted, can be admitted.³ But where made at the time of the election, they have been admitted as a part of the *res gestæ*.⁴

17. *Poll-book contradicted by Parol.*—The poll-book is not such a record as to import absolute verity, but it may be contradicted or corrected by parol evidence.⁵

the voter as to his qualifications were rejected. *People v. Comrs. of Grand Co.*, 2 Pac. Rep. 912.

Where a person has offered evidence of this character himself, and it has been received, he cannot object to other statements of the same voter. *Norwood v. Kenfield*, 30 Cal. 393.

1. Thus, evidence of the general reputation of the politics of the voter, at the time of the election; evidence that one party insisted upon the voter's right to vote, while the other denied it; that he had received his tickets from persons of one party, and refused the tickets of the other; that he came to the polls in a carriage with party emblems on it; and that he was attended by the friends of one of the candidates,—has been admitted, and deemed to be sufficient to prove the character of the vote. *New Jersey Case*, 2 Cong. El. Cases, 19; *Vallandigham v. Campbell*, 2 Cong. El. Cases, 234; *Cook v. Cutts*, 6 Cong. El. Cases, 243; *Delano v. Morgan*, 3 Cong. El. Cases, 168; *Wigginton v. Pacheco*, 5 Cong. El. Cases, 10.

2. *New Windsor Case*, K. & O. (Eng. El. Cases) 173; *Reid v. Julian*, 3 Cong. El. Cases, 822; *Dixon v. Orr* (Ark.), 4 S. W. Rep. 774.

3. In Canada such statements were held not to be admissible,—*Lincoln Election Petition*, 4 Ont. App. Cases, 206,—but were received in Wisconsin, where persons refused to testify for whom they voted. *State v. Olin*, 26 Wis. 319.

In the earlier Congressional cases of *Vallandigham v. Campbell*, 2 Cong. El. Cases, 223; and *New Jersey Case*, id. 19; and *Delano v. Morgan* following them, the testimony was received; and in *Cessna v. Myers*, 4 Cong. El. Cases, 60, where the evidence was clear, and it was shown by other evidence that the voter had voted, the declarations were received, although the author of the report strongly assailed the principle involved in the admission of such evidence.

In *Newland v. Graham*, 2 Cong. El. Cases, 5; and in the later cases of *Cook v. Cutts*, 6 Cong. El. Cases, 251; *Garrison v. Mayo*, 48 Cong. H. R. 954; *Wallace v. McKinley*, 48 Cong. H. R. 1548, the committees have refused to receive such evidence, as they did also in the case of *Dodge v. Brooks*, 3 Cong. El. Cases, 92, where the declarations were made several months after the election.

4. *Patton v. Coates*, 41 Ark. 111. Statements made by a person that he was a Republican, and was inquiring for a Republican ticket at the election, were admitted to show how he had voted. *Wigginton v. Pacheco*, 5 Cong. El. Cases, 10.

Where the votes of a number of persons had been rejected by the judges of election, and they immediately made affidavits in which they swore they tendered the votes attached, and deposited the affidavits with the United States supervisor of election stationed at the polls, and declared they offered to vote, the affidavits were received, and the ballots counted, upon proof that the parties were legal voters, upon the ground that such acts and declarations were a part of the *res gestæ*. *Bell v. Snyder*, 4 Cong. El. Cases, 247.

5. Thus, where a poll-book showed that a voter had voted for only one of two candidates for his party, the error was corrected by parol proof. *Bedfordshire Case*, 2 Lud. (Eng. El. Cases), 402, 407. And in the same case, evidence was received to show that a vote had been given for the opposite candidate, instead of the one for whom it had been recorded. Evidence is also permitted to show that the name of the voter had been assumed by one who had falsely personated him when he voted; and it is the unquestioned practice to allow parol evidence, for the purpose of showing fraud in the poll-book; and where the number of names placed on the poll-books, where the parties had not voted, is numerous, it raises a strong presumption of fraud

18. *Ambiguous Ballots explainable.*—The evidence of surrounding circumstances may be given, to explain ambiguities in the ballots;¹ but the weight of authority is in favor of the idea that the voter cannot be permitted to testify for whom he intended to vote.² Evidence may be received to show who were the candidates nominated by the different parties, and that only two persons were candidates for the office; and, where a ballot is printed, it may be shown how the mistake occurred; and any other fact or circumstance connected with the case, which will show for whom the ballot was intended, may be given.³

19. *Various Presumptions.*—The presumption that all men know the law, applies to election cases.⁴ The presumption is in

on the part of the election officers. *Ward v. Sykes*, 61 Miss. 649.

1. *State v. Griffy*, 5 Neb. 151; *Meriam v. Batchelder*, L. & R. (Mass. El. Cases) 294.

2. *Atty.-Gen'l v. Ely*, 4 Wis. 429; *People v. Saxton*, 22 N. Y. 309. But in *People v. Seaman*, 5 Denio (N. Y.), 409; *People v. Ferguson*, 8 Cow. (N. Y.) 102, this was permitted; and also where the ambiguity was a patent one, testimony of this kind was received. *McKinnon v. People*, 110 Ill. 305.

3. *Lee v. Rainey*, 4 Cong. El. Cases, 589; *Stroback v. Herbert*, 6 Cong. El. Cases, 5; *Wright v. Hooper*, L. & R. (Mass. El. Cases) 100. Evidence has been admitted, where there was an ambiguity in the name of the candidate, to show whether any other persons of the name resided in the district, and, if so, whether they were eligible, or had been named for the office,—*State v. Yeates*, 43 Conn. 573; *Chapin v. Snow*, L. & R. (Mass. El. Cases) 96; *McKennon v. People*, 110 Ill. 305,—and also that a candidate generally signs his name by his initials, or was known by them,—*People v. Ferguson*, 8 Cow. (N. Y.) 102; *McKenzie v. Braxton*, 4 Cong. El. Cases, 19,—or that he was known by a title such as major. *Wallace v. McKinley*, 48 Cong. H. Rep. 1548.

Evidence that only two persons were candidates for a certain office, has been held sufficient to show that ballots, varying considerably from the correct name, were intended for one of the candidates. *Clark v. Robinson*, 88 Ill. 498. But in Minnesota a stricter rule prevails; and it was held that the vote might be counted where the name was abbreviated, only where evidence was introduced showing that the candidate was known by the abbreviation. *Newton v. Newell*, 26 Minn. 529. And the rule in Michigan will not permit the introduction of any evidence outside of the ballot. *People v. Tisdale*, 1 Doug. 65; *People v. Higgins*, 3 Mich. 233; *People v. Cicott*, 16 Mich. 283.

Where the ballot does not show what office the name is meant for, it has been

held that it is not competent to show by the voter for which one it was intended. *Wigginton v. Pacheco*, 5 Cong. El. Cases, 5; *Clark v. Robinson*, 88 Ill. 498. But where the name of the office is correctly given, but it is ambiguous because there is another office to which the description is also applicable, the fact that the person voted for is a candidate for only one of the offices, or that the voters of the precinct had the right to vote for but one, may be shown to explain the ambiguity. *Boynton v. Loring*, 5 Cong. El. Cases, 346; *Phelps v. Goldthwaite*, 16 Wis. 146.

In one Congressional case,—*Campbell v. Morey*, 48 Cong. H. R. 1845,—the name of a candidate for sheriff was written under the printed name of contestant; but the ballot was counted for contestant, and not rejected as double.

This was contrary to the general line of decisions, and could only be upheld by proof of the fact that the candidate for sheriff named was intended to be placed under that office. Where a paster for the office above that of representative, wholly or partially obliterated the title of that office, it was held that it was not to be inferred that the voter did not intend to vote for representative, and that the vote should be counted for that office. *Chappelle v. Prince* (Mass. El. Cases), 396. But when the paster for the name of the candidate for senator was pasted over the name of the candidate for another office, leaving the name of the regular candidate for senator still on the ticket, it was held that the paster should have no effect upon that office. *Clark v. Salmon*, L. & R. (Mass. El. Cases) 191.

When there are several persons of the same name in the district, all of whom are eligible to election to the office, and one of them is announced as a candidate, all ballots for that name will be presumed to be intended for the person who is announced as the candidate. *Macomber v. Fish*, L. & R. (Mass. El. Cases) 311.

4. Thus, it will be presumed that the

favor of the legality of the election,¹ and of the regularity of the canvass.² The law presumes the sworn officers to perform their duty honestly and faithfully.³

Where a series of acts are required to be done by the officer, the fact that one was not done does not affect the presumption that the rest were done.⁴

In the absence of evidence to the contrary, it will be presumed that the voters voting at an election are all the legal voters in the district, or that those who do not vote acquiesce the action of the majority of those who do vote.⁵

20. *Proof of Mistake.* — Ordinarily, the mistake of officers of election or of canvassers can be corrected, and proof is admissible to show such mistakes; but it seems that the record of a legislative body or a judicial record imports absolute verity, and that the court will not permit evidence of such a mistake to be given.⁶

21. *When Court takes Judicial Notice of an Election.* — The courts will take judicial notice of a public election when the time is fixed by law.⁷

22. *Best Evidence required.* — The general rule that the best evidence that can be obtained should be required, is applicable to election cases,⁸ though perhaps it is not so strongly insisted upon by election committees as by the courts.

electors know their rights, and will not be presumed that they were prevented from voting by the fraud or misconduct of the managers of the election. *People v. Brenham*, 3 Cal. 477.

1. *Trustees of Common Schools v. Garvey*, 80 Ky. 159.

2. *Campbell v. Braden*, 31 Kan. 754.

Where a place voted for, as a county-seat, had a legal name and a popular name, but the ballots were printed with the legal name on them, it was *held* that it would be presumed that the canvassers counted the returns under the legal name used on the ballots. *State v. Cavers*, 22 Iowa, 343.

3. *McKnight v. Ragan*, 3 La. Ann. 398; *Littell v. Robbins*, 3 Cong. El. Cases, 138.

Where the law required that election officers should be sworn, it will be presumed that this was done. *Draper v. Johnson*, 1 Cong. El. Cases, 702.

4. Thus, where the law required the officers to demand certain affidavits of non-registered voters, and to return them to the clerk's office with other papers, it was *held* that the failure to return the affidavits did not rebut the presumption that they had been given. *Curtin v. Yocum*, 3 Cong. El. Cases, 416.

5. *State v. Bender*, 38 Mo. 450; *State v. Mayor*, 37 Mo. 270; *Cass Co. v. Johnson*, 95 U. S. 360.

In Illinois it is *held* that the presumption that the voters voting in a district are all the legal electors, cannot be rebutted by the registry-lists. — *People v. Garner*, 47 Ill. 246, — nor by proof of the number of votes cast at the election in the preceding year. *Melvin v. Lisenby*, 72 Ill. 63. But in Mississippi it is *held* that the registration-books were admissible, but that deaths and removals subsequent to the date of the books might be shown. *Hawkins v. Carroll Co.*, 50 Miss. 735. And they are *prima facie* evidence in North Carolina. *Rigsbee v. County of Durham*, 3 S. E. Rep. 749.

6. Thus, in *quo warranto* cases against a person claiming an office, the Journals of the Senate of Ohio showed that Lemuel Moffatt had been voted for by that body, and the House Journal showed the election of Samuel Moffatt; and it was *held* that no evidence could be received to show that there was a mistake in the name. *State v. Moffatt*, 5 Ohio, 259.

In the same State, where it was sought to correct the date of a certificate of a canvassing board, the court refused to admit the evidence in the absence of a charge of fraud, upon the ground, that, being of a public nature, the date could not be impeached without proof of fraud. *Taylor v. Wallace*, 31 Ohio St. 151.

7. *Davis v. Best*, 2 Iowa, 96.

8. *Sinks v. Reese*, 19 Ohio St. 202.

Where the proof is a matter of record, parol evidence is not admissible, unless the record evidence is lost or destroyed.¹

Hearsay evidence, public rumors, and vague estimates of numbers, will be rejected.²

23. *Proof of Rejected Votes.* — In order to justify the counting of rejected votes, four things must be proved: first, that the persons were legal voters at the place where they offered their votes; second, that they offered the votes, or were prevented from so doing; third, that they had been rejected; and fourth, for whom they were offered.³

24. *Burden of Proof.* — The burden of proof is upon the person asking that returns should be rejected because of irregularities, to show that they were such as affected the result, or were in disregard of mandatory provisions of the election;⁴ but when the conduct of the election officers has been such as to show fraud, or the irregularities have been so great as to destroy the credit of the returns, the burden of proof is cast upon the party wishing to uphold the returns.⁵

1. Thus, it has been *held* that a record of a township-meeting, or a certified copy thereof, if obtainable, was the only admissible evidence to show the election of a town officer. *Prickett's Case*, 20 N. J. L. 134. And that a list of voters, if in existence, must be produced to prove that the person's name was on it. *Harris v. Whitcomb*, 4 Gray (Mass.), 433. And where a person's right to vote depended upon a change in the boundaries of a town, it was *held* that the record, if not lost, was the only competent evidence. *Clark v. Robinson*, 88 Ill. 498.

The record of conviction is the best and only evidence upon which to reject the vote of a convict. *Lowe v. Wheeler*, 6 Cong. El. Cases, 76.

But where the record is not definite, parol evidence may be admitted to supplement it. *Preston v. Culbertson*, 58 Cal. 198.

The fact that a record is not properly authenticated will not be sufficient to defeat an election, but parol evidence may be admitted. *State v. Ferguson*, 31 N. J. L. 107. And evidence that a person was acting as a public officer is admissible, and is *prima facie* evidence that he was duly elected and qualified. *Bryan v. Walton*, 14 Ga. 185; *Hollister v. Hollister*, 35 Conn. 247; *Willis v. Sproule*, 13 Kan. 257; *Druse v. Wheeler*, 22 Mich. 439.

When there is written evidence of an appointment, acceptance, and qualification of an officer, he will not be permitted to show by parol that he was not such officer by contradicting the record. *Crawford v. Dunbar*, 52 Cal. 26.

Contents of printed notices, not records,

distributed at an election, were allowed to be proved by a copy of the same printed impression. *Wakefield Case*, Bar. & Aust. (Eng. El. Cases) 307. And inscriptions on flags paraded at public meetings, and the contents of resolutions publicly read at such meetings, can be proved by parol. *R. v. Hunt*, 3 B. & Ald. 556.

2. Thus, evidence of a political census offered to prove fraud has been rejected. *Ingersoll v. Naylor*, 2 Cong. El. Cases, 33. And estimates of the number of voters prevented from voting, made by guessing at the size of the crowd, were *held* too vague. *Norris v. Handley*, 4 Cong. El. Cases, 74. And the proof of the existence of rumors was rejected upon the ground that it was the truth of the rumors, and not their existence, that must be shown. *Duffy v. Mason*, 5 Cong. El. Cases, 291.

3. *Frost v. Metcalfe*, 5 Cong. El. Cases, 291.

4. *Whipley v. McCune*, 12 Cal. 352; *Taylor v. Taylor*, 10 Minn. 107; *Pradat v. Ramsey*, 47 Miss. 24.

5. *Thompson v. Ewing*, 1 Brews. (Pa.) 67; *Marvin's Case*, 2 Phila. 320; *Myers v. Moffatt*, 3 Cong. El. Cases, 560. In *Duffy's Case*, 4 Brews. (Pa.) 531, and *Barber Re*, 10 Phila. 579, it was *held*, that, where legal and illegal votes had been counted indiscriminately, the party for whose benefit the majority in such districts was declared, would be required to lift the curse which the law imposed on the illegal ballots, or that they should be deducted from his count. This rule, however, should not be enforced where the election officers are of the opposite party from the majority candidate, and where they connive at the frauds.

In *quo warranto* proceedings to contest an election, where a party has a regular certificate, the burden of proof is on the State, to show that the respondent was not elected.¹

25. *Proof in Action for refusing Vote.*—Where malice is the gist of an action for refusing a vote, it must be proved that the refusal was knowingly wrongful, and prompted by impure and corrupt motives.²

Where the right to vote depends upon making certain proof before the election officers, the evidence must show that such proof was made; and the lack of such proof cannot be supplied by evidence that the defendants knew that plaintiff was a legal voter, or that they gave insufficient reasons for refusing the vote.³

Where an election is held under a statute, plaintiff need not show that it was legal, in order to recover for a wrongful refusal of his vote.⁴

26. *Evidence of Mistake in depositing or counting Ballots.*—Where different ballot-boxes are used for the ballots for different offices, and a ballot is found in the wrong box, evidence of the facts and circumstances surrounding the transaction is admissible to show the intention of the voter; and when that can be shown with reasonable certainty, the vote should be counted for the office for which the voter intended to cast it.⁵ Evidence of the election officers is admissible to show that they made a mistake in counting the votes.⁶

27. *Matters of Opinion.*—Unless the question is one calling for expert testimony, the opinion of witnesses should not be admitted to determine the issues in a case.⁷

28. *Intention of Person in removing.*—When a person's right to vote is in question by reason of a removal, he may testify as to his intention in leaving the place.⁸

1. *People v. Lacosto*, 37 N. Y. 192.

2. *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693; *Gotcheus v. Matheson*, 5 Lans. (N. Y.) 214.

As an element of proof to show wrongful motives, it may be shown that defendant knew that plaintiff was opposed to him politically. *Elbin v. Wilson*, 33 Md. 135. Or, in short, any evidence which is competent, may be introduced to prove that the defendant was actuated by fraudulent or corrupt motives, or that his intentions were honest, and that he acted under an innocent mistake. *Friend v. Hamill*, 34 Md. 298.

3. *Byler v. Asher*, 47 Ill. 101.

4. *Bernier v. Russell*, 89 Ill. 60.

5. *People v. Bates*, 11 Mich. 362.

In one or two early Congressional cases, however, the committees decided that the action of the election officers should govern. *Washburn v. Ripley*, 1 Cong. El. Cases, 679, where the officers counted for

member of Congress a vote placed in the Congressional box by mistake by the voter himself; and *Newland v. Graham*, 2 Cong. El. Cases, 5, where they counted for representatives votes which had been deposited in the other boxes by their own mistake.

6. *Adams v. Wilson*, 1 Cong. El. Cases, 375.

In one case, where two ballots found together had been rejected as a fraudulent double ballot, the testimony of the officers was admitted to show that, after these ballots were rejected, the number in the box was two less than the number of names on the voting-list; and the testimony of the by-standers was admitted to show that, in their judgment, the ballots had not been cast together. *Reed v. Cosden*, 1 Cong. El. Cases, 353.

7. Thus, it was held that the witnesses should not be permitted to give an opinion as to the fairness or the freedom of an election. *Patton v. Coates*, 41 Ark. 111.

8. *Wilkins v. Marshall*, 30 Ill. 74.

29. *When Official Certificate admissible.* — An official certificate is not admissible to prove facts in the officer's own knowledge, or derived from the examination of the files of his office.¹

Certified copies of abstracts on file in the office of the secretary of state are admissible in evidence; and the secretary is not a witness, and cannot be cross-examined; and his seal gives the certificate the import of absolute verity.²

30. *Proof of Naturalization.* — It is held in the recent case of *Lowry v. White*, in the House of Representatives, that where no record was kept of the naturalization of parties by the court, and the certificate was lost, parol testimony was competent to show the fact of naturalization.³

Where a certificate of naturalization is granted by a court of competent jurisdiction, evidence is not admissible to show that it was improperly granted, or was obtained by false and perjured testimony.⁴ But proof may be offered to show that it was issued by the clerk in the absence of the judge.⁵

31. *Public Documents admissible.* — It has been held, in a number of Congressional cases, that various documents were admissible in evidence for the purpose of proving the facts shown by them.⁶

32. *Use of Record offered.* — Where a record is offered in evidence by one party for one purpose, it may be used by the other party to prove any facts pertinent to the issue.⁷

33. *Proof when Returns are illegal or wanting.* — Where the

1. Thus, it has been held that a clerk's certificate was not admissible to prove that certain documents were not on file in his office, but that he must be sworn as a witness, to prove that fact. *Goggin v. Gilmer*, 2 Cong. El. Cases, 70.

2. *Daily v. Estabrook*, 2 Cong. El. Cases, 229.

A record of a suit between other parties in a contest, at the same election, where the validity of the same election was determined, is not admissible, as it is *res inter alios acta*. *Spencer v. Morey*, 4 Cong. El. Cases, 444.

3. 50 Cong. H. R. 163.

In this case, which turned upon the eligibility of the sitting member, the majority report held that this fact could not be proved by parol evidence; but the minority report was adopted by a decided majority. The applicant need not see that the proceedings were recorded. *Coleman Re*, 15 Blatchf. (C. C.) 406.

While the certificate of naturalization of one's parents is the best evidence, other evidence may be used when this cannot be obtained. *People v. McNally*, 59 How. Pr. (N. Y.) 500.

4. *Wigginton v. Pacheco*, 5 Cong. El. Cases, 16; *People v. Pease*, 30 Barb. 588.

5. *Van Wyck v. Greene*, 3 Cong. El. Cases, 631.

6. Thus, it has been held that land-books required to be kept by the statute of a State were admissible as *prima facie* evidence, to show that a person was a freeholder. *Taliaferro v. Hungerford*, 1 Cong. El. Cases, 250; *Loyall v. Newton*, id. 520.

The census reports of the United States were examined by a committee, to show that the per cent of voters voting in districts where intimidation was alleged was as great as the average in other districts in the country. *Norris v. Handley*, 4 Cong. El. Cases, 68; *Niblack v. Walls*, id. 105.

A city census was admitted, to show that certain persons were not voters in the wards where they had voted. — *Blair v. Barrett*, 2 Cong. El. Cases, 308, — and the muster-rolls of a company of soldiers, to show the residence of the members, and their ages when they enlisted. *Knox v. Blair*, 2 Cong. El. Cases, 521.

7. Thus, when a party sued introduced a record of a town, to show his election to office, the other party was allowed to show, by other parts of the record, that the election was illegal. *Bearce v. Fassett*, 34 Me. 575.

returns are either destroyed or are rejected for irregularity, secondary evidence may be admitted to show that the actual vote was correctly stated in the return;¹ and either party may prove the number of votes cast for him.²

34. *Effect of Illegal Promise.* — Where it was shown that a candidate for an office publicly announced to the voters, that, if he was elected, he would perform the duties of the office for less than the legal salary, it was held, that, in order to defeat his election, the contestant must show that the number of votes obtained by reason of the promise was greater than the majority of the successful candidate.³

35. *Declaration to prove Unlawful Combination.* — Declarations of voters after the election, that they had voted, and how they had voted, have been held competent to prove an unlawful combination to carry an election by illegal voting, though they would not be admitted for the purpose of excluding the particular votes.⁴

(B) EVIDENCE IN CRIMINAL CASES. — I. *For Illegal Voting.* — Parol evidence is admissible to prove illegal voting, where the poll-list is lost or destroyed; but the act is not complete until the ballots are deposited in the box.⁵

It has been held that a statement of the defendant made under oath when challenged is not admissible in his favor, nor the decision of the judges in his favor.⁶

1. *Daniel Bard's Case*, 1 Cong. El. Cases, 116; *Sheridan v. Pinchback*, 4 Cong. El. Cases, 322; *Burns v. Young*, 4 Cong. El. Cases, 181.

This may be shown by certified copies of the precinct returns, when the originals are lost, — *Opinions of Justices*, 70 Me. 570, — or by the testimony of the officers who compiled them.

2. *Reid v. Julian*, 3 Cong. El. Cases, 22; *Norris v. Handley*, 4 Cong. El. Cases, 73.

3. *People v. Thornton*, 25 Hun (N. Y.), 456.

4. *Patton v. Coates*, 41 Ark. 111.

5. *Blackwell v. Thompson*, 2 Stew. & P. (Ala.) 348. But where the poll-list lacks the proper official certificate, it is error to admit it in evidence without preliminary proof of its authenticity; but parol testimony is competent for this purpose. *Hunter v. State*, 55 Ala. 76.

The copy of the record of the proceedings at a town-meeting could not be admitted upon oral evidence that it was such a copy, as the record itself was the best evidence. *Com. v. Wallace, Thatcher's Crim. Cases*, 592.

6. *Morris v. State*, 7 Blackf. (Ind.) 607.

In Iowa, under an indictment for wilfully voting when not a citizen of the United States, it was held that the defendant would not be allowed to prove that he consulted witnesses as to his right to vote, and was

advised by them that he had such right. *State v. Shelly*, 15 Iowa, 404.

In Massachusetts, where a party was indicted under a statute for wilfully voting, knowing himself not to be a qualified voter, it was held that an admission of the defendant, on the trial, that he had voted at the election, was equivalent to an admission that he had voted wilfully. *Com. v. Bradford*, 9 Met. 268.

In the same case it was held, that, under such a statute, the defendant would be permitted to show that he consulted counsel as to his right to vote, and submitted the facts of the case to them, and that he was advised that he had such right; but it is not conclusive that he had not such knowledge. From the case of *State v. Smith*, 15 Iowa, 404, it seems that the defendant will not be permitted to show that he took the advice of persons who were not licensed attorneys, but must consult persons learned in the law.

In the case of *Com. v. Aglar, Thatcher's Crim. Cases*, 412, it was held that the person must know at the time that he is doing, or attempting to do, an unlawful act, before he can be convicted of a wilful violation of the act; and this was also the construction given in the case of *Drewe v. Coulton*, 1 East, 563, note.

It is probable, however, that the greater number of cases in the American courts

But on the other hand it has been held, that, where a charge of fraudulent voting is made, it must be shown that the vote was cast with the knowledge that it was illegal.¹

Secondary evidence of the contents of a ballot is competent, when the ballot is destroyed, in proceedings for altering the ballot.²

2. *Sufficiency of Proof.*—As no general rule can be laid down as to the proof necessary to convict in the various cases, it will be necessary to consider the facts set forth in the decided cases.³

3. *Proof in Action for betting on Elections.*—In an action for unlawfully betting on an election, it was shown that the money was placed in an envelope, on the outside of which were written directions to the stake-holder as to paying it over. It was held that the writing was the primary evidence, and must be

uphold the idea that a voluntary illegal act is presumed to be wilful and fraudulent. *State v. Harrt*, 6 Jones (N. Car.), L. 389; *State v. Barrett*, 10 Ired. (N. Car.) 336; *People v. Harris*, 29 Cal 678.

In Tennessee it is *held* the ignorance of the law will not excuse illegal voting; but it must be shown, in order to convict a person of the offence, that the voter had knowledge of a state of facts which, in law, would disqualify him from voting. *McGuire v. State*, 7 Humph. 54.

And in another case it was *held* that it must be shown that the party was chargeable with knowledge of facts rendering the vote illegal, before he could be convicted of voting illegally. *State v. Haynorth*, 3 Sneed (Tenn.), 64.

In Alabama, where a person is indicted for voting as a minor, it was *held* that he might show that he voted under an honest belief, induced by information derived from parents, relations, or acquaintances, having knowledge of his birth, that he was of lawful age. *Gordon v. State*, 52 Ala. 308; *Carter v. State*, 55 Ala. 181.

It has been *held* in Massachusetts that it is a question of fact for the jury to determine whether the vote was wilful or not. *Com. v. Wallace*, *Thatch. Crim. Cases*, 596.

1. *State v. McComber*, 7 R. I. 349.

2. *Com. v. McGurty* (Mass.), 14 N. E. Rep. 98.

3. When a defendant indicted for illegal voting was proved to have left his father's house, where he was at home, on Sunday preceding the election, and to have gone to the township where he had voted, and to have remained there, chopping wood, until the day after the election, when he returned home again, having voted in the mean time, it was *held* that the proof fully warranted a conviction. *State v. Minnick*, 15 Iowa, 123.

When a defendant was indicted for

having voted illegally at an election, and the only question was, whether he had resided in the town where he had voted six months next preceding the election, it was *held* that it was not sufficient to change the burden of proof, to show that he had resided in another town seven months before the election. *Com. v. Bradford*, 9 Met. (Mass.) 268.

When the indictment was for giving false answers to the officers who presided at a meeting, or for wilfully voting at such meetings without being qualified, it was *held* that it was sufficient to prove that the officers were acting as such, without having proved that they were legally qualified or chosen to hold the office. *Com. v. Shaw*, 7 Met. (Mass.) 52.

Where an allegation was made "that a town-meeting was then and there held," it was *held* that it might be shown that the meeting was one held under the laws and constitution of the State; and where the allegation was, that a meeting of the inhabitants of a town "was duly holden," it was *held* sufficient to show that a meeting of the qualified voters of the town had been held. *Com. v. Shaw*, 7 Met. Mass. 52; *State v. Boyington*, 56 Me. 512.

Where the offence charged was that of having voted in one town, ward, or district, after having voted at the same in another town or district, and there were two counts, in which the priority of the vote was different in each town, it was *held*, that, unless the jury could determine from the proof, in which town the first vote was cast, the proof was not sufficient, although it was shown that the party had voted in both towns. *State v. Fitzpatrick*, 4 R. I. 269.

Proof that an election was in fact held, that a board of inspectors was organized, and received votes, is competent evidence on trial for illegal voting. *People v. Tripp*, 4 N. Y. Leg. Observer, 344.

produced before the State would be allowed to prove the bet by parol evidence.¹

4. *For making False Certificate.*—Where an inspector of an election, chosen under a State law, was indicted for making a false certificate of the result of an election for representative in Congress, it must be shown that the certificate was made fraudulently in order to convict.²

5. *On Indictment for refusing a Vote.*—When an election officer is indicted for knowingly refusing the vote of a qualified citizen, it must be shown that the act was done wilfully.³

XXII. Offences against Election Laws.—1. *Offences at Common Law.*—It is said by Judge McCrary, that the better opinion is, that double voting, or any other wilful and corrupt attempt to defeat a fair expression of the legal voters, through the ballot-box, is, in the absence of a statute, an offence, which may, as a general rule, be punished by indictment under the common law.⁴

2. *Election must be Legal.*—In order to convict a person of an offence at an election, it must be legal and regular; and an offence committed where the election is not authorized by law, or is not so called as to be valid, cannot be punished, where the act prohibits such an offence at an election.⁵

1. *Frazee v. State*, 58 Ind. 8.

2. *U. S. v. Hayden*, 52 How. Pr. (N. Y.) 471. In this case it was *held*, that, where it was shown that the fraud upon the ballot-box had been perpetrated by an unknown person, not an agent of the inspector, there could be no conviction; and where State officers were indicted for adding names of persons not voting at the election, where a member of Congress was elected, in order to affect the result, it was *held* that it must be proved that the act was done by the defendants, or by others in their presence with their consent. *U. S. v. Wright*, 16 Fed. Rep. 112.

3. *People v. Boas*, 29 Hun (N. Y.), 377.

In the case of the *Com. v. Lee*, 1 Brews. (Pa.) 173, it was *held* that it must be shown that the officer rejected the vote knowing it to be the vote of a qualified citizen; that the presumption of honesty was in his favor; and that the Commonwealth must prove that in rejecting the vote the defendant did not act conscientiously, but wilfully and intentionally disregarded his duty. And see *Com. v. Sheriff*, 1 Brews. (Pa.) 183; *State v. Smith*, 18 N. H. 91.

In the case of *Byrne v. State*, 13 Wis. 519, it was *held* that the doctrine that ignorance of a law does not excuse a man, does not apply, where an officer is required by law to decide questions which require the exercise of judgment and discretion; and he can only be required to do his duty according to the best of his knowledge and ability.

4. Am. Law of El. § 469.

It has been *held*, in *Com. v. Silsbee*, 9 Mass. 417, that giving in more than one vote at an election for selectmen at a town-meeting was a misdemeanor at common law.

It is an indictable offence to violently and rudely disturb a town-meeting. *Com. v. Hoxey*, 16 Mass. 385.

It is an indictable offence at common law to bribe, or attempt to bribe, an elector by giving him money for giving in his ballot. *State v. Jackson*, 73 Me. 91.

And in England this is true, although the offence is punishable by the statute. *Rex v. Pitt*, 1 Wm. Bl. 380.

In Pennsylvania it is *held*, fraud in an election for public officers is an indictable offence at common law. *Com. v. McHale*, 97 Pa. St. 397.

In some of the States, however, there are no common-law crimes; and no person can be punished for an offence at any federal election in the United States court, unless a penalty was provided by the statute of the United States.

5. Thus, in England it is *held*, that, in an action for bribery, it was not sufficient to show a *de facto* election, but that a regular election must be shown. *Rex v. Lamb*, 6 H. & N. 75. In *State v. Williams*, 25 Me. 561, it was *held* that an indictment against a person for voting twice at a town-meeting for the choice of selectmen, could not be maintained unless the meeting was warned as required by statutes.

3. *Defence to Action for Illegal Voting.* — The act of voting must be complete before one can be punished for an illegal vote.¹

It is no defence that a disfranchised person should have been told by counsel that there was no record of his conviction, or that he had forgotten the fact of his conviction.² Or that he had been a minor when convicted, and also when discharged from prison.³ Nor is it a defence to an action for voting the second time, to show that the first vote was also illegal, and could not be counted.⁴

4. *Other Offences under State Laws.* — As the offences under the statutes of the various States are dissimilar, it will be necessary to examine the particular decisions of the various States.⁵

Where an election officer was indicted for failing to comply with the requirements of the law in regard to making up the return of an election, it was *held* that he would not be permitted to question the constitutionality of certain provisions of the law, which were limitations upon the rights of the electors. *Hall v. People*, 90 N. Y. 498.

But it was *held* in Texas, that, in a *habeas corpus* proceeding by a party charged with illegal voting at an election, the question of the constitutionality of the statute could be made.

Irregularities at an election, however, will not be a defence to a prosecution for illegal voting if the election was legal, was properly called, and held at the proper time and place. *State v. Calhoun*, 12 Ired. (N. Car.) 178; *State v. Bailey*, 21 Me. 62. But where the irregularities are such as to invalidate the election, it has been *held* that no penalty can be inflicted for voting twice at the election. *Morrill v. Haines*, 2 N. H. 246.

1. In Tennessee it was *held*, that if a party standing at the poll hands his ballot to the proper officer, and his name is announced, and is registered by the clerk by order of the judges, he has voted, although the officer may neglect to deposit the ballot in the box until after the close of the polls. *Steinwehr v. State*, 5 Sneed, 586. But in Alabama, where it was provided that the ballot of a voter should be taken by the manager of an election, and deposited in the box by him, and that the name of the voter should at the same time be entered on the list of persons voting, it was *held* that the act of voting was not completed until the ballot was deposited in the box; and that the entry of the name on the list was not the vote, but only evidence of the vote. *Blackwell v. Thompson*, 2 Stew. & P. (Ala.) 348.

2. *Gandy v. State* (Ala.), 2 So. Rep. 465.

3. *Hamilton v. People*, 57 Barb. (N. Y.) 625.

4. *State v. Perkins*, 42 Vt. 399.

Where the statute made it a felony to

vote the second time at an election, and made it a misdemeanor also to vote in an election district in which the voter did not actually reside, it will not be a defence to a prosecution for the felony that the second vote was cast in the district in which the defendant did not reside. *State v. Welch*, 21 Minn. 22.

Where the law prohibited an officer from receiving a tax on election day, and made it a crime to vote without having paid the tax, a party who paid the tax on election day, and cast his vote afterwards, could not be convicted of casting an illegal vote. *Austin v. State*, 71 Ga. 595.

The fact that a person committed perjury in swearing to his residence, when voting, would not prevent an indictment and conviction for the illegal voting, although he might be subjected to another prosecution for the perjury. *State v. Minnick*, 15 Iowa, 123.

5. Thus, in *Pennsylvania*, it was *held* that a mere attempt to vote illegally is an indictable offence, — *Com. v. Jones*, 10 Phila. 211, — but that fraudulent voting in the army, beyond the limits of the State, was not within the jurisdiction of the criminal courts of the State. *Com. v. Runzman*, 41 Pa. St. 429.

Where a qualified voter supports the right of a challenged person to vote, he is not liable to an indictment unless he acts in bad faith. *Com. v. Sheriff*, 12 Phila. 594.

In *Kentucky*, the office of judge of election is a constitutional one, and a person may be indicted for usurping it without regard to his motives. *Wayman v. Com.*, 14 Bush, 466.

The delivery of a fraudulent ballot to the judge of election is indictable under a statute forbidding any one to wrongfully put, or insert, ballots in the boxes. *Com. v. Gale*, 10 Bush (Ky.), 488.

In *Massachusetts* it was *held* that it was an indictable offence for the mayor and aldermen of the city of Boston to omit, through carelessness, to return any votes cast at an election for member of Congress.

5. *Offences under Acts of Congress.* — Congress has no authority to pass any laws providing for the punishment of offences committed at elections, unless representatives or delegates to Congress, or electors of President and Vice-President, are to be voted for, or unless some parties, acting under the authority of State laws, hinder or prevent persons from casting their votes on account of their race, color, or previous condition of servitude; and most of the offences against the United States laws come under one of these heads, and the cases will be considered more fully in the notes.¹

Com. v. Mayor, etc., Thatch. Crim. Cases, 298.

In *Indiana* it is *held* that it is not a felony to treat voters at an election, — *Heilman v. Shanklin*, 60 Ind. 424, — but in *Tennessee* it is indictable to treat electors with a view to obtain their votes. *State v. Rutledge*, 8 Humph. 32. But it was *held* in that State that it was not indictable under the statute to vote illegally for officers of municipal corporations. *State v. Liston*, 9 Humph. (Tenn.) 603.

The statute of *Alabama*, prohibiting any person from voting out of the county, city, or town of his residence, or from voting at any election where he was not entitled, was *held* not to be infringed by voting out of the ward for municipal offices of the city in which the voter resides. *Nettles v. State*, 49 Ala. 35.

The statute of *Illinois* makes it an offence to refuse a vote where an affidavit is tendered, showing the right of the person who tenders it to vote. A person cannot be convicted under this statute where the affidavit was not tendered, by showing that he had said he would refuse the vote, even if the affidavit was offered. *Sharpe v. People*, 14 Bradw. (Ill.) 224.

Where an act required the registration officer to make a list of persons whose names were stricken from the register, and also makes it an offence to do a forbidden act, or to omit to do any required act, it was *held* to be an offence to include in such list names not stricken from the register; but there will be but one offence if a number of names are included. *Mincher v. State*, 66 Md. 227.

Under a statute for punishing one who shall vote not being qualified, an indictment will not lie against a qualified voter for voting in the name of another person, although charging that the defendant was not qualified to vote in the name of the other person. *State v. McClarnon* (R. I.), 8 Atl. Rep. 688.

1. The purpose of § 5515 of the Revised Statutes of the United States was not to punish violations of the State law by State election officers, unless such violation af-

fects the election of a representative or a delegate in Congress. *United States v. Nicholson*, 3 Woods (C. C.), 215; *United States v. Morrissey*, 32 Fed. Rep. 147. Under this section, an officer of elections is criminally liable for intentional delay until the election day in executing a warrant for the arrest of one charged with illegally registering, or for threatening to arrest the person for the purpose of deterring him from voting. *Spooner Re*, 9 Abb. N. Cas. (N. Y.) 481.

The supervisor of elections is not guilty of an offence in expressing an opinion that one seeking to vote is not qualified, and refusing to return his naturalization certificate, in consequence of which the State inspectors refused to allow him to register. *Hilt Re*, 9 Abb. N. Cas. (N. Y.) 484.

A conviction for using a certificate of naturalization for the purpose of registering as a voter, knowing the same to have been unlawfully issued, cannot be sustained by showing that a certificate, regular on its face, had been issued, to the knowledge of the defendant, without his having taken the oath, or having been present in court. *United States v. Burley*, 14 Blatchf. (C. C.) 91.

It is an offence under sec. 5515 for an inspector of election to appoint unsuitable and incompetent persons as inspectors with intent to affect an election for member of Congress, or its result. *U. S. v. Carrothers*, 15 Fed. Rep. 309.

Under the same section, an election officer may be punished for adding names of persons who did not vote to the list of voters required to be kept by the State law, if the acts were done to affect the result of the election for member of Congress. *United States v. Wright*, 16 Fed. Rep. 112. And where the statute requires an inspector to deliver the certificate to the canvassers, parting with it before he has so delivered it, where a member of Congress is voted for, is an offence under this section. *Coy Re*, 31 Fed. Rep. 394.

Where the judges of election for member of Congress refuse a vote with a wrongful *animus* and intent, they may be

XXIII. Criminal Pleading and Practice. — 1. *General Rules.* — The rules of pleading applicable to other offences will, in general, apply to indictments for violations of the election laws; but in cases of indictments for voting without qualification, the rule that it is sufficient to state the offence in the language of the statute does not apply. There are so many disqualifications, that the indictment should inform the defendant of the particular one charged against him.

This doctrine is supported by the overwhelming weight of the authority, though there are exceptions to the general line of decisions.¹

indicted, notwithstanding a colorable excuse. *United States v. Foster*, 3 Hughes (C. C.), 514.

Congress has authority to provide penalties for the violation of State statutes by State officer at elections for member of Congress. *Siebold Ex p.* 100 U. S. 371; *Clark Ex p.* 100 U. S. 399; *U. S. v. Baader*, 16 Fed. Rep. 116.

Under an indictment for voting without having lawful right to do so, it was *held* that the fact that the defendant, who was a female, believed that she was lawfully entitled to vote under the Constitution, was no defence. *United States v. Anthony*, 11 Blatchf. (C. C.) 200.

A conspiracy to aid or counsel non-residents to go into a county to vote illegally, if any of the alleged acts were done, is complete, although no person went into the county, or cast or offered an illegal vote. *U. S. v. Wrape*, U. S. C. C. (Ind.) 4 Weekly Law Bul. (Cin.) 433.

Where the laws of a State do not disqualify a person from voting, on account of an offence against the government, a person cannot be indicted for fraudulently registering because he had been convicted of having uttered counterfeit money of the United States. *United States v. Barnabo*, 14 Blatchf. (C. C.) 74.

In sect. 5514 of the Revised Statutes of the United States, enacting that where, by the laws of a State, the name of a candidate for representative or delegate in Congress, and the names of candidates for State offices, are required to be on the same ballot, "it shall be deemed sufficient *prima facie* evidence to convict any person voting, or offering to vote, unlawfully under the provisions of this chapter, to prove that the person so charged cast, or offered to cast, such ticket or ballot wherein the name of such representative or delegate in Congress might by law be printed, written, or contained, or that the person so charged committed any of the offences denounced in this chapter with reference to such ticket or ballot," the last clause should be read at if the word "so" were omitted, and the

section is therefore not limited to the offence of voting, or offering to vote, unlawfully, but embraces all the offences named in the chapter. *United States v. Morrissey*, 32 Fed. Rep. 147.

United States supervisors of elections may be indicted for doing an unauthorized act with the intent to affect the result of a Congressional election. *U. S. v. Fisher*, 8 Fed. Rep. 414.

Resisting a *United States marshal* attempting to arrest a man trying to vote at Congressional election under circumstances showing fraud, is indictable under sec. 5222, U. S. Rev. Stat. *U. S. v. Conway*, 6 Fed. Rep. 49.

1. Thus, in *Indiana* it was *held* that an indictment which charged that the defendant had voted at an election, "not having the legal qualifications of the voter," was bad for alleging, not a fact, but a conclusion of law. *Quinn v. State*, 35 Ind. 485.

In *Alabama* it was *held* that a general allegation of illegal voting was not sufficient; although a charge that the defendant, not being twenty-one years of age, voted at a general election, was sufficient. *Gordon v. State*, 52 Ala. 308.

In *New Jersey* it is *held* that an indictment for voting illegally which does not disclose the particular disability of the defendant is fatally defective. *State v. Moore*, 27 N. J. L. 105. And see *Pearce v. State*, 1 Sneed (Tenn.), 63.

On the other hand, in *Iowa* it was *held* that it was sufficient to aver that the party knew himself not to be qualified, without stating the lack of qualification. *State v. Douglas*, 413. And this same doctrine was *held* in *United States v. Quinn*, 8 Blatchf. 48, where it was *held*, the offence being a misdemeanor, that it was sufficient to charge it in the words of the statute; but in *United States v. Hirschfield*, 13 Blatchf. 330, an indictment, alleging that the defendant, having no lawful right to register, did fraudulently and wilfully register, was *held* bad; and another count that he had no lawful right to register, as he well knew by reason of the fact that he was then and

2. *Averment of Proper Officers.* — In an indictment for illegally voting, an averment that the defendant voted at a certain election authorized by law then and there holden, implies that it was holden by proper officers.¹

3. *Averment of Purpose.* — An indictment need not show the names of the candidates, nor that candidates were voted for, for any particular office;² but the purpose for which the election was held should be stated, and it is not sufficient to call it a general election.³

4. *Against the Statute.* — Where the act of Congress has fixed a penalty for the performance of an act by the State officers which the State law also declares illegal, an indictment which concludes against the form "of the statute of the United States" alone is sufficient in the federal courts.⁴

Where an indictment for illegal voting, under the acts to regulate elections, charged that the vote was given at an election held in pursuance of the statute, in that case made and provided for electors for President, etc., it was held that, as the act to regulate elections was the only one under which the election of such officers could be held, the indictment substantially charged that the election was held under that act.⁵

5. *Averment of Time.* — The indictment must specify the day on which the election is held.⁶

6. *Allegation of Fraud.* — The averment of fraud must be specific, and set forth the particular acts charged to have been committed.⁷

there an alien, and had not been admitted to become a citizen, was *held* bad, because these averments did not show that he had no right to register or vote.

In *Oregon* it is *held* that such a defect in failing to state the particular disqualification was waived by failure to demur, and the indictment was good after verdict. *State v. Bruce*, 5 Oreg. 68.

1. *State v. Douglas*, 7 Iowa, 413.

An averment that certain persons were judges of the election, is a sufficient averment that they were duly appointed judges. *State v. Randles*, 7 Humph. (Tenn.) 9.

An averment that a "town-meeting was then and there duly held," is sufficient to enable proof to be given that it was held according to the constitution and laws of the State. *State v. Boyington*, 56 Me. 512. It is not necessary to state by what authority a town-meeting, or an election is held where it is averred that it was duly holden. *State v. Marshall*, 45 N. H. 281.

2. *State v. Minnick*, 15 Iowa, 123.

3. *Carter v. State*, 55 Ala. 181.

In the case of *Lane v. Stat.*, 39 Ohio St. 312, an allegation in the indictment, that defendant at a certain township, in a certain county, "did unlawfully, wilfully, and knowingly vote more than once, to wit, twice, at a certain corporation election then

and there holden, and authorized to be holden by the laws of the State of Ohio," was fatally defective in not describing the election, as under this averment it might have been an election in a private corporation, a township election, or an election in any city or village in the township; but an averment that the election was held, and authorized by law, within and for the city of W., to vote for city attorney and other officers then and there to be chosen, was *held* sufficient to show the purpose of the election. *Gallagher v. State*, 10 Tex. App. 469.¹ And an averment that the inhabitants of a town, at the town-meeting, were called upon to give in their votes for member of Congress, was *held* to be sufficient to show that the meeting was called for the purpose of voting for member of Congress. *State v. Marshall*, 45 N. H. 281.

Where the defendant is charged with voting more than once at the general election held at a certain place, it need not state the names of the persons or officers for whom the alleged vote was cast. *Wilson v. State*, 52 Ala. 299.

4. *U. S. v. Baader*, 16 Fed. Rep. 116.

5. *State v. Moore*, 27 N. J. L. 105.

6. *State v. Day*, 74 Me. 220.

7. A count in the indictment, under a statute providing for the punishment of an

7. *Refusing Legal, or accepting Illegal, Votes.* — In an indictment for refusing to receive legal votes, the purpose of the election should be stated,¹ and also the fact that the defendant knew the voter was entitled to vote.²

8. *Conspiracy.* — An indictment under United States Statutes, § 5520, for conspiracy to prevent a citizen, lawfully authorized to vote, from giving his support or advocacy in a legal manner in favor of an election of a lawfully qualified person as member of Congress, need not set out the acts of advocacy and support, which the conspiracy was formed to prevent.³

9. *For taking False Oaths.* — An indictment for taking a false oath of qualification as a voter must allege that the defendant offered to vote, or was challenged, or informed by an inspector of the qualifications of an elector; and the occasion of the administration of the oath must be specifically set forth.⁴

10. *For betting on Election.* — Where an indictment for losing money by betting on an election charged that the defendant bought a gold ring of the value of ten dollars to be paid for at that price, when a certain candidate should be elected governor, otherwise not to be paid for at all, it was held to be insufficient, as he would in neither event lose any thing of value.⁵

11. *Joinder of Defendants.* — All the inspectors of an election may be joined in the same indictment,⁶ but this is not necessary;⁷ and where the various officers act in different capacities, they cannot be joined in the same bill.⁸

12. *Offences against United States Laws.* — In a prosecution in the federal courts, where the offence charged is on the borderline of federal jurisdiction, it is the imperative duty of the court

officer who should be convicted of any wilful fraud in the discharge of his duties, which charges that such officer "did commit wilful fraud in the discharge of his duties," was fatally defective, although in the words of the statute. *Com. v. Muller*, 2 Pars. (Pa.) 480.

In the same indictment there were counts charging the defendants with having caused to be written on the poll-list a hundred and fifty names of persons who had not voted, and with having counted them, and marked on the tally-papers a hundred and fifty votes which had not been received or polled. It was *held* that these counts were defective, in not giving any of the names alleged to have been placed on the poll-books; but in an indictment for altering the tally-sheets and poll-books, it has been *held* that it is not necessary to copy the documents in the indictment. *State v. Granville* (Ohio), 12 N. E. Rep. 803.

1. *Tilton v. State*, 27 Ind. 492.

2. *State v. Daniels*, 44 N. H. 383.

In Maine, where one of the election officers was indicted for receiving at the

general election the vote of a person whose name was not borne on the list of electors, it was *held* to be necessary to allege that the act so committed was unreasonable, corrupt, or wilfully oppressive. *State v. Small*, 10 Me. 109.

Where one judge was indicted for knowingly and unlawfully receiving the vote of a person not entitled to vote, it was *held* to be unnecessary to state how the other officers acted. *Com. v. Gray*, 2 Duv. (Ky.) 373.

3. *United States v. Goldman*, 3 Woods, C. C. 187.

4. *Humphreys v. State*, 17 Fla. 381.

An allegation that the defendant "being required by law to take an oath," is not sufficient. *Dennis v. State*, 63 Ind. 389.

5. *Wagner v. State*, 63 Ind. 250.

6. *Byrne v. State*, 12 Wis. 519.

7. *Com. v. Gray*, 2 Duv. (Ky.) 373.

8. In the case of *Com. v. Miller*, 2 Pars. (Pa.) 220, a bill joining the inspectors, judge, and clerks for fraudulent acts at the election, was *held* bad upon demurrer for misjoinder of parties.

to require a clear and distinct averment of every fact essential to give the court jurisdiction; and for this purpose, the indictment must contain an affirmative and distinct charge of an act which does or may affect the election of a representative or delegate in Congress.¹

For particular instances, see notes.

13. *Action for Penalties.* — A complaint under § 2006 of the Revised Statutes of the United States must show that the officer refused, or knowingly omitted, to give the plaintiff an opportunity to perform the acts required to be done as a prerequisite to vot-

1. *U. S. v. Morrissey*, 32 Fed. Rep. 147. In this case the counts upon which there was a verdict of guilty, charged that the defendant had received certain ballots from persons whom he knew were not entitled to vote, whose votes were for that reason known to him to be fraudulent, but failed to state they were cast for a candidate for Congress, and for this defect the judgment was arrested; but in the *U. S. v. McBosley*, 29 Fed. Rep. 897, it was held that an indictment under section 5511, for illegal voting or bribery at an election for member of Congress, voted for on the same ballot with local or State officers, need not charge that the ballot contained the names of persons for member of Congress, nor that the bribe was given to influence the vote in reference to the Congressional election; and in *Coy Re*, 31 Fed. Rep. 794, where the inspector, in violation of the requirements of the State law, parted with the certificate showing the votes cast for State officers and for member of Congress, before delivering it to the canvassers, it was held that the indictment need not charge that it was done with intent to affect the result of the election for Congress.

An indictment for permitting illegal voting at a Congressional election, need not set out the special means by which the permission was given. *U. S. v. Doherty*, 25 Fed. Rep. 28.

Where an indictment under section No. 5511 in various counts charged that the defendant did then and there procure certain persons (naming them) to vote more than once, and that he did then and there counsel them to vote more than once, and also that he did counsel certain persons to vote in places where they had no right to vote, stating the time and place particularly, it was held that the indictment which charged the offence in the words of the statute was sufficient. *U. S. v. White*, *U. S. C. C. S. D. of Ohio*, 2 Weekly Law Bul. (Cin.) 27.

An allegation that a party claimed the right to vote at an election, is not equivalent to the allegation that he is a qualified voter. *U. S. v. Hendrick*, 2 Sawyer (C. C.), 479.

An allegation that the defendant knowingly offered a person who is under the age of twenty-one years a bribe to vote at a Congressional election, was held to mean that he knew the person to be a minor when he offered the bribe, — *U. S. v. O'Neil*, 2 Sawyer, 481, — and also that it was equivalent to the allegation that he had counselled the party to vote. *U. S. v. Hendrick*, 2 Sawyer, 476.

It was held that the charge that the defendant gave the party money to vote at the Congressional election was sufficient. *U. S. v. Johnson*, 2 Sawyer (U. S.), 482.

When the indictment was under section 5523, for refusing to answer lawful inquiries of the supervisor of election, in the verification of the registration list, it was held that it must be averred that the inquiries were made of the defendant at the place assigned in such list as his place of residence, or it will be fatally defective. *U. S. v. Davis*, 6 Fed. Rep. 683.

An indictment under section 5511 of the Revised Statutes is defective, unless it charges that the interference was with a voter, qualified and offering to vote at a Congressional election for representative in Congress. *U. S. v. Cahill*, 3 McCrary (C. C.), 200.

An indictment charging that defendants were officers, at an election held at a certain precinct at a certain time, for member of Congress, and that they "being then and there officers of said election, with intent to affect such election and its results, did acts unauthorized in this that they, being required to keep a list of the persons then and there voting, and to swear that said list was correct, did then and there add to such lists," is sufficient under §§ 5515 and 5522 of the Revised Statutes of the United States. *U. S. v. Baader*, 16 Fed. Rep. 116.

An indictment charging defendant with a fraudulent attempt to vote at an election, when member of Congress is to be elected, must aver that there was an attempt to vote for representative. *U. S. v. Seaman*, 23 Fed. Rep. 882.

ing, and that the act of the officer was on account of race, color, or previous condition of servitude of the plaintiff.¹ And in order to recover under § 2008, the declaration must aver that the plaintiff was prevented from voting, by force, bribery, threats, intimidation, or other unlawful means; and when the allegation was, that the unlawful means was an erroneous decision of defendant while acting as officer of the election, without any averment that the decision was wilfully or maliciously wrong, it was held to be insufficient.²

XXIV. Meaning of Phrases. — The phrase "majority of voters," in a constitution or law, is held to mean a majority of those voting, and not of all qualified to vote.³

"Majority of qualified voters" means of those actually voting.⁴

"Majority of voters voting" means of all voting at the election, and not merely of those voting on the question at the election.⁵

The phrase "loyal voters," if it has any meaning, means something different from legal voters or qualified voters.⁶

The term "voters," as used in the State constitution, means those entitled to vote for State offices.⁷

Where an act provided that towns and cities might submit a proposition to the vote of the "inhabitants," the word "inhabitants" was held to mean legal voters.⁸

The phrase, "any election," in a statute, embraces elections for local option,⁹ but does not include a vote for a school-tax.¹⁰

XXV. Illegal Contracts. — 1. *What Contracts are void.* — Contracts not to vote, but to pair off, are of no validity.¹¹

A contract to use money for purposes not permitted by the law for the promotion of the candidacy of any party, will be void.¹²

1. McKay v. Campbell, 1 Sawyer (U. S.), 374.

2. Seely v. Koox, 2 Woods, C. C. 368.

3. Everett v. Smith, 22 Minn. 53; Holcum v. Davis, 56 Ill. 414; People v. Allen, 52 N. Y. 538; Sanford v. Prentice, 28 Wis. 358.

4. State v. Mayor of St. Joseph, 37 Mo. 270.

5. Constitutional provision that two-thirds of the qualified voters of a district shall favor a proposition, is not the same as a law that two-thirds of the voters voting at the election shall vote for it, and such a law would be invalid; though, if it had followed the language of the constitution, a two-thirds vote of the parties voting at the election would have been held sufficient by the Supreme Court of the United States. Harshman v. Bates Co., 93 U. S. 569. But in Missouri it was held, that, under such circumstances, the registration books are the test. State v. Brassfield, 67 Mo. 331.

6. State v. Wiant, 49 Ill. 263; State v. Beched (Neb.), 34 N. W. Rep. 342.

It also means of those voting legally.

Atchison, etc., R. R. Co. v. Jefferson Co., 17 Kan. 39.

6. Leeman v. Hinton, 1 Duv. (Ky.) 37.

7. State v. Williams, 5 Wis. 308.

Qualified elector means same as registered voter. White v. Reagan, 25 Ark. 622.

8. Walnut v. Wade, 103 U. S. 683.

9. Gandy v. State (Ala.), 2 So. Rep. 465.

"Election" and "election by the people" are synonymous, and imply a popular vote. Clarke v. Irvine, 5 Nevada, 111; Rosen, stock v. Swift, 11 Nevada, 138.

10. Marshall v. Donovan, 10 Bush (Ky.) 694.

11. The judges of election have no authority to reject votes because the party has agreed with another that neither of them should vote. Piatt v. People, 29 Ill. 54.

12. In New York, under the statute providing that it should not be lawful for any person to contribute money for any purpose intended to promote the election of any particular person or ticket, except for defraying the expenses of printing and cir-

The contract to satisfy a debt, if a party would use his political influence for a candidate, will not be enforced.¹ A note given in consideration of the agreement of the payee to resign an office, and to use his influence to secure an appointment of the maker, is void, in the hands of the payee.²

An agreement to pay for food and liquor for the friends of the candidate, during the time of the canvass and the election, was held void, although the articles had been furnished without any intention of influencing the election.³

2. *Wagers*.—In this country no wagers on the result of an election can be enforced, as they are held to be void as being against public policy if the election is one in which either of the parties have interest.⁴

This applies as well to Presidential as to State or municipal elections.⁵ And a purchase upon condition of paying nothing if the majority is in favor of one party, and double the value of the article if in favor of the other, will be treated as a wager, and will not be enforced.⁶

culating votes and other papers, it was *held* that a contract to erect and keep open a building to be used by a certain party and its candidates during a campaign, was void. *Jackson v. Walker*, 5 Hill, 27. But in a later case it was *held* that this ruling went beyond the letter or spirit of the statute, and that a contract to pay for putting up and taking down a tent to be used for political meetings could be enforced. *Hurley v. Van Wagner*, 28 Barb. 109. *Foley v. Speer*, 11 Daly, 254, holds that a candidate could not be compelled to pay expenses which he had promised, when part of them were illegal.

1. *Nichols v. Mudgett*, 32 Vt. 546.

2. *Meacham v. Dow*, 32 Vt. 721.

3. *Duke v. Ashby*, 11 Ired. (N. Car.) 112.

4. *Ball v. Gilbert*, 12 Met. (Mass.) 397; *Hizer v. State*, 12 Ind. 330; *Worthington v. Block*, 13 Ind. 334; *Murdock v. Kilbourn*, 6 Wis. 468; *Connor v. Ragland*, 15 B. Mon. (Ky.) 634; *Sike v. Thompson*, 9 Barb. (N. Y.) 315; *McAllister v. Hoffman*, 16 S. & R. (Pa.) 147; *Stoddard v. Martin*, 1 R. I. 1; *Hill v. Kidd*, 43 Cow. (N. Y.) 615; *Forman v. Hardwick*, 10 Ala. 316; *Howe v. Foster*, 19 Ark. 347; *Craig v. Andrews*, 7 Iowa, 17; *Cooper v. Brewster*, 1 Minn. 94; *Dufresne v. Guerremont*, 5 Low. Can. Jurist, 278; *Allen v. Hearn*, 1 Term R. 56; *Stevens v. Sharpe*, 26 Ill. 404.

5. *Gordon v. Casey*, 23 Ill. 70; *Sipe v. Finnerty*, 6 Iowa, 394.

In some early cases in Illinois it was *held* that it was not against public policy to make a bet on the result of the Presidential election in another State. *Morgan v. Pettit*, 3 Scan. 529; *Smith v. Smith*, 21

Ill. 244. But these cases were afterward overruled. *Gregory v. King*, 58 Ill. 169.

6. *Givens v. Rodgers*, 11 Ala. 543; *Davis v. Leonard*, 69 Ind. 213.

In one case, goods were sold to two parties upon the agreement between themselves, that, if one candidate was elected member of Congress, one of them should pay the whole bill, and the other should pay it if the other candidate received the majority: it was *held*, that, as the sale was absolute, the seller could recover the contract price, as he had nothing to do with the bet of the buyer. *Lurton v. Gilliam*, 1 Scam. (Ill.) 577.

After a bet of this kind is decided, it has been *held* that the losing party may demand and recover his money from the stake holder. *Spence v. Wheeler*, 15 Conn. 28; *Gilmore v. Woodcock*, 69 Me. 118; But in California the opposite view was taken, — *Johnson v. Russell*, 37 Cal. 670, — but that a retraction could be made before the result was known. *Hardy v. Hunt*, 11 Cal. 343.

An agreement to sell hogs at nine cents a pound, payable when a certain candidate should be elected, has been *held* to be a wager, and void. *Lucas v. Harper*, 24 Ohio St. 328. And the buyer may rescind such a wager by delivering back the property before the result has been ascertained. *Harper v. Crane*, 36 Ohio St. 328.

Money bet on an election cannot be recovered back after it has been paid, in absence of a statutory provision. *Schlosser v. Smith*, 93 Ind. 83.

List of Authorities. — *English Text-Books*. — Heywood, County Elections (2d ed.); Clerk, Law of Elections (1st ed.);

ELECTOR—ELEEMOSYNARY—ELEMENTS—ELIGIBLE.

ELECTOR.—One who has the right to make choice of public officers; one who has a right to vote.¹

ELEEMOSYNARY.—See CHARITIES; CORPORATIONS.

ELEMENTS.—See ACT OF GOD.²

ELIGIBLE.—Capable of being legally chosen, and of legally holding.³

ELOPEMENT.⁴

Bushby, Election Law (4th ed.); Davis, Registration and Elections (1st ed.); Cox & Grady, Registration and Elections (12th ed.); Simeon, Law of Elections (1st ed.); Male on Elections (2d ed.); Wordsworth on Elections (2d ed.); Roe on Elections (2d ed.); Rogers on Elections (1st ed.); Orme on Elections (1st ed.); Rogers on Election Committees (5th ed.); Saunders, Registration and Elections (1st ed.); Hardcastle, Election Petitions (1st ed.); Wolferstan, Election Petitions (1st ed.); Tancred, Quo Warranto (1st ed.). *Canadian Text-Books.*—Brough on Elections (1st ed.); Notman, Parliamentary Elections (1st ed.). *American Text-Books.*—McCrary, American Law of Elections (2d ed.); Giaque, Ohio Election Laws (1st ed.); Cooley, Constitutional Limitations (4th ed.); High, Extraordinary Remedies (1st ed.).

1. Bouv. Law Dict.; Beardstown v. Virginia, 76 Ill. 39.

In Sanford v. Prentice, 28 Wis. 358, a distinction is made between an elector and a voter; the former being one qualified to vote, the latter one who actually does vote. But where a constitution provided that certain laws, before taking effect, should be submitted to the electors of the counties affected thereby, "and be adopted by a majority of such electors," "electors" was held to mean *electors voting at the election*. Taylor v. Taylor, 10 Minn. 107; Everett v. Smith, 22 Minn. 53. And these words are treated as synonymous, and meaning those qualified to vote, in State v. Tuttle, 53 Wis. 45; s. c., 9 N. W. Rep. 791.

In the expression "qualified electors," the word "qualified" is redundant, the term being in no way distinguishable from "electors." Beardstown v. Virginia, 76 Ill. 43.

2. "Damages by the elements," and "damages by the acts of God," are convertible expressions in the law of leases. "The elements are the means by which God acts." Polack v. Pioche, 35 Cal. 416.

A statutory provision that, where a leased building "shall be destroyed or so injured by the elements or other cause as to be untenable," the lessee, if not in fault, may quit possession, and not be lia-

ble for further rent, applies only to cases where the building becomes untenable by reason of some sudden and unexpected calamity, and not by mere failure to repair. Hatch v. Stamper, 42 Conn. 28.

3. The word embraces both ideas. Where one holding a federal office is, by constitutional provision, ineligible to office, he cannot be elected and then render himself eligible by resigning his federal office before the time of entering upon the duties of the other office. Searcy v. Grow, 15 Cal. 117; State v. Clarke, 3 Nev. 566; Carson v. McPhetridge, 15 Ind. 327; Brady v. Howe, 50 Miss 626.

Conversely, one duly eligible, and elected to an office under the State government, becomes incapacitated to hold the same by accepting and entering upon a federal office. People v. Leonard (Cal.), 14 Pac. Rep. 853.

But, in the absence of statutory provision, eligibility to office is capacity to hold, not capacity to be elected: it is to be determined by the qualifications of the officer at the time of entering upon his office, and not at the time of election. State v. Smith, 14 Wis. 497; State v. Murray, 28 Wis. 99; State v. Trumpf, 50 Wis. 103.

4. Lord Coke says that under the statute of Westm. 2, c. 34, "If the wife elope from her husband, that is, *if the wife leave her husband, and goeth away and tarrieth with her adulterer*, she shall lose her dower until her husband willingly without coercion ecclesiastical be reconciled unto her, and permit her to cohabit with him." Co. Litt. 32 a. The word elope is not used in the statute, which provides, that "if a wife willingly leave her husband, and go away and continue with her adventerer, she shall be barred forever of action to demand her dower," etc. So that the meaning Lord Coke attaches to the word covers the entire offence specified in the statute. See also Bacon's Ab. "Dower," F.; Cogswell v. Tibbetts, 3 N. Hamp. 41.

Sir William Blackstone, and the courts in many of the cases, exclude the conception "adultery" from the meaning of the word. "Yet now," says Blackstone, "by the statute of Westm. 2, if a woman voluntarily leaves (*which the law calls eloping*

ELSE.¹

ELSEWHERE.²

EMANCIPATION.³

from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her." 2 Bl. Com. 130. In *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, the court says, "If the wife elopes, *without an adulterer*, and afterwards offers to return, and the husband refuses to receive her, his liability for her contracts for necessities is revived from that time, notwithstanding a general notice not to trust her." See also *McGahay v. Williams*, 12 Johns. 293; *Hunter v. Boucher*, 3 Pick. (Mass.) 289; *Harris v. Moore*, 4 Esp. 41.

To constitute an elopement that will bar the wife's right of dower, by the statute of Westm. 2, the wife must leave and depart from her husband. In an action brought by a widow for dower in certain real estate belonging to her late husband's estate, the plea alleged that the demandant had committed adultery on a particular day, and thereafterwards lived in adultery, during the life of her late husband, he being absent on a voyage to Europe. But there was no allegation that she left, and departed, and dwelt with the adulterer. Said the court, "Notwithstanding any thing alleged in this plea, she may have continued to reside in the family of her late husband during the whole time mentioned in the plea; and however gross her conduct there may have been during the absence of her husband, it is very clear it does not amount to an elopement." *Cogswell v. Tibbetts*, 3 N. Hamp. 41.

De Grey, C. J., in *Hatchett v. Baddeley*, 2 Wm. Black. 1080, speaks of the meaning of elopement as follows: "The word elopement is not a legal term, nor has any express meaning in the law. It is not to be found in Bracton, Britton, or Fleta; nor is used in the statute of Westm. 2. The 'Mirror' indeed has the word *elopa*, but in a different sense; and none of the dictionaries or etymologists explain the word, except Blount and Jacob. Lord Coke is the first that I remember to have mentioned it, and he speaks of a wife's eloping *ana* remaining with an adulterer. The modern books never speak of an elopement but in a criminal view."

1. An instrument signed "A. B., or else C. D.," but otherwise having the ordinary form of a promissory note, is not a promissory note by C. D. within the statute of Anne, because it operates differently as to the parties. It is an absolute undertaking on the part of A. B. to pay; and it is conditional only on the part of C. D., for he un-

dertakes to pay only in the event of A. B.'s not paying. *Ferris v. Bond*, 4 B. & Ald. 679.

2. If one who has real estate in the towns of A., B., C., and D., though that in D. greatly exceeds in value that in A., B., or C., devises "all his real estate in A., B., and C., or elsewhere," the real estate in D., if there is nothing in the will to show a contrary intention, will pass by the word "elsewhere." *Chester v. Chester*, 3 P. Wms. 61; *Winn v. Littleton*, 1 Vern. 3; *Strong v. Teatt*, 2 Burr. 912; *Freeman v. Chandos*, Cowp. 363; *Atkyns v. Atkyns*, Cowp. 808; *Roe v. Reade*, 8 Term, 118.

The word "elsewhere" was *held* to have a similar effect in an act of Parliament, passed by way of settlement in execution of marriage articles. *Freeman v. Chandos*, Cowp. 360.

Money equitably converted into land may pass in a devise under the word "elsewhere." By marriage articles, it was agreed that the marriage portions should be laid out in the purchase of lands, which were to be settled to such uses and trusts that the husband would have the right of disposition by will. Until a purchase could be had, the money was to be held in trust; and the trustees were to invest it in mortgages, or in government or other securities, and to apply the produce as if lands had been purchased. Before the purchase had been made, the husband died, leaving a will, in which he devised all his "freehold, leasehold, and copyhold lands lying in I. and E., or elsewhere," to his wife for life. It was *held* that the marriage portions had been equitably converted into land, and passed, by this devise, under the word "elsewhere." "It is said," said *L. Ch. Hardwicke*, "the lands do not lie anywhere, for they are not yet purchased. [But] when people make such descriptions as the testator has done here, they intend to pass every thing they have in the world. Now, the money is somewhere; and that, by the transmutation of this court, is changed into land."

In shipping articles, the word "elsewhere" must be construed either as void for uncertainty, under the act of Congress of July 20, 1790, for the regulation of seamen in the merchants' service, or as subordinate to the principal voyage stated in the preceding words; the word "voyage" being used as a technical word, and importing a definite commencement and end (*Story*, §. 1. *Brown v. Jones*, 2 Gall. (U. S.) 477; *Wood v. The Nimrod*, Gilp. (U. S.) 83.

3. When children lose the settlement,

EMBARGO.—An embargo is, in its special sense, a detention of vessels in a port, whether they be national or foreign, whether for the purpose of employing them and their crews in a naval expedition, as was formerly practised, or for political purposes, or by way of reprisals. A *civil embargo* may be laid for the purpose of national welfare or safety, as for the protection of commercial vessels against the rules of belligerent powers which would expose them to capture. Such was the measure adopted by the United States in December, 1807, which detained in port all vessels except those which had a public commission, and those that were already laden or should sail in ballast. A *hostile embargo* is a kind of reprisals by one nation upon vessels within its ports belonging to another nation with which a difference exists, for the purpose of forcing it to do justice. If this measure should be followed by war, the vessels are regarded as captured; if by peace, they are restored.¹

EMBASSADOR.—See AMBASSADOR.

under the poor-laws, of their father, by their marriage, or by contracting some other relation, so as wholly and permanently to exclude the parental control; by acquiring a new settlement, or by separating themselves from their father's family after they attain the age of twenty-one years,—they are said to be emancipated. *King v. Inh'b'ts of Offchurch*, 3 Term, 114; *King v. Inh'b'ts of Witton cum Twam-brookes*, 3 Term, 355; *King v. Inh'b'ts of Roach*, 6 Term, 247; *King v. Inh'b'ts of Woburn*, 8 Term, 479; *King v. Inh'b'ts of Cowhoneyborne*, 10 East, 88; *King v. Inh'b'ts of Rotherfield Greys*, 1 Barn. & C. 345; *King v. Inh'b'ts of Wilmington*, 5 Barn. & Ald. 525; *Queen v. Inh'b'ts of Rothwell*, 72 B. 574 n.; *Inh'b'ts of Somerset v. Inh'b'ts of Dighton*, 12 Mass. 383; *Inh'b'ts of Taunton v. Inh'b'ts of Plymouth*, 15 Mass. 203; *Overseers of Alexandria v. Overseers of Bethlehem*, 1 Harr. (N. J.) 119.

In the law of contracts, when a father expressly, or impliedly by his conduct, waives his right, generally, to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts as are made with him for his services. *Nightingale v. Withington*, 15 Mass. 272; *McCoy v. Huffman*, 8 Cowen (N. Y.), 84; *Stiles v. Granville*, 6 Cush. (Mass.) 458.

The Civil Code of Louisiana provides for three sorts of emancipation of minors as follows: 1. Emancipation conferring upon the minor the full administration of his own estate; 2. Emancipation by marriage; 3. Emancipation relieving the minor from the time prescribed by law for at-

taining the age of majority. Art. 365 *et seq.*

In the United States, the word "emancipation" is also used to signify the liberation of slaves. See United States Digest, "Slaves."

1. Woolsey's International Law.

An embargo is not required to be, upon the face of the act, definite as to time. It is frequently otherwise. But it is from the very nature and policy of the measure a temporary restraint. An embargo, *ex vi termini*, means only a temporary suspension of trade. *McBride v. Mar. Ins. Co.*, 5 Johns. (N. Y.) 308; *Beale v. Thompson*, 3 Bos. & Pul. 416. Embargo means a "prohibition to sail." *The William King*, 2 Wheat. (U. S.) 153.

Where, after a voyage had commenced, the vessel was detained in a port by the Embargo Act of Dec. 22, 1807, it was *held* that the insured, under the general words of the policy, which was against "all arrests and restraints," had a right to abandon and recover for a total loss. *McBride v. Mar. Ins. Co.*, 5 Johns. (N. Y.) 299. Whether an embargo be legally or illegally laid, the insurer is equally liable for the loss occasioned by it. *Marshall on Insurance*, b. 1, c. 12, s. 5.

An embargo, considered as a temporary suspension of commerce, does not operate by a dissolution of any mercantile contract. *Baylies v. Fettyplace*, 7 Mass. 325; *Beale v. Thompson*, 3 Bos. & Pul. 405; s. c. 4 East, 546; *Hadley v. Clarke*, 8 Term, 259.

The Embargo Act of Dec. 22, 1807, was constitutional. 2 Hall's Law Journal, 255; 1 Kent's Com. 432.

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I. Definition. — Embezzlement is a crime unknown to the common law, but depends entirely upon statutory enactments; is a sort of statutory larceny,¹ and may be defined as a fraudulent appropriation to one's own use of the money or goods of another, which were intrusted to his care as servant, bailee, or otherwise.² Though kindred to theft, embezzlement is a separate and distinct offence. Theft involves the idea of an unlawful acquisition,

1. *State v. Wolff*, 34 La. Ann. 1153; *Leonard v. State*, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 527.

2. *Cothran v. The Hanover Nat. Bank*, 40 N. Y. Super. Ct. (8 J. & S.) 401. See also *Ker v. People*, 110 Ill. 629; *State v. Mason*, 108 Ind. 48; *State v. Baldwin*, 57 Iowa, 266; s. c., 30 N. W. Rep. 476; *Johnson v. Com.*, 5 Bush (Ky.), 431; *Barclay v. Breckinridge*, 4 Met. (Ky.) 374; *Com. v. Hays*, 80 Mass. (14 Gray) 62; s. c., 74 Am. Dec. 662; *Com. v. Libbey*, 52 Mass. (11 Metc.) 64; s. c., 45 Am. Dec. 185; *State v. Heath*, 8 Mo. App. 99; *Chaplin v. Lee*, 18 Neb. 440; s. c., 25 N. W. Rep. 609; *People v. Dalton*, 15 Wend. (N. Y.) 581; *People v. Burr*, 41 How. (N. Y.) Pr. 294; *State v. Snell*, 9 R. I. 112; *Brady v. State*, 21 Tex. App. 659; s. c., 1 S. W. Rep. 462; *State v. Johnson*, 21 Tex. 775; *Leonard v. State*, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 527; *Rex v. Taylor*, 3 B. & P. 596; *Reg. v. Jackson*, 1 Car. & K. 384; *Reg. v. Chapman*, 1 Car. & K. 119; *Regina v. Norman*,

1 Car. & M. 501; *Rex v. Murray*, 5 Car. & P. 145; s. c., 1 Mood. 276; *Rex v. Headge*, 2 Leach (4th ed.) 1033; s. c., Russ. & Ry. 168; *Rex v. Grove*, 1 Mood. 447; *Rex v. Hall, Rus. & Ry.* 463; s. c., 3 Stark 67.

Money Paid by Mistake. — Where money is paid by mistake to the defendant, and by him converted to his own use with felonious intent, he cannot be convicted of embezzlement. *State v. Heath*, 8 Mo. App. 106. A relation of trust must exist, but the fiduciary relation essential to characterize the crime is sufficiently set forth by an averment that the property was delivered to the defendant upon the trust and confidence that he would return it to the owner on demand. See *Commonwealth v. Hussey*, 111 Mass. 435; *Commonwealth v. Hays*, 80 Mass. (14 Gray) 62; s. c., 74 Am. Dec. 661; *Commonwealth v. Concannon*, 87 Mass. (5 Allen) 502; *Commonwealth v. Butterick*, 100 Mass. 1.

whereas embezzlement is a fraudulent conversion of personal property after its possession has been lawfully acquired.¹

The statutory offence of embezzlement originated in the necessity which resulted from the inapplicability of the common law of larceny to breaches of trust by persons occupying fiduciary relations.² The fraudulent conversion may be consummated in any

1. Chaplin v. Lee, 18 Neb. 440; s. c., 7 Cr. L. Mag. 379; Simco v. State, 8 Tex. App. 406; s. c., 2 Cr. L. Mag. 113.

To constitute Embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding. Chaplin v. Lee, 18 Neb. 440; s. c., 7 Cr. L. Mag. 379.

The first possession being lawful, the act of embezzlement consists, in a certain sense, in a mere act of the mind, without any outward and visible trespass, as in the case of ordinary larceny, and that this act of fraudulent appropriation has taken place may be inferred from the conduct of the defendant. Hence, in this case, the facts (which the evidence fairly tended to prove) that defendant having come into possession of an order on the county treasurer, which he knew that his predecessor had redeemed, but had neglected to mark "paid," falsely marked it as paid and redeemed by himself, and falsely credited himself in the books of his office with the amount as disbursed by himself, and subsequently returned it to the county auditor as paid and redeemed by himself, and fraudulently obtained credit therefor upon the books of the county auditor; *held*, to constitute sufficient evidence to warrant the jury in finding an actual conversion by defendant of public money to his own use, and was therefore sufficient to sustain verdict of guilty. State v. Baumhager, 28 Minn. 226; s. c., 2 Cr. L. Mag. 823.

In Illinois. — Statute defining Embezzlement construed. — The word "care," as used in sect. 75 of the criminal code relating to embezzlement, is the equivalent of "custody," and may mean "charge," "safe keeping," "preservation," or "security." The word "possession," as used in the same section, has, perhaps, a different and broader meaning than the word "care;" but it may also mean "to keep," "to take or seize hold," "to hold or occupy," as the owner of property would or might do; and it matters little whether one or both words are used in an indictment. Ker v. People, 110 Ill. 629.

In Indiana. — What is now generally known as the crime of embezzlement, under act of March 5, 1883, was at one time usually treated and punished as a form or species of larceny, and it still has some features in common therewith. It is purely a statutory crime, its definition varying with the varying statutes; but in general terms

it may be said to be the fraudulent appropriation, by one person, to his own use, of money or property intrusted to his care and control by another. State v. Mason, 108 Ind. 48.

The Kentucky Statute, in relation to embezzlement, embraces all persons who are guilty of fraudulently secreting or converting to their own use the money or property of others intrusted to them, or placed in their hand for the purpose of being carried or delivered. Johnson v. Com., 5 Bush (Ky.), 431.

In Louisiana, it is said that "embezzle" includes in its meaning appropriation to one's own use, and, therefore, the use of the word "embezzle" in an indictment or information contains the charge that the defendant appropriated the money or property to his own use. State v. Wolff, 34 La. An. 1153; s. c., 4 Cr. L. Mag. 611.

In Texas. — In order to constitute embezzlement under the laws of Texas, the accused must occupy the designated fiduciary relation, and the money or property must belong to his principal, and come to the possession of the accused by virtue of that relation. Griffin v. State, 4 Tex. App. 390. Embezzlement is *eo nomine* an offence against the laws of Texas, and is fully defined in art. 786 *et seq.* of chap. 16 of the Penal Code. Hodges v. State, 22 Tex. App. 415; s. c., 9 Cr. L. Mag. 555, 556.

Repeal of Statute. — Saving Clause. — Pending Prosecutions. — The proviso to sect. 3 of the Indiana act of March 21, 1879, upon the subject of embezzlement (Acts 1879, p. 126), saved the right to prosecute for offences committed under the previous statute upon the subject of embezzlement, and the right to continue pending prosecutions thereunder. State v. Smith, 72 Ind. 549.

2. Leonard v. State, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 527.

Defects of the Common Law. — The defects of the common law by means of which many persons, who unlawfully appropriated another's goods, escaped criminal prosecution, though the moral turpitude of the offence was as great as in the case of larceny proper, were two. The first of these gaps was constituted by the position, that, to maintain larceny, the stolen goods must at some time have been in the prosecutor's possession. The second resulted from the assumption, that when possession of

manner capable of effecting it; and its commission is a question of fact, and not of pleading, when the indictment charges that the defendant did embezzle, fraudulently misapply, and convert to his own use the property intrusted to him.¹

II. What Constitutes. — 1. *Generally.* — It is often said that embezzlement is only a breach of trust; but this is misleading, for it is one species of a breach of trust which has been declared criminal by statute.² It is said that a person charged with embez-

goods is acquired *bona fide* by the bailee no subsequent fraudulent conversion can be larceny while the bailment lasts. 1 Whart. Cr. L. (9th ed.) sect. 1009. See *Com. v. Butterick*, 100 Mass. 11; *Com. v. Hays*, 80 Mass. (14 Gray) 62; s. c., 74 Am. Dec. 662; *State v. Lanier*, 89 N. C. 517; *State v. Shirer*, 20 S. C. 392; *Cartwright v. Green*, 8 Ves. 405.

1. *Leonard v. State*, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 528.

Embezzlement not an Infamous Crime. — Embezzlement is not an "infamous crime" within the intention of the fifth amendment of the Constitution; and hence, a person charged therewith may be tried without the intervention of a grand jury. *United States v. Reilly*, 20 Fed. Rep. 46; s. c., 18 Cent. L. J. 457. See 4 Am. & Eng. Encyc. of L. 644 *et seq.*

No crime is "infamous" within the meaning of Constitutional Amendment V. unless expressly made infamous by an act of Congress. *State v. Gardner*, 1 Root (Conn.), 485; *Clark v. Hall*, 2 Har. & McH. (Md.) 378; *Com. v. Keith*, 49 Mass. (8 Metc.) 531; *Com. v. Barlow*, 4 Mass. 439; *Com. v. Macomber*, 3 Mass. 257; *Cushman v. Loker*, 2 Mass. 106; *In re Truman*, 44 Mo. 181; *Lyford v. Farrar*, 31 N. H. (11 Fost.) 314; *People v. Whipple*, 9 Cow. (N. Y.) 707; *People v. Herrick*, 13 Johns. (N. Y.), 82; s. c., 8 Am. Dec. 364; *State v. Keyes*, 8 Vt. 65, 66; s. c., 30 Am. Dec. 450; *Wilson v. State*, 1 Wis. 184; *Moore v. State*, 55 U. S. (14 How.) 13; bk. 14, L. ed. 306; *United States v. Reid*, 53 U. S. (12 How.) 364; bk. 13, L. ed. 1204; *Fox v. State*, 46 U. S. (5 How.) 410, 438; bk. 12, L. ed. 212; *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591; bk. 8, L. ed. 1055; *United States v. Mills*, 32 U. S. (7 Pet.) 138; bk. 8, L. ed. 636; *United States v. Wiltberger*, 18 U. S. (5 Wheat.) 76, 93, 96; bk. 5, L. ed. 154; *United States v. Bevans*, 16 U. S. (3 Wheat.) 336; bk. 4, L. ed. 403; *United States v. Coolidge*, 14 U. S. (1 Wheat.) 415; bk. 3, L. ed. 124; *United States v. Hudson*, 11 U. S. (7 Cr.) 34; bk. 3, L. ed. 144; *United States v. Burr*, 8 U. S. (4 Cr.) 470; bk. 2, L. ed. 699; *United States v. Shepard*, 1 Abb. C. C. 436, 440; *United States v. Okie*, 5 Blatchf. C. C. 516; *United States v. Wilson*, 3 Blatchf. C. C. 435; *United States v. Golding*, 2 Cr. C. C. 212;

Marbury v. Madison, 1 Cr. C. C. 137; *United States v. Maxwell*, 3 Dill. C. C. 275, 278; *United States v. Clayton*, 2 Dill. C. C. 226; *United States v. Hawthorne*, 1 Dill. C. C. 422; *United States v. Shepherd*, 1 Hughes C. C. 520; *United States v. Wynn*, 3 McCr. C. C. 266; s. c., 9 Fed. Rep. 886; *United States v. Patterson*, 6 McL. C. C. 467, 468; *United States v. Lancaster*, 2 McL. C. C. 431, 433; *United States v. Block*, 4 Sawy. C. C. 212; *United States v. Waller*, 1 Sawy. C. C. 701; *United States v. Magill*, 1 Wash. C. C. 464, 465; *United States v. New Bedford Bridge*, 1 Woodb. & M. C. C. 401; *In re Wilson*, 18 Fed. Rep. 33; *United States v. Clark*, Crabbe (U. S. D. C.), 584; *United States v. Cross*, 1 McAr. (D. C.) 149; *United States v. Yates*, 6 Fed. Rep. 861; *United States v. Coppersmith*, 4 Fed. Rep. 198; *United States v. Baugh*, 1 Fed. Rep. 784; *Rex v. Priddle*, Leach, 442; *Rex v. Davis*, 5 Mod. 75; *Pendock v. Mackender*, 2 Wils. 18; Am. Jur. and other authorities cited *United States v. Brady*, (Star Route Cases, U. S. D. C.); 3 Cr. L. Mag. 69; 1 Bish. Cr. L. sects. 581, 584, 621, 743, 974; 4 Bl. Com. 94, 95, 230; *Chit. Cr. L.* 599, 600, 601; *Coke Litt.* 391a 6b note 1; *Coke Litt.* 6 a. b.; *Conk. Tr.* 83; 1 *Greenl. Ev.* sects. 372, 373, p. 15; 2 *Hale P. C.* 277; 1 *Hale P. C.* c. 43, p. 503; 1 *Kent Com.* 336, 337; 1 *Phil. Ev.* 22, 23, note; 1 *Russ. Cr.* (Graves, ed.) 44, 46, 47; *Serg. Const. L.* 345; 1 *Stark. Ev.* 94, 95; 4 *Tuck. Bl. No.* 10 of Appendix; *Wheat. Cr. L.* (3d ed.) 354 *et seq.*; *Willis*, 665; 3 *Wilson's Works*, 371, 377.

2. The court says, in *Com. v. Hayes*, 80 Mass. (14 Gray) 63, that "The statutes relating to embezzlement, both in this country and England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust toward their employers or principals, and thereby became possessed of their property. . . . The statutes relating to embezzlement were intended to embrace this class of

zlement must have been an agent, clerk, or servant, and must have come into possession of the money or chattels, alleged to have been embezzled, by virtue of his employment in such capacity.¹ But where one places his money in the hands of another, relying upon his honesty or responsibility for its return, with the stipulated interest, then a failure of the party to properly account

offences; and it may be said, generally, that they do not apply to cases where the element of a breach of trust or confidence, and the fraudulent conversion of money or chattels, is not shown to exist."

1. *People v. Sherman*, 10 Wend. (N. Y.) 299; s. c., 25 Am. Dec. 563; *Regina v. Goodbody*, 8 Car. & P. 665; *Rex v. Prince*, 2 Car. & P. 517; *Rex v. Barker*, 1 D. & R. N. P. C. 19; *Rex v. Mellish*, R. & R. 80.

A Servant may be found guilty of embezzlement, though he is not a general servant, but is employed to receive in a single instance only. *Rex v. Hughes*, 1 Mood. C. C. 370. It has been held that a servant, receiving money on his employer's account, commits embezzlement by converting it into his own use, although the employer had no right to it, and would be a wrong-doer in receiving it. *Rex v. Beacall*, 1 Car. & P. 454; s. c., 11 Eng. C. L. 448.

A Clerk intrusted to receive money at home from out-door collectors, receiving it abroad from out-door customers, was considered as acting thus "by virtue of his employment." *Rex v. Beechey*, R. & R. 318.

An Agent. — An indictment for embezzlement lies against an agent for converting to his own use the money, goods, etc., of any other person, which shall have come into his possession by virtue of his employment as agent. *Com. v. Stearns*, 42 Mass. (2 Metc.) 343; *People v. Hennessey*, 15 Wend. (N. Y.) 147.

Continuing Offence. — Arrangements for embezzlement by the fraudulent issue of checks were made between C, the aiding and abetting accomplice, and B, the principal, Sept. 21. The embezzlement was consummated by cashing the checks Sept. 24. *Held*, that C's offence was continuous from the arrangements of the 21st, to the consummation on the 24th. *State v. Cushing*, 11 R. I. 313.

Proof of a continuous series of conversions of money by an officer to the use of another, in pursuance of a conspiracy between them, will support a verdict of the jury finding the aggregate sum as the amount of a single embezzlement. *Brown v. State*, 18 Ohio St. 496.

Converting Mortgage to Own Use. — If the execution of a deed of mortgage has

been procured by mere fraud, the person who executed it may lawfully take it into his possession wherever he can find it; but if it was executed for a valuable consideration, even though the full sum named therein was not actually due, it is the property of the mortgagee; and if the mortgageor afterwards obtains possession of it from a person with whom it has been deposited, for the purpose of conveying the same to the mortgagee, and, instead of so conveying it, fraudulently and feloniously converts the same to his own use, knowing that he has no right to retain it, he may be convicted of embezzlement. *Com. v. Concanon*, 87 Mass. (5 Allen) 502.

Necessity of Demand to Constitute Conversion. — Where the party making a demand for money, claimed to have been embezzled, had no authority to make such demand, no lawful demand for the money is made, and a refusal of such demand does not constitute a conversion. *People v. Tomlinson*, 66 Cal. 344; s. c., 20 Cent. L. J. 197. See 5 Am. & Eng. Encycl. of L. tit. Demand, p. —.

In Massachusetts. — Fraudulent conversion to one's own use of money paid to him by mistake is not embezzlement, within Mass. Stat. 1857, ch. 233. *Com. v. Hays*, 80 Mass. (14 Gray) 62. See *Kribs v. People*, 82 Ill. 425.

Missouri Revised Statutes, Sect. 1322, has application only to those who occupy the relation of common carriers, or some similar contractual relation, and does not apply to a mortgageor to whom a mortgage has been intrusted for record, and who fails to have it recorded. *State v. Grisham*, 90 Mo. 163 s. c., 9 Cr. L. Mag. 267.

In Vermont. — Where defendants fraudulently concealed effects of the deceased before administration granted, with the intent of finally converting the same to their own use, but which the administrator afterwards found in their possession, *held*, embezzlement under Vt. Gen. Stat. ch. 51, sect. 10. *Spaulding v. Cook*, 48 Vt. 145.

A tenant in common with an intestate, removing the property, but without denying the right of the estate, or refusing to account, is not within the liabilities of Vt. Comp. Stat. ch. 50, sect. 11, as there must be an intention of wrongfully abstracting to the injury of the assets. *Batchelder v. Tenney*, 27 Vt. 578.

for the money so received will not subject him to a criminal prosecution for embezzlement.¹

2. *Intent*.—Intent to convert funds or property to one's own use is a necessary element in embezzlement; and, therefore, before the offence can be made out, it must distinctly appear that the respondent has acted with a felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner.²

3. *As Distinguished from Larceny*.—Embezzlement, as contradistinguished from larceny, is purely a statutory offence, and should never be made to overlap common-law larceny. Any thing which is indictable at common law, as larceny, should never be indictable under the statute providing a punishment for embezzlement, and *vice versa*.³

It may be laid down as a general proposition, that when property, lawfully in the custody of an employee or bailee, is criminally appropriated to the use of such employee or bailee, the offence may be embezzlement, but it cannot be larceny,⁴ yet the crime of

1. *Cribs v. People*, 82 Ill. 425. See *Com. v. Hays*, 80 Mass. (14 Gray) 62.

If a Minor Son places in the Hands of a Third Person to deliver to his Father certain bounty money received for enlisting in the United States service, which the said third party unlawfully appropriates to his own use, an indictment for embezzlement, describing the money as the property of the father, will be sustained against the offender. *Com. v. Norton*, 93 Mass. (11 Allen) 110.

2. *People v. Treadwell*, 69 Cal. 226; *People v. Gray*, 66 Cal. 271; *Beaty v. State*, 82 Ind. 228; s. c., 4 Cr. L. Mag. 459; *People v. Galland*, 55 Mich. 628; s. c., 6 Cr. L. Mag. 425; *People v. Hurst*, 41 Mich. 328; s. c., 8 Cr. L. Mag. 354; *People v. Wadsworth* (Mich.), 6 West Rep. 180; *State v. Reilly*, 4 Mo. App. 392; *State v. Lyon*, 45 N. J. L. (16 Vr.) 272; *United States v. Sander*, 6 McL. C. C. 598.

Felonious Intent.—Intent to convert funds to one's own use is a necessary element in embezzlement, and is a question of fact to be decided in view of the circumstances. *People v. Galland*, 55 Mich. 628; s. c., 6 Cr. L. Mag. 425.

Same. — Embezzlement. — Felonious Intent.—Where one is charged with the embezzlement of money or property intrusted to him, an intent to feloniously appropriate it, at the time of the appropriation, is essential; and if the appropriation is made upon the belief, honestly entertained by the defendant, that he has lawful title or right to the money or property, the act is not criminal. *Beaty v. State*, 82 Ind. 228; s. c., 4 Cr. L. Mag. 459.

Same. — Presumed from Illegal Use.—Where one uses the money of another

without right to do so, and thereby converts it to his own use, the statute infers a fraudulent intent, and punishes the act as embezzlement. *People v. Wadsworth*, (Mich.); 6 West. Rep. 180.

Where the Facts do not show whether the Act committed amounts to a Breach of Trust or Felony, the former will be presumed. *Barclay v. Breckenridge*, 4 Met. (Ky.) 374. Thus in a case where there was nothing indicating concealment or a felonious disposition on the part of the defendant, but where he made a candid admission immediately upon inquiry, and thereafter made partial payment, and gave security at different times when asked, there was no offence of embezzlement established. *People v. Hurst*, 41 Mich. 328; s. c., 8 Cr. L. Mag. 354.

3. See *Fulton v. State*, 13 Ark. 168; *Kibs v. People*, 81 Ill. 599; 1 Whart. Cr. L. sect. 1009; 3 Chit. Cr. L. 291.

Power of Legislature to include Larceny.—Being purely a creature of the statute, the Legislature has power to so prescribe its limits as to make it include the common-law offence of larceny, or to permit a conviction for larceny under an indictment for embezzlement. *Planters' Ins. Co. v. Tunstall*, 72 Ala. 142; *People v. Salorse*, 62 Cal. 139; *Ker v. People*, 110 Ill. 630; *State v. Wengo*, 89 Ind. 204; *Bork v. People*, 91 N. Y. 5; *Leonard v. State*, 7 Tex. App. 417; *State v. Sluner*, 20 S. C. 392; *Reg. v. Cooper*, 2 L. R. C. C. 123. See also N. Y. Penal Code, sect. 528.

4. See *Pullman v. State*, 78 Ala. 31; s. c., 56 Am. Rep. 21; *People v. Salorse*, 62 Cal. 139; s. c., 5 Cr. L. Mag. 448; *State v. Wingo*, 89 Ind. 204; s. c., 5 Cr. L. Mag.

embezzlement embraces all the elements of larceny, except the actual taking of the property embezzled, that being already right-

448; *Warmoth v. Com.*, 81 Ky. 133; *People v. Nichols*, 3 Park. (N. Y.) Cr. Cas. 379; *State v. Lanier*, 89 N. C. 517; s. c., 5 Cr. L. Mag. 616; *Rex v. Sullens*, Car. C. L. 319; s. c., 1 Mood. C. C. 129; *Reg. v. Haywood*, 1 C. & K. 518; *Reg. v. Gill*, 6 Cox, C. C., 295; s. c., *Dears. C. C.* 289; 23 L. J., M. C. 50; 18 Jur. 70; *Reg. v. Goodneough*, 6 Cox, C. C. 206; *Reg. v. Hawkins*, 4 Cox, C. C., 224; *Reg. v. Goodneough*, *Dears. C. C.* 210; *Reg. v. Hawkins*, 1 Den. C. C. 584; s. c., T. & M. 328; 14 Jur. 513; *Rex v. Headge*, 2 Leach, C. C., 1033; s. c., R. & R. C. C. 160; *Rex v. Whittingham*, 2 Leach, C. C., 912.

Larceny is the felonious stealing, taking, and carrying away of the personal goods of another. *State v. Wingo*, 89 Ind. 204; s. c., 4 Cr. L. Mag. 661. See tit. "Larceny," this series.

Appropriation by Husband of Money intrusted to Wife.—If the husband feloniously takes, and converts to his own use, money deposited with his wife to be kept for the benefit of a third person, without her association in the crime, he is guilty of larceny, and not of embezzlement. *Pullman v. State*, 78 Ala. 31; s. c., 56 Am. Rep. 21.

Goods in Possession of Master.—A. had agreed to buy straw from B., and he had sent his servant C. to fetch it. C. did so, and put down the whole quantity at the door of A.'s stable, which was in the courtyard of A. Part of the straw was put into the hayloft, but part was taken away by C. and sold. *Held*, that this was larceny, and not embezzlement, as the delivery was complete when the straw was put down at the stable-door. *Reg. v. Hayward*, 1 C. & K. 518.

Goods received from Master.—If a servant receives from his master, goods, and sells and appropriates them to his own use, he is guilty of larceny, and not embezzlement. *Reg. v. Hawkins*, 4 Cox, C. C., 224.

Generally where the agent has received goods or money to carry, deliver, or control for his principal, unless the agent parts with the manual possession, and delivers the property to the principal, or another for him, he cannot be convicted of larceny. The offence is embezzlement. *Warmoth v. Com.*, 81 Ky. 133.

Goods or Note given by Master to Servant.—Where the prosecutor gave his servant a five-pound note to get changed, which he did, and made off with the change, *held*, that it was embezzlement, and not larceny. *Rex v. Sullens*, Car. C. L. 319; 1 Mood, C. C. 129.

The prisoner having been trusted by his

master with a number of articles of soldier's clothing for the purpose of selling them, and ten pounds of silver to enable him to give change, sailed in a ship for the coast of Africa, having, before his departure, written to his master to say that he would send the account, together with a remittance, from Madeira; *held*, that he could not be convicted of embezzlement, having received the goods from his master himself, and not from another for and on account of his master; but that he might have been convicted of larceny. *Reg. v. Hawkins*, 1 Den. C. C. 584; s. c., T. & M. 328; 14 Jur. 513.

Receiving Money from Master to be expended in Business.—**Appropriation.**—The prisoner, who was clerk to the prosecutor, was indicted for embezzling certain moneys belonging to his master. The evidence showed that the prisoner had received, at different times, several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins; the prisoner obtained the skins on credit, and applied the money to his own use, but debited prosecutor in his day-book with several sums of money as having been paid for the skins. The jury found the prisoner not guilty of embezzlement, but guilty of larceny. *Held*, that the conviction was wrong. *Reg. v. Goodneough*, *Dears. C. C.* 210; s. c., 6 Cox, C. C., 206.

Marked Money given by Master to Third Person to pass at Shop.—The prosecutor gave some marked money to J. W. to expend at his (the prosecutor's) shop, for the purpose of detecting a servant, of whom the master had suspicions. The servant was convicted of embezzling a portion of the marked money. *Held*, that the conviction was right. *Reg. v. Gill*, 6 Cox, C. C., 295; s. c., *Dears. C. C.* 289; 23 L. J. M. C. 50; 18 Jur. 70.

If a servant secretes moneys, which his master has marked and sent by a friend to make a purchase at his shop, with a view to try the honesty of his servant, it is a felonious breach of trust, and an embezzlement, and not a larceny at common law. *Rex v. Headge*, 2 Leach, C. C., 1033; s. c., R. & R. C. C. 160; *Rex v. Whittingham*, 2 Leach, C. C., 912.

A Common Carrier on a Canal received a quantity of iron, to be conveyed from Albany to Buffalo. At an intermediate point, with the aid of one of the boat-hands, and with a felonious intent, he put off a certain quantity, and carried the rest to Buffalo. *Held*, that the crime was not larceny, but embezzlement under the New York statutes, and that an acquittal on a

fully in the possession of the embezzler.¹ And in order to a conviction for embezzlement, it is necessary to prove that the possession of the property, as distinguished from its mere custody, was in the defendant. If the actual or constructive possession was in the owner, then the wrongful conversion would be larceny, and not embezzlement. The two offences are distinct, and must be set out in such terms as will indicate the precise offence intended to be charged.²

charge of larceny for this offence was no bar to an indictment for the same offence as embezzlement. *People v. Nichols*, 3 Park. (N. Y.) Cr. Cas. 579. But see some case on appeal.

Obtaining Property by False Pretences.

—If a person honestly receives the possession of goods, chattels, or money of another upon any trust, express or implied, and, after receiving them, fraudulently converts them to his own use, he may be guilty of the crime of embezzlement, but cannot be convicted of larceny, except as embezzlement is by statute made larceny. If the possession of such property is obtained by fraud, and the owner of it intends to part with his title as well as his possession, the offence is that of obtaining property by false pretences, provided the means by which they are acquired are such as, in law, are false pretences. If the possession is fraudulently obtained with intent, and on the part of the person obtaining it at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offence is larceny. *Com. v. Barry*, 124 Mass. 325; s. c., 7 Cent. L. J. 98.

The defendant was charged and convicted of embezzlement of a horse hired to him by another. Upon appeal, it was claimed that the conviction was erroneous, because the offence committed, if any, was larceny, and not embezzlement. *Held*, that when an act of taking co-exists with a felonious intent to deprive the owner of his property, the offence is complete. Hence, if, at the time of receiving the horse from its owner, the defendant had the fraudulent intent to take it and convert it to his own use, and to deprive the owner of it, and did, in fact, obtain possession for that purpose, he would have been guilty of larceny, because a fraudulent receipt of the property of another amounts, in law, to a taking without his consent; but in this case there was no charge against the defendant, and no proof that the original taking was felonious; and the offence, therefore, constituted embezzlement, and not larceny. *People v. Salorse*, 62 Cal. 139; s. c., 5 Cr. L. Mag. 448.

In *Indiana* it has been *held* that what-

ever would be embezzlement under the act of 1879 (Acts 1879, p. 126), would not be larceny, though it might have been larceny before the passage of that act, that act having the effect of so modifying, by implication, the older statute defining larceny. Hence, a servant who, being without fraud intrusted with the possession of his master's goods, feloniously sells and thus converts them to his own use, is now guilty of embezzlement and not of larceny. *State v. Wingo*, 89 Ind. 204; s. c., 5 Cr. L. Mag. 448.

In *North Carolina* the distinction between the statute which makes embezzlement a felony punishable as larceny, and the English statute which makes it larceny, is noted in *State v. Lanier*, 89 N. C. 517; s. c., 5 Cr. L. Mag. 616.

1. *State v. Baldwin*, 70 Iowa, 180.

Embezzlement retains so much of the Character of Larceny that it is essential to the commission of the crime that the owner be deprived of property embezzled, by an adverse holding or use. *Com. v. Este*, 140 Mass. 279.

2. *Com. v. Berry*, 99 Mass. 428; *Com. v. O'Malley*, 97 Mass. 584; *Com. v. King*, 63 Mass. (9 Cush.) 284; *Com. v. Doherty*, 127 Mass. 20; s. c., 9 Cent. L. J. 77.

When Guilty of Embezzlement for Appropriation of Property in Custody merely.—

Under the English statutes, and those similar to them, that is, those which provide that a clerk or servant shall be guilty of the crime of embezzlement when he converts personal property which comes into his possession, "for and in the name, or on the account, of his master or employer," but does not use the words "by virtue of such employment," to constitute embezzlement on the part of an agent or servant, the thing embezzled must not have come into the master's hands before it is received by the servant; because if it does, whether delivered to the servant by the master or by another, the conversion of it will be larceny, and not embezzlement. The possession of the servant is the possession of the master, except in those cases where the property is delivered by a third person to the servant for delivery to the master, in which case the possession is the servant's; where the property is delivered to the servant by the master, the control is that of

III. What may be Embezzled. — 1. *In General.* — Any money or personal property belonging to the principal, master, or employer, which comes into the possession or control of a servant, clerk, or agent, may be embezzled.¹ Thus a servant, agent, or clerk, who

the master, and the servant has the mere custody of the goods or property; hence, in order that the servant may have such lawful possession as to render him guilty of embezzlement for the appropriation of the goods, they must have been delivered to him by a third person. *Warmouth v. Com.*, 81 Ky. 133; *Johnson v. Com.*, 5 Bush (Ky.), 431; *Gill v. Bright*, 6 T. B. Mon. (Ky.) 130; *Com. v. Doherty*, 127 Mass. 20; *People v. Burr*, 41 How. (N. Y.) Pr. 293; *United States v. Clew*, 4 Wash. C. C. 700; *Reg. v. Butler*, 2 Car. & K. 340; *Reg. v. Hayward*, 1 Car. & K. 518; *Reg. v. Smith*, 1 Car. & K. 423; *Reg. v. Evans*, Car. & M. 632; *Reg. v. Beaman*, Car. & M. 595; *Reg. v. Goode*, Car. & M. 582; *Reg. v. Wilson*, 9 Car. & P. 27; *Rex v. Freeman*, 5 Car. & P. 534; *Rex v. White*, 4 Car. & P. 46; *Reg. v. Hawkins*, 1 Den. C. C. 584; *Rex v. Robinson*, 2 East, P. C., 565; *Rex v. Paradise*, 2 East, P. C., 565; *Reg. v. Watts*, 2 Den. C. C. 14; 1 Eng. L. & Eq. 558; *Rex v. Bakewell*, 2 Leach (4th ed.), 943; *Rex v. Abrahams*, 2 Leach (4th ed.), 824; s. c., 2 East, P. C., 569; *Rex v. Chipchase*, 2 Leach (4th ed.), 699; s. c., 2 East, P. C., 567; *Rex v. Bass*, 1 Leach (4th ed.), 251; s. c., 2 East, P. C., 566; *Reg. v. Heath*, 2 Mood. C. C. 33; *Reg. v. Jackson*, 2 Mood. C. C. 32; *Rex v. Metcalf*, 1 Mood. C. C. 433; *Rex v. Murray*, 1 Mood. C. C. 276; *Rex v. Stock*, 1 Mood. C. C. 87; *Reg. v. Masters*, 12 Jur. 942; s. c., 1 Den. C. C. 332; *Temp. & M. 1*; 2 Car. & K. 930; *Peck's Case*, 2 Russell on Crimes (3 Eng. ed.), 180; *Rex v. Smith*, 1 R. & R. C. C. 267; *Rex v. Hammon*, R. & R. C. C. 221; *Rex v. Walsh*, 4 Taunt. 258; s. c., 2 Leach (4th ed.), 1054; R. & R. C. C. 215.

The Servant of a Co-Partnership who fraudulently appropriates money which he has received from one member of the firm, under the direction to carry it to another member, is not guilty of embezzlement, but of larceny. *Com. v. Berry*, 99 Mass. 428; *Com. v. O'Malley*, 97 Mass. 584; *Com. v. Hays*, 80 Mass. (14 Gray) 62; *People v. Call*, 1 Den. (N. Y.) 120; s. c., 43 Am. Dec. 655; *United States v. Clew*, 4 Wash. C. C. 702. And where A. agreed to loan B. a certain sum of money, and gave him money to a larger amount to count in A.'s presence, A. took therefrom the sum agreed to be lent, and B. after counting the money refused on demand to return any of it to A., and carried it all away. He was held guilty of larceny, and not of embezzlement. *Com. v. O'Malley*, 97 Mass. 584. See *Com. v. Wilde*, 71 Mass. (5 Gray) 83; s. c., 66 Am.

Dec. 350; *People v. Call*, 1 Den. (N. Y.) 120; s. c., 43 Am. Dec. 655; *Reg. v. Thompson*, 9 Cox, C. C., 244; *Reg. v. Janason*, 4 Cox, C. C., 82.

Taking Goods from Shop or Store after Business Hours. — It has been held that the felonious taking of goods from the owner's shop by clerk or packer in his employ, who had keys, by means of which at the time in question he entered the shop after it was closed, but who was not a salesman, although the owners had occasionally allowed him to take and sell goods for them, is larceny, and not embezzlement. *Com. v. Davis*, 104 Mass. 548. See *Fulton v. State*, 13 Ark. 168; *Com. v. Berry*, 99 Mass. 428; *State v. Coombs*, 55 Me. 477; *State v. Healy*, 48 Mo. 531.

Appropriation of Goods by Mercantile Clerk. — It has been held, that under the English statutes, and those similarly worded, when a clerk in a mercantile house takes goods and converts them to his own use, he is guilty of larceny, and not embezzlement, for the reason that he has a limited and qualified possession of goods as to a stranger, but as against the owner he has neither possession nor the right to possession. *Cobletz v. State*, 36 Tex. 353.

Embezzling Proceeds of Property. — The proceeds of property may be embezzled, as well as the property itself. Thus, when a servant who has the mere custody of property is employed to sell goods or to change a bank-note, and he appropriates to his own use the goods or the note, he is guilty of larceny, and not embezzlement. See *Rex v. Freeman*, 5 Car. & P. 534; *Rex v. White*, 4 Car. & P. 46; 1 Wharton Cr. L. 956 *et seq.* However, if he sells the goods, procures the change for the note, and absconds with the proceeds, he is guilty of embezzlement, and not larceny. *Com. v. King*, 63 Mass. (9 Cush.) 284; *Rex v. Winnall*, 5 Cox, C. C., 326; *Rex v. Sullens*, 1 Mood. C. C. 129. See *State v. Foster*, 37 Iowa, 404; *Johnson v. Com.*, 5 Bush (Ky.), 431; *Reg. v. Gale*, 13 Cox, C. C., 340; s. c., 35 L. T. N. S. 526; *Reg. v. Keena*, 11 Cox, C. C., 123; s. c., L. R. 1, C. C. 113; *Rex v. Hartley*, R. & R. C. C. 139.

1. See *People v. Williams*, 60 Cal. 1; s. c., 2 Cr. L. Mag. 822; *State v. Stoller*, 38 Iowa, 321; *State v. Orwig*, 24 Iowa, 102; *Com. v. King*, 63 Mass. (9 Cush.) 284; *Com. v. Stearns*, 43 Mass. (2 Met.) 343; *Bork v. People*, 91 N. Y. 5; *Brown v. State*, 23 Tex. App. 214; s. c., 9 Cr. L. Mag. 973; *State v. White*, 66 Wis. 343; 8 Cr. L. Mag. 355;

appropriates to his own use bank-bills, obtained by him on a check drawn by his principal or master, is guilty of embezzlement; ¹ and the same is true of a similar appropriation of city or municipal bonds, ² exchequer bills, ³ shares of stock in joint-stock company, ⁴ money collected as trustee from debtors of an insolvent, ⁵ grain, ⁶ game, ⁷ or an animal. ⁸

Rex v. Mead, 4 Car. & P. 535; *Reg. v. Barnes*, 8 Cox, C. C., 129; *Rex v. Aslett*, 2 Leach, C. C., 954, 958; s. c., 1 B. & P. N. R. 1; R. & R. C. C. 67; *Reg. v. Read*, L. R. 3 Q. B. Div. 133; s. c., 14 Cox, C. C., 17; 47 L. J. M. C. 50; 37 L. T. 722; 26 W. R. 283; 6 Cent. L. J. 195.

"Money or Other Property." — In Iowa. — The words "any money or property of another," in Iowa Rev. Stat. sect. 4244, include promissory notes and bills of exchange, by virtue of their being evidences of debt. Hence an indictment under sect. 4237 will lie for embezzlement of a treasury draft on the United States, drawn in favor of the State, and payable to the governor, although not indorsed by him. *State v. Orwig*, 24 Iowa, 102.

Same in Massachusetts. — The phrase "money or property of another," in Mass. Rev. Stat. ch. 126, sect. 9, providing, that "if any clerk, agent, or servant, etc., shall embezzle, etc., without the consent of his employer or master, any money or property of another," he shall be deemed guilty of larceny, applies to the money or property of the employer or master, as well as to that of any other person than the clerk, agent, etc. *Com. v. Stearns*, 43 Mass. (2 Metc.) 343.

Same. — In Texas. — "Property," as defined in art. 732, Penal Code Texas, includes any and every article commonly known and designated as personal property. "Money" is "property" within the meaning of art. 219 of the Texas Code of Crim. Proc., by which the venue of prosecution for embezzlement is regulated. *Brown v. State*, 23 Tex. App. 214; s. c., 9 Cr. L. Mag. 973.

1. *Com. v. King*, 63 Mass. (9 Cush.) 284. See *Rex v. Mead*, 4 Car. & P. 535.

Halves of Bank-Notes. — The halves of country bank-notes, sent in a letter, are goods and chattels, and a person who embezzles them is indictable for such embezzlement. *Rex v. Mead*, 4 Car. & P. 535.

2. *Bork v. People*, 91 N. Y. 5; *State v. White*, 66 Wis. 343; s. c., 8 Cr. L. Mag. 355.

Unissued Bonds of a City, which are in the custody of the city comptroller, are the subject of embezzlement; and the fact that the city may not be liable upon them, has nothing to do with the case. *State v. White*, 66 Wis. 343; s. c., 8 Cr. L. Mag. 355.

Negotiable Bonds of a Municipal Corporation complete in form, and capable of becoming effective instruments in the hands

of a *bona fide* holder, are, although unissued, "property" within the meaning of the Laws 1875, chap. 19, providing for punishment of peculation of public moneys and property. *Bork v. People*, 91 N. Y. 5.

3. Exchequer Bills. — If an indictment charges the prisoner with having embezzled "certain bills," commonly called "exchequer bills," and it appears that the person who signed them on the part of government was not legally authorized to do so, the indictment is bad, for they are not the things which they are averred to be. *Rex v. Aslett*, 2 Leach, C. C., 954, 958; s. c., 1 B. & P. N. R. 1; R. & R. C. C. 67.

4. Embezzlement of Shares of Stock. — Shares of stock constitute property, and are, therefore, the subject of embezzlement. *People v. Williams*, 60 Cal. 1; s. c., 2 Cr. L. Mag. 822; 4 Cr. L. Mag. 940.

5. Debts assigned to Trustees. — B. being in difficulty, assigned all his books, debts, estate, and effects to trustees for the benefit of his creditors. He was employed by the trustees at a salary to manage the business, and to collect the debts for them. He received the amount of two of the debts, but did not account for the sums received. *Held*, that inasmuch as the debts, being *choses in action*, could not be legally assigned, he had received only money which was in law, though not in equity, his own, and, therefore, that he could not be guilty of embezzling it. *Reg. v. Barnes*, 8 Cox, C. C., 129.

6. Converting Wheat. — One who has converted to his own use wheat which has been stored with him, *held* not to be liable for embezzlement under the Iowa Code of 1873, sect. 3910; the term therein, "property which may be the subject of larceny," being used generically. *State v. Stoller*, 38 Iowa, 321.

7. Animals Feræ Naturæ. — Continuous Act. — The prisoner being employed as a gamekeeper, and having no authority to kill rabbits for his own use, killed and removed wild rabbits in and from a wood belonging to his master, with the intention of selling them. The killing, removing, and selling were one continuous act. *Held*, that he was not guilty of embezzlement. *Reg. v. Read*, L. R. 3 Q. B. D. 133; s. c., 14 Cox, C. C., 17; 47 L. J. M. C. 50; 37 L. T. 722; 26 W. R. 283; 6 Cent. L. J. 195.

8. *Washington v. State*, 72 Ala. 272; s. c., 6 Cr. L. Mag. 289.

2. *Value Immaterial.*—The value of the article converted is not an element in the crime,¹ and a special finding by the jury of the amount of the loss is not essential to the power of the court to sentence under the statute.² But a different rule, it seems, prevails in Texas.³

3. *Property and Money Sold, Kept, or Received contrary to Statute, or illegally.*—If an agent receives money of his principal upon illegal consideration, and in the transaction of an unlawful business, and converts it to his own use, he is guilty of embezzlement; and the money having been received illegally, is no defence.⁴ The same is true where money is received for an illegal or immoral purpose.⁵ And the fact that moneys were derived from an unlawful source, will not avoid the charge of their embezzlement.⁶

1. *Washington v. State*, 72 Ala. 272; s. c., 6 Cr. L. Mag. 289; *People v. Salorse*, 62 Cal. 139; s. c., 5 Cr. L. Mag. 448; *People v. Leehey* (Cal.) 1 Cr. L. Mag. 124; 4 Pac. C. L. J. 75; *People v. Bork*, 78 N. Y. 346; s. c., 5 Cr. L. Mag. 911; 19 N. Y. Week. Dig. 281.

In Alabama.—An agent or servant who embezzles or fraudulently converts to his own use "any money or property which has come into his possession by virtue of his employment, must be punished on conviction as if he had stolen it" (Code, sect. 4377), and the larceny of an ox or any other domestic animal named in the statute being now made a felony, without regard to the value of the animal stolen (Code, sect. 4358), the embezzlement of such animal by an agent is equally a felony, without regard to value. *Washington v. State*, 72 Ala. 272; s. c., 6 Cr. L. Mag. 289.

In California.—Under sect. 514, Penal Code, the embezzlement of a horse or other of the animals specified in sect. 487, subdivision 3, of that code, is felony, without regard to the value of the property. *People v. Salorse*, 62 Cal. 139; s. c., 5 Cr. L. Mag. 448; *People v. Leehey* (Cal.), 1 Cr. L. Mag. 124; 4 Pac. C. L. J. 75.

2. *People v. Bork*, 78 N. Y. 346; s. c., 5 Cr. L. Mag. 911; 19 N. Y. Week. Dig. 281.

3. In a case where the defendant, a barber, was convicted of embezzling a razor worth a dollar and a half, upon evidence which showed that two razors had been lent to him, one of which he had paid for by shaving, it was held, upon proof that the other was of no value, that a conviction for embezzlement was not sustained by the evidence. *Perry v. State*, 22 Tex. App. 19, s. c., 9 Cr. L. Mag. 398.

4. *State v. Tumey*, 81 Ind. 559; s. c., 3 Cr. L. Mag. 498, 581; 4 Cr. L. Mag. 459.

Where an Agent of a Foreign Insurance Company is prosecuted for the Embezzlement of the moneys of the company received by him in the course of his agency, as embezzlement is defined in section 1944, Indiana Rev. Stat. 1881, it is no defence that such agent had not complied with the requirements of section 3765, Rev. Stat. 1881, in regard to his agency, and had therefore received such moneys for the company upon an illegal consideration and in the transaction of an unlawful business. *State v. Tumey*, 81 Ind. 559; s. c., 3 Cr. L. Mag. 498, 581; 4 Cr. L. Mag. 459.

5. *State v. Tumey*, 81 Ind. 559; s. c., 3 Cr. L. Mag. 498, 581; 4 Cr. L. Mag. 459; *Com. v. Cooper*, 130 Mass. 285; s. c., 3 Cr. L. Mag. 260; *State v. Shadd*, 80 Mo. 358; s. c., 18 Cent. L. J. 236.

Money intrusted for Immoral Purpose.—It is no defence in a prosecution for embezzlement; that the money was given to the defendant to devote to an illegal purpose, e. g., gambling for the prosecutor. *State v. Shadd*, 80 Mo. 358; s. c., 18 Cent. L. J. 236.

In Transactions of Unlawful Business.—If an agent receives money of his principal upon an illegal consideration, and in the transaction of an unlawful business, and converts it to his own use, he is guilty of embezzlement, and the money having been received illegally, is no defence. *State v. Tumey*, 81 Ind. 559; s. c., 3 Cr. L. Mag. 581; 4 Cr. L. Mag. 459.

In Massachusetts.—It is no defence to an indictment for the embezzlement of money under the Gen. Stats. c. 161, sect. 38, that the money was intrusted to the defendant for an illegal purpose. *Com. v. Cooper*, 130 Mass. 285; s. c., 3 Cr. L. Mag. 260.

6. *Woodward v. State*, 103 Ind. 127; s. c., 8 Cr. L. Mag. 355; *State v. Tumey*, 81 Ind. 559; s. c., 4 Cr. L. Mag. 459, 3 Cr. L. Mag. 498; *Rothrock v. Perkinson*, 61 Ind. 39; *United States Express Co. v.*

IV. Clerks and Servants. — 1. *Who are.* — a. *Generally.* — A clerk is usually defined as a person in the employ of a merchant, who attends to a part of the merchant's business, while the merchant himself superintends the whole.¹ And a servant may be said to be any person who lets, hires, or engages his services to another, to work at any commerce or occupation whatever, for the benefit of such other, for a certain sum as retribution or compensation, or upon certain conditions.² Where the prisoner is indicted for

Lucas, 36 Ind. 361; Com. v. Smith, 129 Mass. 105.

Embezzlement of Proceeds of Lottery Ticket. — It is no defence to a prosecution for embezzlement of money collected by an agent, that it was collected on a lottery-ticket, in contravention of the laws of this State. Woodward v. State, 103 Ind. 127, 244; s. c., 7 Cr. L. Mag. 355.

Embezzlement of Proceeds of Liquor. — It is no defence to an indictment for the larceny of intoxicating liquors, or to an indictment for embezzling the proceeds of the sales of such liquors, that the liquors were kept for sale, or sold, in violation of law. Com. v. Smith, 129 Mass. 105.

1. See 1 Bouv. L. Dict. (15th ed.) 323; 2 Bouv. Inst. 1287; 1 Chitt. Pr. 80; Pardessus, *Droit. Comm.* n. 38.

2. See 2 Bouv. L. Dict. (15th ed.) 630.

Laborers, or Persons hired by the Day's work or any longer time, are said not to be considered servants. Duchamp v. Nicholson, 2 Mart. (La.) N. S. 681; Boniface v. Scott, 3 Serg. & R. (Pa.) 351. See also Chilcot Bromley, 12 Ves. 114; Townshend v. Windham, 2 Vern. 546. *Ex parte* Skinner, 3 Deac. & C. 332.

As to who are clerks and servants generally, see People v. Allen, 5 Den. (N. Y.) 76; Lewis v. Kendall, 6 How. (N. Y.) Pr. 62; People v. Sherman, 10 Wend. (N. Y.) 298; s. c., 25 Am. Dec. 563; People v. Dalton, 15 Wend. (N. Y.) 582; State v. Costin, 89 N. C. 511; s. c., 5 Cr. L. Mag. 616; Com. v. Lynch (Pa.), 9 Cr. L. Mag. 114; 3 Lan. L. Rev. 412; Reg. v. Goodbody, 8 Car. & P. 665; Reg. v. Gibson, 8 Cox, C. C., 436; Reg. v. Barnes, 8 Cox, C. C., 129; Reg. v. Walker, Dears. & B. C. C. 600; s. c., 8 Cox, C. C., 1; 27 L. J. M. C. 207; Reg. v. Arman, Dears. C. C. 575; s. c., 7 Cox, C. C., 45; 1 Jur. N. S. 1115, 1117; Reg. v. Hoare, 1 F. & F. 647; Reg. v. Faulkes, L. R. 2 C. C. 150; s. c., 44 L. J. M. C. 65; 32 L. T. 407; 23 W. R. 696; Rex v. Hartley, R. & R. C. C. 139.

Where One employed by a Merchant "to sweep out, and wait about the Store, but not as a clerk," was authorized by the merchant to take a lot of shoes and sell them, during his visit to a neighboring town, which he did, and converted the money to his own use, *held* that he was a

servant within the meaning of the embezzlement act, and received the goods by virtue of his employment. State v. Costin, 89 N. C. 511; s. c., 5 Cr. L. Mag. 616.

A. was convicted on an indictment charging him with embezzlement. He was store-keeper and clerk of a county jail, and it was no part of his duty (which was defined by written instructions) to receive money; but he had, from time to time, received moneys in the absence of the governor of the jail, and to the knowledge of some of the justices. It was submitted that he had not received the money by virtue of his employment, and that that question ought to be left to the jury; but the recorder directed that if they believed that A. received the money, he did receive it by virtue of his employment. *Held*, that the question whether he received the money by virtue of his employment ought to have been left to the jury, and that the conviction was wrong. Reg. v. Arman, Dears. C. C. 575; s. c., 7 Cox, C. C., 45; 1 Jur. N. S. 1115, 1117.

Assignor for Benefit of Creditors. — **Employment by Trustee.** — B., being in difficulties, assigned all his books, debts, estate, and effects to trustees for the benefit of his creditors. He was employed by the trustees at a salary, to manage the business, and to collect the debts for them. He received the amount of two of the debts, and did not account for it. *Held*, that he was not a clerk or servant within the meaning of the act. Reg. v. Barnes, 8 Cox, C. C., 129.

A Captain of a Barge employed to sell Coal. — Where the owner of a colliery employed the prisoner, as captain of one of his barges, to carry out and sell coal, and paid him for his labor by allowing him two-thirds of the price for which he sold the coal above the price charged at the colliery, *held*, that the prisoner was a servant within the meaning 39 Geo. 3, c. 85; and having embezzled the price, he was guilty of larceny within the meaning of that act. Rex v. Hartley, R. & R. C. C. 139.

A Drover of Cattle. — A drover of cattle was employed by a grazier in the country to drive eight oxen to London; his instructions were, that if he could sell them on

embezzling moneys he received by virtue of his employment as clerk, it is for the jury to say whether the relation of master

the road, he might do so; and that those he did not sell on the road he was to take to a particular salesman in Smithfield Market, who was to sell them for the grazier: the drover received the money for the beasts, and applied it to his own use. *Held* that he could not be convicted of embezzlement. *Reg. v. Goodbody*, 8 Car. & P. 665.

Employment by Father.—Father Clerk to Local Board.—The prisoner's father was clerk to the local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence, the prisoner acted for him in the business of the board, and when present he assisted him. The prisoner was not appointed or paid by the board, and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on a mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgages, and appropriated a part of it to his own use. *Held*, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement. *Reg. v. Faulkes*, L. R., 2 C. C. 150; s. c., 44 L. J. M. C. 65; 32 L. T. 407; 23 W. R. 696.

A Stage Driver is a servant within the meaning of an act punishing, as felonious stealing, the embezzlement of property received by virtue of employment as servant. *People v. Sherman*, 10 Wend. (N. Y.) 298; s. c., 25 Am. Dec. 563. See also *Lewis v. Kendall*, 6 How. (N. Y.) Pr. 62; and *People v. Dalton*, 15 Wend. (N. Y.) 582.

A Solicitor employed to Collect Rents.—An indictment charged a person, who was a solicitor, with embezzlement. It appeared from his appointment, as entered in the minute-book of the company, that he was a land-agent to the company, and that in the course of his duties he collected the rents of houses, refreshment-stalls, book-stalls, etc., and should have paid the sums over to the company, and that he managed the parochial assessments, as to the justness of claim. His salary was £300 a year, and an extra sum was allowed for travelling expenses. *Held*, that he was a clerk or servant. *Reg. v. Gibson*, 8 Cox, C. C., 436.

One to whom a Note has been handed for Collection, a certain proportion of what he collected to be paid over, cannot be indicted for embezzlement under section 107 of the Pennsylvania Criminal Code of 31st of March, 1860, for neglecting to pay over the proper proportion of the amount

collected. He is not a "clerk, servant, or other person in the employ of another." There is no breach of trust, simply a failure to pay. *Com. v. Lynch* (Pa.), 9 Cr. L. Mag. 114; s. c., 3 Lan. L. Rev. 412.

Where a Constable is employed to collect Certain Demands without suit, if the debtors will pay, and by procuring and serving process before a justice of the peace where they will not, he is not a "servant" of the creditor within the meaning of the New York statute concerning embezzlement. *People v. Allen*, 5 Den. (N. Y.) 76.

No Remuneration agreed upon.—A., who had been a farm servant of B., but who had ceased to be so, was employed by B. to collect his debts; it being B.'s intention to go to America, and to take A. with him, and set him up there in business for himself. There was no agreement for any remuneration to be paid by B. to A. for collecting the debts. *Held*, that A. could not be convicted of embezzling the sums received by him on behalf of B. *Reg. v. Hoare*, 1 F. & F. 647.

When Debtor, not as Servant.—The prisoner kept a refreshment-house at B., and whilst doing so was engaged by the prosecutors, manure manufacturers, to get orders, which they supplied from their stores. He was to collect the money, and send it at once to them, and also to furnish weekly accounts. He was paid by commission, and it did not appear that he had undertaken to give any definite time or labor to the business; but he was to act in a particular district, and was called agent for the B. district. He was to go through the country, and see the farmers, and get orders, and during the season was to be continually among the farmers. Subsequently the prosecutors rented stores at B., which were placed under the prisoner's control, and from them he supplied the orders he obtained. The first mode, however, or the mixed mode, might have been resorted to according to the convenience of the prosecutors. After some time a proposal was made to a guaranty society to insure the prosecutors in respect to their connection with the prisoner. This proposal was signed by the prisoner. It was a printed form issued by the society, and contained a notice that some salary must be payable, or the society would not insure. It stated that the prisoner's salary was £1 a year, besides commission, estimated at £65 a year. At this time the prosecutors had agreed to give the salary of £1 a year. The prisoner was allowed to get in arrear, and was treated by the prosecutors as a debtor in respect of the arrears. Having, however, received money

and servant or clerk existed between the prosecutor and the prisoner.¹

b. Occasional Employment.—It is not necessary that the clerk or servant should be in the steady employment of his master or principal: it is sufficient if he is occasionally in his employ, or employed for the particular occasion or work.²

from certain customers, he fraudulently returned their names as not having paid, and for this he was tried and convicted of embezzlement. *Held*, that the conviction could not be sustained, as it was not established by the evidence that the prisoner was the servant of the prosecutors. *Reg. v. Walker, Dears. & B. C. C. 600; 8 Cox, C. C., 1; 27 L. J. M. C. 207.*

1. *Reg. v. Chater, 9 Cox, C. C., 1.*

2. *Lewis v. Kendall, 6 How. (N. Y.) Pr. 59; Reg. v. Tongue, Bell, C. C., 289; s. c., 8 Cox, C. C., 386; 30 L. J. M. C. 49; 3 L. T. N. S. 415; 9 W. R. 59; Reg. v. Winnall, 5 Cox, C. C., 326; Rex v. Hughes, 1 Moo. C. C., 370; Rex v. Burton, 1 Moo. C. C. 237; Rex v. Nettleton, 1 Mood. C. C. 259; Rex v. Spencer, R. & R. C. C. 299.*

A Person casually employed by an individual to receive money in a single message, and pay it out, is not a servant of such individual within 2 N. Y. Rev. Stats. 678, sect. 59; *Lewis v. Kendall, 6 How. (N. Y.) Pr. 59.*

A servant may be found guilty of embezzlement, though he is not a general servant, and is employed to receive in a single instance only. *Rex v. Hughes, 1 M. C. C. 370.*

A Person employed to collect the Sacrament Money from the communicants is not the servant of the minister, church-wardens, or poor, etc., as to be within 7 & 8 Geo. 4, c. 29, sect. 47, if he embezzles the money. *Rex v. Burton, 1 M. C. C. 237.*

Embezzlement by one neither Clerk nor Servant.—It is sufficient, if he was employed to receive the money he embezzled, although receiving money may not be in his usual employment, and although it was the only instance in which he was so employed. *Rex v. Spencer, R. & R. C. C. 299.* But it was held in *Rex v. Nettleton, 1 Moo. C. C. 259*, that embezzlement by one who is neither clerk nor servant, nor in any respect under the control of the person by whom he is in a single instance only requested to receive moneys, was not punishable under 7 & 8 Geo. 4, c. 2, sect. 49, as he did not come within the description of clerk or servant, or a person employed for the purpose of, or in the capacity of, a clerk or servant. *Rex v. Nettleton, 1 Mood. C. C. 259.*

Occasional Employment.—A man was sufficiently a servant within 39 Geo. 3, c. 85, although he was only occasionally em-

ployed when he had nothing else to do. *Rex v. Spencer, R. & R. C. C. 299.*

A Person hired by a Market Gardener to do a day's work, and who is requested by his employer to take some vegetables to market and sell them, and bring back the produce, is a servant to his employer in respect of such employment within 7 & 8 Geo. 4, c. 29, sect. 47; *Reg. v. Winnall, 5 Cox, C. C., 326.*

Appropriation of Proceeds of Check.—The prisoner had worked for the prosecutor, sometimes as a regular laborer, and sometimes as a roundsman; but at the time in question, he not being at all in the prosecutor's service, was sent by the prosecutor to get a check cashed at a banker's, for doing which he was to be paid a sixpence. He got the cash, and made off. *Held*, no embezzlement, as the prisoner was not a servant of the prosecutor within 7 & 8 Geo. 4, c. 29, sect. 47; *Rex v. Freeman, 5 Car. & P. 534.*

A. was Secretary to a Benefit Building Society. It was no part of his duty, as prescribed by the rules, to receive money for the society; but, according to the course of business, the subscriptions were frequently received by him, and when mortgages were redeemed the money was paid to him as secretary, but for and upon receipts signed by the trustees. Having embezzled the redemption money upon mortgages so paid to him, he was indicted under 7 & 8 Geo. 4, c. 29, sect. 47. *Held*, that there was evidence for the jury that he was employed by the trustees as their servant to receive money on their behalf. *Reg. v. Hastie, 9 Cox, C. C., 264; s. c., L. & C. 269; 32 L. J. M. C. 63; 9 Jur. N. S. 235; 7 L. T. 695; 11 W. R. 293.* A., who was convicted of embezzlement, was secretary of a money club. His duties were cognate to that of receiving money, although the receipt of money was not expressly named as one of them in the rules which were in writing. He was directed by the club to sue upon a joint promissory note, their property, or get better security; and the note was handed to him by the treasurer, not a member of the club, who desired that his name should not be used in legal proceedings. The note was payable to the treasurer's order; and A. indorsed the treasurer's name on the note, and employed an attorney, who issued a writ at the suit of A. In consequence of the action, money was paid to

c. Payment on Commission. — Duty not Compulsory. — A person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within the statute.¹ But where a person was employed as a traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following; and he had no salary, but was paid by commission, and was at liberty to get orders when and where he pleased within his district, but was to be exclusively in the employ of the prosecutors, and to give the whole of his time — the whole of every day — to their service, — he was held to be a clerk and servant within the meaning of the statute.²

him by one of the makers of the note, the receipt of which he denied, and fraudulently withheld the money from the club, and appropriated it. The court *held* that he was rightly convicted. *Reg. v. Tongue*, Bell, C. C., 289; s. c., 8 Cox, C. C., 386; 30 L. J. M. C. 49; 3 L. T. N. S. 415; 9 W. R. 59.

1. *Reg. v. May*, L. & C. 13; s. c., 8 Cox, C. C., 421; 3 L. T. 680; *Reg. v. Negus*, L. R. 2, C. C. 34; s. c., 42 L. J. M. C. 62; 28 L. T. 646; 21 W. R. 687; *Reg. v. Bowers or Bower*, L. R. 1, C. C. 41; 12 Jur. N. S. 550; 14 L. T. 671; 14 W. R. 803. See 24 & 25 Vict. c. 96, sect. 68; *Reg. v. Hall*, 31 L. T. 883; *Reg. v. Marshall*, 21 L. T. 796.

Payment of Commission. — B., in answer to an application, was informed by letter from the prosecutors, "We are not disposed to appoint any agent at N., but for all business you do for us we shall be happy to pay you a commission." He afterwards obtained some orders, and misappropriated some moneys received by him. The jury found that it was his duty to account to the prosecutors for the money he might receive for them immediately on receipt of it. It was *held*, that B. was not a clerk or servant, and could not be convicted of embezzlement. *Reg. v. May*, L. & C. 13; s. c., 8 Cox, C. C., 421; 3 L. T. 680.

The prisoner was employed by a coal-merchant under an agreement, "that he was to receive 1 shilling per ton, procuration fee, payable out of the first payment, — four per cent for collecting, and three pence on the last payment. Collection to be paid on Friday evening before 5 P.M., or on Saturday before 2 P.M." He received no salary; was not obliged to be at the office except on Friday or Saturday, to account for what money he had received. He was at liberty to go where he pleased for orders. *Held*, he was not to be a clerk or servant within the 24 & 25 Vict. c. 96,

sect. 68, relating to embezzlement. *Reg. v. Marshall*, 21 L. T. 796.

A Person whose Duty it is to obtain Orders When and Where he Likes, and to forward them to his principal for execution, and then has three months within which to collect the money for the goods sent, is not a clerk or a servant. *Reg. v. Mayle*, 11 Cox, C. C., 150.

A person engaged to solicit orders, and paid by commission on the sums he was forthwith to hand over to his employers, who was at liberty to apply for orders when he thought most convenient, and was not to employ himself for any other persons, is not a clerk or servant within 24 & 25 Vict. c. 96, sect. 68; *Reg. v. Negus*, L. R. 2, C. C. 34; s. c., 42 L. J. M. C. 62; 28 L. T. 646; 21 W. R. 687.

And if such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement if he does not pay over, or account for, the money so received. *Reg. v. Mayle*, 11 Cox, C. C., 150.

An Account and Debt Collector was employed by the prosecutors to collect certain debts specified in a list given to him. The time and mode of collecting the debts were in his discretion, and he was authorized to sue for them, if necessary, but at his own charge. In no case was he to receive from the prosecutors more than five per cent on the amount collected by him and paid over to the prosecutors. The jury having found, on these facts, that he was employed in the capacity of a clerk, and convicted him of embezzlement of certain sums received by him, and not paid over to the prosecutors, *held*, that the finding was wrong, and that he was not employed as a clerk. *Reg. v. Hall*, 31 L. T. 883.

2. 24 & 25 Vict. c. 96, sect. 68; *Reg. v. Bailey*, 12 Cox, C. C., 56; s. c., 24 L. T.

It would seem that if the money comes into the servant's hands, any act still remains to be done, before he has the right to take his share, wrongful conversion to his own use is embezzlement; but if on the receipt of the money, he is entitled to his share of commission on the claim collected, it is not embezzlement;¹ but where a servant receives money for his master for an article made of his master's material, it will be within the statute, if he embezzles the price, though he made the article, and was to have a given proportion of the price for making it.²

d. Employment by Other Masters. — The fact that the person is employed by different masters, and that he pays his own expenses out of his commission on the business transacted by him, will not relieve him from liabilities under the statute punishing for embezzlement.³

2. *What Constitutes Embezzlement by.* — *a. Generally.* — In order to sustain a conviction of the offence of embezzlement under the statute,⁴ three things must be shown: (1) that the accused was the clerk, agent, servant, or apprentice of a private person; (2) that the money came into his possession by virtue of his employment; (3) that he embezzled, or fraudulently converted it to his own use,

477; *Reg. v. Thomas*, 6 Cox, C. C., 403; *Reg. v. Tite*, L. & C. 29; s. c., 8 Cox, C. C., 458; 30 L. J. M. C. 142; 7 Jur. N. S. 556; 4 L. T. 259; 9 W. R. 554.

A. was indicted for embezzlement. He was engaged by the prosecutor as a commercial traveller, to be paid by commission, and he was at liberty to obtain orders for other persons. *Held*, that there was evidence of his being a servant to the prosecutor. *Reg. v. Tite*, L. & C. 29; s. c., 8 Cox, C. C., 458; 30 L. J. M. C. 142; 7 Jur. N. S. 556; 4 L. T. 259; 9 W. R. 554.

Where Duty not Compulsory. — A butty collier, who received a certain sum for every ton of coal he raised, was also allowed to sell coal for his employer, the owner of the colliery. It was his duty to pay over the gross money received on such sales, and be subsequently allowed a poundage thereon. Having converted money received for the coal to his own use, he neglected to account for it. *Held*, that although the sale of the coal was not compulsory, he was a servant to the owner of the colliery, so as to support an indictment for embezzlement. *Reg. v. Thomas*, 6 Cox, C. C., 403.

1. See 13 Cent. L. J. 464.

2. See *Rex v. Hoggins*, R. & R. C. C. 145.

3. See *Reg. v. Turner*, 11 Cox, C. C., 551; s. c., 22 L. T. 278; *Reg. v. Batty*, 2 Mood. C. C. 257; *Rex v. Carr*, R. & R. C. C. 198.

Employment by Other Masters. — A person employed by A. to sell goods for him at certain wages may be convicted of em-

bezzlement as the servant of A., though at the same time employed by other persons and for other purposes. *Reg. v. Batty*, 2 Mood. C. C. 257.

A person employed upon commission to travel for orders and collect debts, was a clerk within 39 Geo. 3, c. 85, and might have been indicted for embezzlement, although he was employed by many different houses on each journey, and paid his own expenses out of his commission on each journey, and did not live with any of his employers, nor act in any of their counting-houses. *Rex v. Carr*, R. & R. C. C. 198.

The prisoner agreed with a manufacturer of earthenware to act as his traveller, and "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by him, and that he would not, without his consent in writing, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts. The manufacturer subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement under 24 & 25 Vict. c. 96, sect. 68, *held* that he was a clerk or servant of the prosecutor within that statute. *Reg. v. Turner*, 11 Cox, C. C., 551; s. c., 22 L. T. 278.

4. Alabama Code, sect. 4377-

or fraudulently secreted it with the intent to convert it to his own use.¹

Where a clerk by authority of his master collects one bill and fraudulently converts the money, the offence of embezzlement is complete; and if he collects another bill after the first conversion, and then fraudulently converts the proceeds, he is guilty of a second offence,² and the embezzlement of several articles at the same time is an embezzlement of each.³

b. Possession or Custody of Goods. — A distinction exists where a servant has merely the custody, and where he has the possession of the goods.⁴ To constitute the crime of embezzlement, the person must have the money or property in his possession by virtue of his occupation or employment, and it must be fraudulently converted to his own use in violation of a trust reposed in him.⁵

1. Pullam v. State, 78 Ala. 31; s. c., 56 Am. Rep. 21; John Langley's Case, 4 City Hall Rec. 159.

The prisoner was indicted for petit larceny at common law, and for embezzling under the statute. It appeared in evidence that the prisoner, a servant boy, who had been in the employment of S. for some time, was intrusted by S. with a basket of cakes to sell and return the money, but did not return either the cakes, the money, or the basket. It was *held*, that to convict him of larceny, the jury must believe that at the time his master intrusted him with the property he harbored the felonious intent to convert it to his own use; and to bring the offender within the act in relation to embezzlement, the jury must be convinced that the prisoner converted the property to his own use, with intent to steal the same. John Langley's Case, 4 City Hall Rec. 159.

Animus Furandi. What constitutes the offence. — In the absence of proof of *animus furandi*, the act of a servant giving away old tools of his master will be presumed a matter of charity, and not embezzlement. State v. Fritchler, 54 Mo. 425.

When Society or Partnership is illegally or irregularly Constituted. — Where a society, in consequence of administering to its members an unlawful combination and confederacy under 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; and 57 Geo. 3, c. 19, a person charged with embezzlement, as clerk and servant to such society, cannot be convicted. Reg. v. Hunt, 8 Car. & P. 642.

2. Ricord v. Central Pac. R. R. Co., 15 Nev. 168.

3. Com. v. Butterick, 100 Mass. 1.

4. Warmoth v. Com. 81 Ky. 133.

5. See Jones v. State, 59 Ind. 229; Ennis v. State, 3 G. Greene (Iowa) 67; Com. v. Berry, 99 Mass. 428; Com. v. Hays, 80

Mass. (14 Gray) 62; s. c., 74 Am. Dec. 661; Com. v. Tuckerman, 76 Mass. (10 Gray) 173; Com. v. Libbey, 52 Mass. (11 Metc.) 64; s. c., 45 Am. Dec. 185; *ex parte* Ricord, 11 Nev. 287; People v. Hennessey, 15 Wend. (N. Y.) 147; State v. Costin, 89 N. C. 511; s. c., 5 Cr. L. Mag. 616; Hart v. Mills, 31 Tex. 317; DeGaultie v. State, 31 Tex. 34; Tucker v. Anderson, 25 Tex. Supp. 158; People v. Sheahan, 1 Wheel. Cr. Cas. 226.

Conversion of Horses by Servant. — Where a person in the employment of another is intrusted with a span of horses and wagon, and while thus in charge appropriates them to his own use, he is guilty of embezzlement, and not larceny, under the statute of Iowa. Ennis v. State, 3 G. Greene (Iowa) 67.

Conversion of Money sent by Person from one place to another. — Where the money was sent from New Orleans by the accused, and he converted it to his own use, and refused to pay it on demand in Texas, he was guilty of embezzlement under the statute; but if the indictment allege the theft to have been from the person, it is not sustained by such proof. Hart v. Mills, 31 Tex. 317, 318; Tucker v. Anderson, 25 Tex. Supp. 158, 159. See De Gaultie v. State, 31 Tex. 34, 35.

By the Common Law this would be nothing but a breach of trust, for which the party would be liable to a civil action; but by this section the act is a felony, of the class of thefts. De Gaultie v. State, 31 Tex. 34.

Massachusetts Doctrine. — In Commonwealth v. Hays, 80 Mass. (14 Gray) 62, it is *held* that the Massachusetts statute relating to embezzlement has been strictly construed, and its operation carefully confined to persons having in their possession, by virtue of their occupation or employment, the money or property of another, which has been fraudulently converted, in violation of a trust reposed in them. Where

Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant converts the same, he is indictable under the statute for embezzlement.¹

It is held that an indictment for embezzlement lies against a clerk or servant for converting to his own use the money, goods, etc., of any other person as well as for converting to his own use the money, goods, etc., of his master or employer, which shall have come into possession or under his care by virtue of his employment; the words "any other person," in the statute, mean any person other than he who is guilty of embezzlement.² A servant who merely has the possession of goods, but not the care and control of them, and they do not come into his possession by virtue of his office as clerk or servant, and are not intrusted to him by his master or employer for some specific purpose, a felonious appropriation of them is not embezzlement.³

one employed by the maker of a note, not as a broker, but merely to sell it, and receive the proceeds, and pay them over specially to a third person, fraudulently converts them to his own use, he is guilty of embezzlement, although upon receiving the note he gave the maker his own note for the same amount, if it was agreed that his note should be deposited with a third person beneficially interested as a receipt, to be surrendered when the proceeds are paid over. *Com. v. Foster*, 107 Mass. 222; *Com. v. Libbey*, 52 Mass. (11 Metc.) 64; s. c., 45 Am. Dec. 185. The case is also cited and distinguished in *Com. v. Tuckerman*, 76 Mass. (10 Gray) 173, where it is held that the treasurer of a railroad company is an "officer, agent, clerk, or servant" of the corporation within the meaning of the statute relating to embezzlement, and that where he receives money of the corporation, and deposits it in a bank, and afterwards draws it out in bills or coin, which he fraudulently converts to his own use, he is liable for embezzlement under that statute.

New York Doctrine. — In New York an indictment for embezzlement, under 2 Rev. Stat. 678, sect. 59, lies against one taking to his own use the money, goods, etc., of his master, and those of other persons coming under his care by reason of his employment. *People v. Hennessey*, 15 Wend. (N. Y.) 147. The act to prevent servants embezzling their master's goods (Rev. Stat. vol. i. p. 413) extends to those cases only where the servant or apprentice has the custody of the goods. *People v. Sheahan*, 1 Wheel. Cr. Cas. 226. See 3 Rev. Stat. (45th ed.) 957.

By the True Construction of Nevada Compiled Laws, sect. 2380, money received by a

clerk, who is intrusted by his employer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer. *Ex parte Ricord*, 11 Nev. 287.

1. *State v. Costin*, 89 N. C. 511; s. c., 5 Cr. L. Mag. 616.

2. *People v. Hennessey*, 15 Wend. (N. Y.) 147.

Indiana Doctrine. — Under provisions of the act of Dec. 21, 1865 (2 Rev. Stat. 1876, p. 449; Rev. Stat. 81, 1944) defining the crime of embezzlement where money or other property or article of value has been intrusted by the master to his servant, and such money, etc., belonged to, or had been deposited with, the master in whose employment the servant then was, if such servant has fraudulently appropriated such money, etc., so intrusted to him, to his own use, he will be guilty only of embezzlement, and cannot be convicted of larceny. *Jones v. State*, 59 Ind. 229.

3. See *Commonwealth v. Davis*, 104 Mass. 548; *Commonwealth v. Berry*, 99 Mass. 428; *People v. Robinson* (N. Y.), 4 Cr. L. Mag. 611; 16 N. Y. Week. Dig. 355; *Cobletz v. State*, 36 Tex. 353; *Reg. v. Reed*, Dears. C. C. 257; s. c., 23 L. J. M. C. 25; 18 Jur. 67.

The Felonious Taking of Goods from the Owner's Shop by a Clerk and packer in their employ, who had keys by means of which, at the time in question, he entered the shop after it was closed, but who was not a salesman, although the owners had occasionally allowed him to take and sell goods for them, is larceny, and not embezzlement. *Com. v. Davis*, 104 Mass. 548.

The defendant, on the first night after his employment as clerk, was left in charge of the store, and carried off from it a

c. Employer's Money; Failure to account for; False Entries, etc.

—It is the duty of a servant authorized to receive money to account to his employer therefor; and a failure to pay over to the employer or to the government is evidence of embezzlement.¹

quantity of money and goods. The next day he was apprehended, while leaving the country, at some distance from the place where the act was committed, and the money and goods were found upon him. *Held*, that under Pasch. Dig. art. 2385, the facts constituted theft, and not embezzlement. *Cobletz v. State*, 36 Tex. 353.

Where Defendant was employed to deliver Goods from a store, and also helped in the store to arrange the goods, and to clean and dust, *held* that the goods in the store were not in his possession or under his control within the statute relating to embezzlement. *People v. Robinson* (N. Y.), 4 Cr. L. Mag. 11; s. c., 16 N. Y. Week. Dig. 355.

The Prisoner was sent with his Master's Cart for some Coals. The coals were delivered to the prisoner, and deposited in the cart. On the road home the prisoner disposed of a portion of them; *held*, no embezzlement, as the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, the possession from that time became the master's. *Reg. v. Reed, Dears.* C. C. 257; s. c., 2 C. L. R. 607; 23 L. J. M. C. 25; 18 Jur. 67.

The Servant of a Copartnership fraudulently appropriated Money which he had received from one member of the firm under the direction to carry it to another member. *Held*, that an indictment for embezzlement would not lie. Goods in the servant's custody, received from the master for a specific purpose, and the appropriation, *animus furandi*, is larceny. *Com. v. Berry*, 99 Mass. 428.

The Cashier of a Mercantile House, having charge of the money of the concern, being about to leave their employment, took of the money of the firm in his hands the amount due him as the balance of his salary, without the knowledge and against the wish of his employers, and charged the same to himself on their books. *Held*, that the employee was not guilty of embezzlement, and did only what he had a right to do. *Ross v. Innis*, 35 Ill. 488.

1. See *State v. Cameron*, 3 Heisk. (Tenn.) 78. *Compare ex parte Ricord*, 11 Nev. 287; *State v. Snell*, 9 R. I. 112. See also *Reg. v. Jackson*, 1 C. & K. 384; *Reg. v. Lister, Dears.* & B. C. C. 118; s. c., 26 L. J. M. C. 26; 2 Jur. N. S. 1124; *Reg. v. White*, 8 Car. & P. 742; *Reg. v. Betts, Bell*, C. C. 90; s. c., 8 Cox, C. C. 140; 28 L. J. M. C. 69; 5 Jur. N. S. 274; 32 L. T.

O. S. 339; 7 W. R. 239; *Reg. v. Masters*, 1 Den. C. C. 332; s. c., T. & M. 1; 2 C. & K. 930; 3 New Sess. Cas. 326; 3 Cox, C. C. 178; 18 L. J. M. C. 2; 12 Jur. 942; *Rex v. Beacall*, 1 C. & P. 312; *Rex v. Wellings*, 1 C. & P. 454, 457.

Wilful Omission to account. — It was the duty of a servant authorized to receive money from his employer to account to his employer the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums nor paid them over. He never denied the receipt of them, or tendered any written account in which they were omitted. *Held*, that if he wilfully omitted to account for these sums and pay them over on the respective days on which he received them, these were embezzlements, and that such wilful omission to account and pay over were equivalent to a denial of the receipt of them. *Reg. v. Jackson*, 1 C. & K. 384.

A Miller's Foreman employed to sell goods for his master, sold some to a customer, received the money, but did not account for the money in any way. *Held*, that the prisoner was guilty of embezzlement. *Reg. v. Betts, Bell*, C. C., 90; 8 Cox, C. C., 140; 28 L. J. M. C. 69; 5 Jur. N. S. 274; 32 L. T. O. S. 339; 7 W. R. 239.

Servant of Corporation. — If the party embezzling is employed as the servant of a corporation, although not duly appointed their servant, even under their common seal. *Rex v. Beacall*, 1 Car. & P. 312; and *Rex v. Wellings*, 1 Car. & P. 454, 457.

Money received from Fellow-Servant. — If the prisoner had, as a servant, in the course of his duty, received from a fellow-servant money paid to that servant for his master by another servant, who had received it from the customers, it was the duty of the prisoner, after such receipt, to hand the money to another servant (the cashier) of his master; but, instead of handing it over, he fraudulently retained it. *Held*, that this was embezzlement. *Reg. v. Masters*, 1 Den. C. C. 332; s. c., T. & M. 1; 2 C. & K. 930; 3 New Sess. Cas. 326; 3 Cox, C. C. 178; 18 L. J. N. C. 2; 12 Jur. 942.

Where Master has no Right to Money received. — If a servant receives money on his employer's account, and embezzles it, he is guilty of felony, although they had

Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping is no embezzlement.¹ And if a person whose duty it is to receive money for his employer receives money, and renders a true account of all the money he has received, he is not guilty of embezzlement if he absconds and does not pay over the money; but if he had received the money, and had rendered an account in which it was omitted, this would be evidence to show that he had embezzled the amount.² Where a servant, in the discharge

no right to it, and were wrong-doers in receiving it. *Rex v. Wellings*, 1 Car. & P. 454, 457; *Rex v. Beacall*, 1 Car. & P. 312.

Entries correct, but Less paid over. — B. was employed to drive a coach, and it was his duty to inform a bookkeeper how much he had received during the day; the bookkeeper then entered the amount in a book and on the day-bill. B.'s duty then was to pay over the amount he had received to his employer. B. gave true account to the bookkeeper who made these entries, but B. accounted to his employer for smaller sums, and paid them over to him, saying that they were all he received. *Held*, that this was embezzlement. *Reg. v. White*, 8 Car. & P. 742.

Entry in Ledger Remittance. — No Entry of Receipt. — The prisoner was convicted of embezzlement. It was his duty to receive remittances from the customers of his master, to enter them to the credit of such customers in a day or cash book, and to enter the whole amount received by him on the credit side of a banker's deposit account, and to pay in the amount to the credit of the prosecutors with their bankers; and it was his duty afterwards to post the amounts in a ledger, which contained the account of the different customers. The prisoner received a remittance, which he appropriated to his own use; he made an entry of this amount in the ledger to the credit of the customer, but he made no entry of its receipt. *Held*, that the conviction was right, as the entry made in the ledger did not exempt the prisoner from the operation of the 47th section of the 7 & 8 Geo. IV. c. 29. *Reg. v. Lister, Dears. & B. C. C.* 118; 26 L. J. M. C. 26; 2 Jur. N. S. 1124.

Receipt by Servant by Virtue of Employment. — Embezzlement of money by a servant not authorized to receive it, was not within 7 & 8 Geo. IV. c. 29, sect. 47; *Rex v. Thorley*, 1 M. C. C. 343. If a servant generally employed by his master to receive sums of one description, and at one place

only, is employed by him in a particular instance to receive a sum of a different description, and at a different place, this latter sum was to be considered as received by him by virtue of his employment, within 39 Geo. III. c. 85; *Rex v. Smith, R. & R. C. C.* 516.

Grounds of Defence. — One who has collected money under color of authority for an employer, cannot defend a prosecution for embezzlement in not paying it over to him, on the ground that he was not authorized. *Ex parte Ricord*, 11 Nev. 287.

1. *Reg. v. Norman*, 1 Car. & M. 501.

A different rule, however, prevails in some of the States, where it is *held* that a claim against his principal, which the agent knows to be unfounded, raises no presumption that the withholding of the money was to save himself from loss, and not with felonious intent. *State v. Reilly*, 4 Mo. App. 392.

2. *Reg. v. Creed*, 1 C. & K. 63; *Rex v. Hodgson*, 3 Car. & P. 422; *Reg. v. Winnall*, 5 Cox, C. C., 326.

Entries Correct, but no Remittance. — It was the duty of a clerk to receive moneys daily at N., to enter all such moneys so received in a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the moneys, but he did not remit them to L. as was his duty. *Held*, no embezzlement. *Rex v. Hodgson*, 3 C. & P. 422.

Goods given by Master to Servant to sell.

— Servant deferring Payment. — A person hired by a market-gardener to do a day's work, was requested by him to take some vegetables to market, sell them, and bring back the money; the prisoner thereupon sold four pots of potatoes, and received the money. He sold four other pots, but did not receive the money. On his return to his master, he stated correctly the price he sold the potatoes for, but said that he would settle with him on a subsequent day, as he had not received the money, and did not offer the sum received, or say he had

of his regular duty, receives money belonging to and for his master, and enters a less sum on the books than he received, and converts the balance to his own use, he will be guilty of embezzlement;¹ and if an entry is made on the books of the proper amount, but a smaller sum accounted for to the employer, the servant will be guilty of embezzlement.² But if a clerk receives money from his master to pay away on his master's account, and he states in his account that one of the payments was to a greater amount than it really was, this will not be embezzlement.³

Under the English statute,⁴ embezzlement of money by a servant must be in respect of money delivered to or received, or taken into possession by the servant for, or in the name of, or on the account of, his master.⁵

A clerk may commit more than one embezzlement of his employer's money, and, if he does, he may be separately indicted for each separate offence; but, if the money from different parties was all collected before any portion of it was converted, then

been paid for a part, and subsequently made the excuse, and never paid any part of the money. *Held*, that this was not embezzlement, unless he, when he said he had not received the money, meant that he had not received any part of it. *Reg. v. Winnall*, 5 Cox, C. C., 326.

1. See *Reg. v. Guelder*, Bell, C. C., 284; s. c., 8 Cox, C. C., 372; 30 L. J. M. C. 34; 6 Jur. N. S. 1214; 3 L. T. 337; *Rex v. Hall, R. & R. C. C.* 463; s. c. 2 Stark. 67; *Rex v. Hammon, R. & R. C. C.* 221; s. c. 2 Leach, C. C., 1083; 4 Taunt. 304.

Entry of Smaller Sum.—If a servant, immediately on receiving a sum for his master, enters a smaller sum in his master's books, and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry; and it will make no difference though he received other sums for his master on the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry. *Rex v. Hall, R. & R. C. C.* 463; 2 Stark. 67.

Entry in Ledger by Banker's Clerk.—A banker's clerk taking money from the till, intending to embezzle it, is guilty of felony, although the check of a customer is left in lieu of it, if that customer has really no cash in the banker's hands, though both he and the banker may suppose he has, and if the check is drawn by the customer, not to pledge his own credit with the bank or draw out money of his own, but to draw out money the prisoner falsely pretends to have in his name. *Rex v. Hammon, R. & R. C. C.* 221; 2 Leach, C. C., 1083; 4 Taunt. 304.

Entries in Books.—Fraudulently obtaining Receipts.—G. was convicted upon an indictment for embezzlement. It was his duty, as the assistant overseer of a township, to collect the rates; and the course was, upon receipt, to pay them into a bank to the account of the overseer's receipts for the same sums so paid. It was his duty also to enter the rates when received in a book; and at the audit he charged himself by the entries in his book, and discharged himself by the receipts of the overseers. Having misappropriated certain moneys, which he duly entered in the book when received, he fraudulently obtained from the overseers receipts for the several sums stated in the indictment by falsely telling that he had paid the money into the bank. These receipts he produced to the auditor, and so deceived him as to his having handed over the moneys. *Held*, that he was rightly convicted, and that the fact of his entering the sums, when received, in his book, did not alter the character of his offence. *Reg. v. Guelder*, Bell, C. C., 284; s. c., 8 Cox, C. C., 372; 30 L. J. M. C. 34; 6 Jur. N. S. 1214; 3 L. T. 337.

2. *Reg. v. White*, 8 Car. & P. 742.
3. *Rex v. Murray*, 5 Car. & P. 145; 1 Mood. C. C. 276.
4. 24 & 25 Vict. c. 96, s. 68.
5. *Reg. v. Thorpe, Dears. & B. C. C.* 62; s. c., 8 Cox, C. C., 29; 27 L. J., M. C. 264; 4 Jur. N. S. 466; *Reg. v. Harris, Dears. C. C.* 344; 6 Cox, C. C., 363; 2 C. L. R. 464; 23 L. J. M. C. 110; 18 Jur. 408; *Reg. v. Beaumont, Dears. C. C.* 270; s. c., 6 Cox, C. C., 269; 2 C. L. R. 614; 23 L. J. M. C. 54; 18 Jur. 159; *Reg. v. Cullum*, 2 L. R. C. C. 28; 42 L. J. M. C. 64; 28 L. T. 571; 21 W. R. 687; *Reg. v. Gale*, 2 Q. B. D.

petitioner committed but one offence.¹ It seems that a servant is liable on an indictment for embezzlement only for the particular sum taken; and it must be shown that a particular sum received, or a part thereof, has been converted to his own use.²

V. Agents. — 1. *Who are Agents: Generally.* — The word "agent," as employed in the statute, is used in its popular sense, meaning one who undertakes to transact some business, or to manage some affair, for another, by authority and on account of the latter, and to render an account of it. It imports a principal, and implies employment, service, delegated authority to do something in the name and stead of the principal; and it does not include a mere naked bailee, who holds possession wholly and exclusively for the benefit of the bailor.³

141; s. c. 46 L. J. M. C. 134; 35 L. T. 526; 13 Cox, C. C., 340.

Thus, a clerk intrusted to receive money at home from out-door collectors, received it abroad from out-door customers. *Held*, that such a receipt of money might be considered by virtue of his employment, within 39 Geo. III. c. 85, although it was beyond the limits to which he was authorized to receive money for his employers. *Rex v. Beechey, R. & R. C. C.* 319. But where A. was employed to lead a stallion, and he was to charge 30s. a mare, and not to take less than 20s., he received the sum of 6s. for the covering of a mare, *held*, no embezzlement, as the sum was not received by virtue of his employment. *Rex v. Snowley*, 4 Car. & P. 390.

1. *Ex parte Ricord*, 11 Nev. 287.

2. See *Reg. v. Chapman*, 1 C. & K. 119; *Rex v. Tyers, R. & R. C. C.* 402.

Thus a person received £7. 2s. 6d. in his capacity of a clerk to overseer of a parish, and made an entry in a book of the receipt of that sum accordingly, and placed money with other sums in his possession, the entry of £7. 2s. 6d. was afterwards erased, and £5. 6s. 10½d. substituted for it, and the prisoner only accounted to the parish officers for £5. 6s. 10½d. On the indictment for embezzling £1. 15s. 7d., and conviction thereon, *held*, that as the prisoner might have paid over the whole of what he received for the £7. 2s. 6d. and have taken the £1. 15s. 7d. from the other moneys he received, he was improperly convicted. *Rex v. Tyers, R. & R. C. C.* 402.

Particular Sum or Part thereof must be Proved. — It was the duty of a clerk to receive money for his employer, and pay wages out of it, and to make entries of all moneys he received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he from time to time paid over his balances to his employer. The clerk having entries of weekly payment in his

first book amounting to £25, he entered them in the second book as £35; and two months after, in accounting with his employer, by these means made his balance £10 too little, and paid it over accordingly. *Held*, that he could not be convicted of embezzlement, without it being shown that he had received some particular sum on account of his employer, and had converted either the whole or a part of that sum to his own use. *Reg. v. Chapman*, 1 C. & K. 119.

3. *Pullam v. State*, 78 Ala. 31; s. c., 56 Am. Rep. 21; *State v. Shadd*, 80 Mo. 358; s. c., 7 Cr. L. Mag. 795; *State v. Healy*, 48 Mo. 531; *State v. Barter*, 58 N. H. 604; s. c., 4 Cr. L. Mag. 459; *Campbell v. State*, 35 Ohio St. 70; s. c., 1 Cr. L. Mag. 528; *Rex v. Hartley, R. & R.* 139; Ala. Code, sect. 4377.

Who is an "Agent" within the Statute. — One may be an agent within the statute of embezzlement (Gen. Stat. ch. 257, sect. 8), who is not engaged in a general or continuous agency or service, but is authorized on a single occasion by the maker of certain notes to exchange them in renewal of others. *State v. Barter*, 58 N. H. 604; s. c., 4 Cr. L. Mag. 459.

The person authorized to make the exchange may be an agent for that purpose, although the notes are made for his accommodation, and he is acting for himself as well as for his maker. *State v. Barter*, 58 N. H. 604; s. c., 4 Cr. L. Mag. 459.

Where Money is intrusted to one to purchase Land, and is converted to the private use of the person so intrusted with it, this constitutes embezzlement. *State v. Healy*, 48 Mo. 531. And the case is not changed by reason of the fact that the title to the land which he contracted to purchase was in litigation, and for that reason the money could not be paid over to the vendor.

Person employed to collect Notes. — A person having in his possession certain

To render a person a servant, and to sustain the charge of embezzlement, the agent, etc., must be in the regular employment of the master, and it must be by virtue of such employment that the money or property appropriated comes to his hands. A mere casual employment does not fall within the statute.¹ When a person is employed to render special services as agent for another, his agency ceases with performance of the service and payment of the compensation therefor, unless there is an express understanding between them, or it may be implied from the circumstances, that, as to the matters growing out of the original purpose of the agency, the relations between the parties survived; and as to this question, the jury is to decide.² Where the relation of master and servant does not exist, there can be no embezzlement, because, where parties are conducting independent business, a misappropriation of goods or moneys coming into their hands by reason of such business, but which belongs rightfully to another, is not embezzlement.³

promissory notes as indorsee, who employs an agent to collect the same, and account to him for the proceeds, is an employer within the meaning of the act against embezzlement; and upon the trial of the person so employed, for the embezzlement of the proceeds, it is no defence to show that his employer was bound to account to another for the moneys. *Campbell v. State*, 35 Ohio St. 70; s. c., 1 Cr. L. Mag. 528.

One who auctions off "Pools" upon a Horse-Race, and receives the money of the purchaser, and gives a receipt therefor, is the agent of such purchaser; and if he converts such money to his own use, with intent to deprive the owner of its use and value, he is guilty of embezzlement, although the money was placed in his hands for an immoral purpose. But where such agent is to receive a per cent of the money bid, and placed in his hands, such per cent should be deducted from the amount, and the offence will not be a felony, if such deduction reduces it below thirty dollars. *State v. Shadd*, 80 Mo. 358; s. c., 7 Cr. L. Mag. 795.

Captain of Barge employed to sell Coal.—In *Rex v. Hartley*, R. & R. 139, the owner of a colliery employed the prisoner as captain of one of the barges, to carry out and sell coal, and paid him for his labor by allowing him two-thirds of the price for which he sold the coal, after deducting the price charged at the colliery. He was held to be an agent. The court said, "He had no interest in the boat or coal; he was merely the servant of the owner, employed to take the coal to market to sell, and bring back the money to his employer; and the mode for paying

him for his labor was by allowing him a fixed proportion of the profit made on the sale, beyond the price charged at the colliery. This did not vary the nature of the employment, nor make him less a servant, than if he had been paid a certain price per caldron or day."

1. *Johnson v. State*, 9 Baxt. (Tenn.) 279; s. c., 3 Cr. L. Mag. 883.

2. *People v. Treadwell*, 69 Cal. 226; s. c., 8 Cr. L. Mag. 354; 10 Pac. Rep. 502; Cal. Code, 2355.

3. See *Com. v. Young*, 75 Mass. (9 Gray) 5; *Rex v. White*, 4 Car. & P. 46; *Reg. v. Cosser*, 13 Cox, C. C. 187; *Rex v. Mason*, D. & R. N. P. C. 22.

Thus, a mechanic receiving leather to be made into shoes at his own shop, is not an agent or servant of the person furnishing the leather within the meaning of Mass. Rev. Stat. ch. 126, sect. 29, against embezzlement. *Com. v. Young*, 75 Mass. (9 Gray) 5.

Whilst in treaty with Messrs. G. & P. for the sale and transfer of a public-house license, the prisoner was required by them to give security for the purchase-money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which the latter was to deposit with G. & P. by way of security, and not negotiate or use for any other purpose, and if the transfer was not effected, was to return them to the prosecutor. The prisoner, instead of depositing them with G. & P., converted two of them to his own use. *Held*, that he was not an agent within sect. 75 of 24 & 25 Vict. c. 96, and could not be convicted under that section. *Reg. v. Cosser*, 13 Cox, C. C., 187.

2. *What constitutes Embezzlement by; Intent; Possession of Property.*—To warrant the conviction of an agent for the embezzlement of his principal's money, four facts must be established beyond a reasonable doubt: to wit, first, the agency whereby the defendant was charged with the duty of receiving the money; second, his receipt of his principal's money; third, that he received it in the course of his employment; and, fourth, that he embezzled, misapplied, or converted it to his own use.¹

A. placed valuable Securities in the Hands of B., with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." No accident did happen to A., and the proceeds were by B. converted to his own use. *Held*, that B. was not indictable under 52 Geo. III. c. 63 (repealed); and it seemed that he would not be so under 7 & 8 Geo. IV. c. 29, sect. 49; *Rex v. White*, 4 C. & P. 46.

Where a Party established a Savings Bank, consisting of 130 members, each of whom paid a weekly subscription of 2s. 1d., the odd penny being paid to him for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by a lottery, consisting of 129 blanks and one prize amounting to £13, which was to go to the holder of the fortunate ticket, and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of £10. 8s., without receiving any benefit therefrom. *Held*, that he was not indictable under the 52 Geo. III. c. 63, for embezzling the money as an agent, or as a person having the possession of money for safe custody. *Rex v. Mason, D. & B. N. P. C.* 22.

1. See *Washington v. State*, 72 Ala. 202; s. c., 4 Cr. L. Mag. 611; *ex parte Hedley*, 31 Cal. 108; *State v. Goode*, 68 Iowa, 593; *Lee v. Com. (Ky.)*; 8 Cr. L. Mag. 354; 1 S. W. Rep. 4; *Com. v. Foster*, 107 Mass. 221; *State v. Healy*, 48 Mo. 531; *Campbell v. State*, 35 Ohio St. 70; s. c., 1 Cr. L. Mag. 528; *Brady v. State*, 21 Tex. App. 659; *Webb v. State*, 8 Tex. App. 310; s. c., 1 Cr. L. Mag. 802; *Rex v. Prince*, 2 Car. & P. 517; *Reg. v. Tatlock*, L. R. 2 Q. B. Div. 157; s. c., 46 L. J. M. C. 7; 35 L. T. 520; 13 Cox, C. C., 328. What constitutes embezzlement cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity. *Lee v. Com. (Ky.)*; 8 Cr. L. Mag. 838; 1 S. W. Rep. 4.

Agents intrusted in Course of Business.

—The 52 Geo. III. c. 63, applied only to persons to whom securities were intrusted in the exercise of their functions or business. *Rex v. Prince*, 2 Car. & P. 517.

An Insurance Broker was employed to

effect three policies upon a vessel, which he did, advancing the premiums. A total loss having occurred, the broker received the necessary documents to collect the moneys insured, and thereupon collected the amounts due upon two of the policies, by checks payable to his order, which he paid into his own bank to his own credit. The premiums advanced by the broker and his commission on effecting the policies and receiving the losses were unpaid to him. The broker, on being asked for the moneys after they had been received, said they were not due until a future day, and subsequently made excuses, and did not pay over the sums received on account of the losses to the prosecutor. The jury, in answer to a question left to them, found that the policies had been intrusted to the broker for a special purpose; viz., that he should receive the moneys due on them, and forthwith pay them over to the prosecutor. There was no evidence to support such a finding in the case. *Held*, that there was a miscarriage, and, as the court had no power to direct a new trial, the conviction should be quashed. *Reg. v. Tatlock*, L. R. 2 Q. B. Div. 157; 46 L. J. M. C. 7; 35 L. T. 520; 13 Cox, C. C. 328.

Direction as to Application of Money received.—An agent was employed to sell goods on commission, and, as soon as he received moneys from customers, he was to remit them to his employers. During his employment, his employers wrote to him, "We will send H., B., & P. their bills at the end of the month, and the same day that you receive money from the customers you remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month." *Held*, that this letter was not a direction in writing as to the application or disposition of moneys received by the agent within sect. 75 of the 24 & 25 Vict. c. 96. *Reg. v. Brownlow*, 39 L. T. 479.

Sale by Agent after Authority countermanded.—If any chattel, or valuable security, is intrusted to any broker or agent originally for the purpose of sale, but the authority to sell it is afterwards counter-

In order to constitute an embezzlement of money collected by an agent, and not paid over, there must be a felonious intent at the time of the collection to deprive the owner thereof.¹

3. *Working on Commissions.*—Not every breach of trust is embezzlement. Thus a person having a mere commission to sell does not render himself guilty of embezzlement by converting the money obtained to his own use;² and one gratuitously engaging to procure the discount of a bill, not being himself in any business in which such employment regularly falls, cannot be convicted of embezzling the bill intrusted to him for the purpose of such discount.³

An agent selling goods on commission,⁴ or collecting claims on commission, is not liable for embezzlement, if he converts the

manded, and the broker or agent, notwithstanding that countermand, sells the goods in violation of the orders of his principal, such broker or agent might be convicted of misdemeanor, under 7 & 8 Geo. IV. c. 29, sect. 49; *Reg. v. Gornn*, 3 Cox, C. C., 64.

Conversion of Money to buy Land.—An agent who converts to his own use money intrusted to him by his principal for the purchase of land, is guilty of embezzlement. And the case is not altered by reason of the fact that the land contracted for proved to be in litigation, and that the title was, for that cause, in abeyance. *State v. Healy*, 48 Mo. 531.

Matters of Defence.—When an agent is prosecuted for the embezzlement of his employer's money, in a certain county, wherein he had possession of the money, and in which it was his duty to account to his employer upon demand being made, it is no defence to show that he expended the money for his own use in another county. *Campbell v. State*, 35 Ohio St. 70; s. c. 1 Cr. L. Mag. 528.

What constitutes the Offence.—The larceny of an ox being made a felony (Alabama Code, sect. 4328), without regard to its value, its embezzlement by an agent who acquired possession by virtue of his employment or agency (Ala. Code, sect. 4377), is also a felony. *Washington v. State*, 72 Ala. 202; s. c., 4 Cr. L. Mag. 611.

Where one employed by a maker of a promissory note, to sell it and receive the proceeds and pay them over specifically to a third person, fraudulently converts them to his own use, it amounts to embezzlement. And the fact, that, upon receiving the note, he gave to the maker his own note for the same amount, will make no difference, if it was agreed that his note should be deposited with the third person as a receipt, to be given up to him upon his paying over the proceeds. *Com. v. Foster*, 107 Mass. 221.

Where one by agreement received of an-

other a watch to trade for a wagon, and was to have five dollars as compensation for his services, but converted the watch to his own use, *held*, that this was embezzlement. *State v. Foster*, 37 Iowa, 404.

Under the Iowa Code, sect. 3909, embezzlement from a corporation may be committed by an agent, though he be under sixteen years of age; and an allegation in an indictment that he was over that age was superfluous, and a proof of it was not necessary to conviction. *State v. Goode*, 68 Iowa, 593.

In Missouri.—Embezzlement by the agent of an individual, or of a private company, is not an offence for which the agent can be indicted under the Missouri statute of 1836, concerning crimes and punishments. *Hamuel v. State*, 5 Mo. 260.

To constitute Embezzlement under the Code of Texas, the conversion must be of money or other property of the principal or employer, and it must have come into the possession of the agent or employee by virtue of his agency or employment. Evidence *held* insufficient to support a conviction for embezzlement, inasmuch as it does not establish the necessary fact that the money converted was the property of the employer. *Brady v. State*, 21 Tex. App. 659.

1. *State v. Reilly*, 4 Mo. App. 392; *United States v. Sander*, 6 McL. C. C. 598.

Thus, an agent authorized to receive letters of another cannot be charged with embezzling one which he received as such agent, unless he took it with a criminal intent. *United States v. Sander*, 6 McL. C. C. 598.

2. *Regina v. Goodbody*, 8 Car. & P. 665.
3. *Rex v. Prince*, M. & M. 21; s. c., 2 Car. & P. 517.

4. *Com. v. Libbey*, 52 Mass. (11 Metc.) 64; *Miller v. State*, 16 Neb. 179; s. c., 5 Cr. L. Mag. 910.

Working on Commission.—In *Com. v. Libbey*, 52 Mass. (11 Metc.) 64, the court

money so received to his own use,¹ because in all cases where a person receives money, a portion of which belongs to himself as a commission on the whole amount, he is not guilty of embezzlement, though he converts the whole to his own use.²

4. *Collecting Agents.*—While it is true that an agent who collects claims for commission on the sums collected, and pursues the calling as a separate business, is not liable for embezzlement if he converts the money so received to his own use;³ yet

said that, "In case of a domestic servant, and, to some extent, in a case of special agency, the right of property and the possession continue in the principal, and a disposal of the property would be a violation of the trust, and an act of embezzlement. But cases of commission merchants, auctioneers, and attorneys, authorized to collect demands, stand upon a different footing; and a failure to pay over the balance due to their employers upon their collection will not, under the ordinary circumstances attending such agency, subject them to the heavy penalties consequent upon a conviction of the crime of embezzlement."

In *Miller v. State*, 16 Neb. 179; s. c., 5 Cr. L. Mag. 910, the plaintiff in error was indicted for the embezzlement, as agent, of certain moneys belonging to the M. M. Company, a corporation, received by him on sales of their machinery. The contract of agency, introduced in evidence on the part of the State, contained the following clause: "To remit to the said party of the first part the proceeds of each and every sale as early as the day following the delivery of the machinery to the purchaser. If the said sale was for all cash, the full commissions, as per article 3d, may be retained, or if a time sale, the full settlement for the same shall be remitted, less the proportion of commissions due on the cash received; the balance of the commission shall be due *pro rata* as the cash is paid on the notes. If any cash received on sales of machines is not remitted, as agreed in this section, the party of the second part shall not only be legally liable, but agrees that the settlement shall be made on the time sale basis, and ten per cent interest shall be paid on all cash so retained." *Held*, that money so retained was not embezzled, and that no conviction could be had therefor.

But it has been said that if such an agent receives in payment for goods so sold a check payable to his own order, and fraudulently converts it or its proceeds, he is guilty of embezzlement under the statute, notwithstanding a custom between him and his employer for him to deposit such checks in his own name, and send his employer his own checks in lieu thereof. *Com. v.*

Smith, 129 Mass. 104; s. c., 2 Cr. L. Mag. 707.

On the trial of an agent employed to sell goods, and authorized to receive payment, for embezzlement of money so received,—*Mass. Gen. Stat.*, ch. 161, sec. 38,—the fact that he is paid in part by commissions on the sales made, is immaterial. *Com. v. Smith*, 129 Mass. 104; 2 Cr. L. Mag. 706.

1. See *Com. v. Libbey*, 52 Mass. (11 Metc.) 64; *Com. v. Stearns*, 43 Mass. (2 Metc.) 343; *State v. Kent*, 22 Minn. 41; *Miller v. State*, 16 Neb. 179; s. c., 5 Cr. L. Mag. 910; *Reg. v. White*, 8 Car. & P. 742; *Rex v. Carr*, R. & R. 198; *Reg. v. McDonald*, 1 Leigh & C. 85; *Reg. v. May*, 1 Leigh & C. 13.

Collecting on Commission.—Under a statute punishing embezzlement of the "property of another," a collector employed under an agreement that, as compensation for his service as general collector of moneys in question, he shall be entitled to a percentage of all such moneys, no matter who collects them, cannot be convicted, for this agreement makes him a joint owner of the fund; hence it is not the property of another. *State v. Kent*, 22 Minn. 41. In *Reg. v. May*, 1 Leigh & C. 13, the prisoner was employed by an iron company to obtain orders at M., and was to receive a commission upon the orders obtained. It was his duty to account to the company for any money which he might receive for them, but it did not appear that it was his duty to receive money for them. It was *held* that he was not a clerk or servant within the statute, and was not held for embezzlement. In *Reg. v. McDonald*, 1 Leigh & C. 85, the servant was partly paid by salary and partly by percentage on the profits, but he was not to contribute to the losses, and had no control over the management of the business. The court *held* him to be a servant within the meaning of the statute. *Rex v. White*, 8 Car. & P. 742; *Rex v. Carr*, R. & R. 198.

2. *Com. v. Libbey*, 52 Mass. (11 Metc.) 64.

3. *Com. v. Libbey*, 52 Mass. (11 Metc.) 64; *Com. v. Stearns*, 43 Mass. (2 Metc.) 343; *State v. Kent*, 22 Minn. 41; *Reg. v. White*, 8 Car. & P. 742; *Reg. v. McDonald*, 1 Leigh & C. 85; *Reg. v. May*, 1

when a person not engaged in the business of collecting moneys for others as an independent employment is employed to collect moneys for another, subject to his direction and control, the relation of principal and agent is thereby created; and in such case the agent may be guilty of embezzlement, although he was to receive for his services a percentage of the moneys collected.¹

5. *Stockbrokers*. — Stockbrokers, it seems, may be convicted of embezzlement where they receive money in the course of their employment which they fraudulently convert to their own use.²

6. *Railroad and Express Agents*. — Railroad and express agents who convert to their own use moneys which come into their possession as such agents, and by virtue of their employment, and in the discharge of their duties, are guilty of embezzlement.³

Leigh & C. 13; *Rex v. Carr*, R. & R. 198.

A person who is employed to collect bills for the proprietors of a newspaper establishment, and converts to his own use the money which he collects for them, is not such an agent or servant as is intended by Mass. Rev. Stat., ch. 126, sect. 29, which prescribes the punishment of embezzlement by agents and servants. *Com. v. Libbey*, 52 Mass. (11 Metc.) 64.

In *Missouri*. — The statute remedy (Wagn. Stat. 170b, sects. 7, 25) for an agent's failure to pay over collections to the commissioners at the North-western Insane Asylum, held to be concurrent with the common-law remedy. *State v. Bittinger*, 55 Mo. 596.

1. *Campbell v. State*, 35 Ohio St. 70; s. c., 1 Cr. L. Mag. 528.

General Statute Kentucky, c. 29, art. 12, sect. 2, punishing person who, being intrusted with money or other property (which might be the subject of larceny) to be delivered to another, embezzles, or fraudulently converts it to his own use, does not apply to the act of an agent in converting money collected by him for his principal. And therefore, where a church appoints one as its agent to solicit and collect subscriptions for repairing the church, and the agent collects money from various persons, which he fails to pay over to the church, held, he cannot be indicted under the statute for embezzlement. The money could not be considered as paid to one to be delivered to another; but payment to the agent was equivalent to payment directly to the church. *Shelburn v. Com.* (Ky.) 9 Cr. L. Mag. 398; s. c., 3 S. W. Rep. 7.

2. See *Reg. v. Christian*, L. R. 2 C. C. 94; s. c., 12 L. J. M. C. 26; 29 L. T. 654; 22 W. R. 132; 12 Cox, C. C., 502; *Reg. v. Crommie*, 55 L. T. 580; s. c., 8 Cr. L. Mag. 355.

A Stockbroker received an Order to buy Stock, together with a check for "cover

and commission;" he did not buy, but paid the check into his bank, and spent the money. Held, rightly convicted under 24 & 25 Vict. c. 96, sect. 75. *Reg. v. Crommie*, 54 L. T. 580; s. c., 8 Cr. L. Mag. 355.

A stock and share dealer was employed by a lady to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in checks for round sums. On one occasion he wrote to her, "I enclose a contract-note for £300 Japanese bonds at 112, £336;" and the contract-note ran, "sold to Mrs. S. £300 J. at 112, £336," and was signed by him. She wrote in reply, "I have just received your note and contract-note for the Japanese shares, and enclose a check for £336 in payment." The dealer never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the check. Held, that the letter was a direction in writing to apply the proceeds of the check to pay for the bonds, if they had still to be paid for, within the meaning of 24 & 25 Vict. c. 96, sect. 75; and that he was rightly convicted of misdemeanor under that section. *Reg. v. Christian*, 2 L. R. C. C. 94; 12 L. J. M. C. 26; 29 L. T. 654; 22 W. R. 132.

Written Direction. — An indictment under 7 & 8 Geo. IV. c. 29, sect. 49 against a broker for embezzlement of a security for money, must have alleged a written direction to him as to the application of the proceeds. *Reg. v. Golde*, 2 M. & Rob. 425.

3. See *ex parte Hedley*, 31 Cal. 108; *State v. Baldwin*, 70 Iowa, 180; s. c., 9 Cr. L. Mag. 115; *State v. Porter*, 26 Mo. 201.

Defendant was charged with embezzling the funds of a railway company; but it appeared from the evidence that he had been a trusted employee of the company for many years, and was a man of unblemished reputation for honesty, and that the circum-

VI. By Directors, Members, and Officers of Corporations, etc. — 1. By Officers generally. — It is a general rule that if any officer, agent, or clerk of an incorporated company or institution, or of any city, town, or county, or of any clerk, agent of any private person or co-partnership, or if any consignee or bailee of money or property, shall employ or fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer, or the proceeds of such property after sale which shall have come into his possession, or shall be under his control by virtue of such office, agency, or employment, he will be guilty of embezzlement.¹ It is a breach of trust which constitutes the gist of the offence. It is not every officer of an incorporated institution who is held to be liable under statute, but only such officers, clerks, or agents as have the money of their principal or employer (the institution) which shall have come into their possession or shall be under their control by

stances were such that others might have embezzled the money, and that the only evidence against him was the fact that he tried for a time to conceal the loss of the money; but that fact he explained in a manner consistent with honest motives. *Held*, that a verdict of guilty could not be sustained. *State v. Baldwin*, 70 Iowa, 180; s. c., 9 Cr. L. Mag. 115.

In an indictment against a station-agent of a railroad company for the embezzlement of money which came into his hands, his suppression of way-bills is competent evidence from which the jury may infer an attempt to defraud; but where the testimony shows that he was a person of good character, and that others in the employ of the company had access to the money also, his explanation of his conduct in keeping back the way-bills, for the purpose of discovering the theft, should be accepted by the jury as true. *State v. Baldwin*, 70 Iowa, 180; s. c., 9 Cr. L. Mag. 115.

It is not necessary that the Prosecution should prove by direct and positive evidence the conversion charged it, without the consent of a railroad corporation, the alleged master, or employer. *State v. Porter*, 26 Mo. 201.

An Agent authorized to draw "Telegraphic" Checks. — When an agent of an express company, who was authorized to draw "telegraphic" checks on the company for its use, and was furnished with a secret word to identify them, drew such checks, and appropriated the money to his own use, which he was not authorized to do, he was *held* to have received the money in the course of his employment. *Ex parte Hedley*, 31 Cal. 108.

3. *Henderson v. Gilliam*, 12 Tex. 74; *Castro v. Gentiley*, 11 Tex. 31; *Hanchett*

v. Gray, 7 Tex. 552. See *Com. v. Tuckerman*, 76 Mass. (10 Gray) 173; *Coats v. People*, 22 N. Y. 245; *Hamilton v. Van Hook*, 26 Tex. 305; *Reg. v. Stainer*, L. R. 1 C. C. 230; s. c., 21 L. T. 758; 18 W. R. 439.

Clerk of a Friendly Society. — It is embezzlement in the clerk of a friendly society fraudulently to withhold the rents of a house collected in the course of his duty as clerk. It is no defence that the business of the society has not been conducted according to the statute. *Reg. v. Miller*, 2 Mood. C. C. 249.

An officer of a friendly society, some of the rules of which were in restraint of trade, embezzled its money. *Held*, that the rules in restraint of trade are not criminal, although they may be void as being against public policy, and that a society having such rules is entitled to the protection of the criminal law for its funds, and consequently, that the officer might legally be convicted of embezzlement. *Reg. v. Stainer*, 1 L. R., C. C. 230; s. c., 21 L. T. 758; 18 W. R. 439.

The Treasurer of a Railroad Corporation is an "officer, agent, clerk, or servant, of an incorporated company," within the statute relating to embezzlement by such persons. *Com. v. Tuckerman*, 76 Mass. (10 Gray), 173, 196.

In order to sustain an indictment under the statute relating to embezzlements (2 N. Y. Rev. Stat. 678, sec. 59, as amended by Laws 1874, ch. 207), against the treasurer of a corporation, for the alleged conversion to his own use of money of the corporation, it must be made to appear that the money in question came into his possession or under his care by virtue of his office. *Bartow v. People*, 78 N. Y. 377; s. c., 1 Cr. L. Mag. 802.

virtue of said office, agency, or clerkship.¹ Embezzlement cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity.²

2. *By Servants.*—The servants and members of a corporation or society will be guilty of embezzlement where they appropriate to their own use moneys or property coming into their hands as servants or members of the corporation or society in the course of their employment or duty.³

Upon the trial of such an indictment it appeared that B., the prisoner, was treasurer of a savings institute, and was also cashier of a bank, the two corporations occupying the same room, and doing business over the same counter. By the by-laws of the institute it was provided that its president should have charge of its securities and property; also that the money of the institute should be deposited with the bank; it was so deposited, credit being given to the institute. A bond of a thousand dollars belonging to the institute was placed in the hands of F., its attorney, for collection; by whom, did not appear. F. collected the bond, and retained the money for the purpose of making another investment, depositing it to his own credit in said bank; subsequently he drew, on his own check, six hundred dollars from the bank; this, with other moneys, all amounting to fifteen hundred dollars, he placed in a package addressed to B., whether officially or personally did not appear. This package was delivered to S., who handed it to B. on the street after banking hours. B., in accordance with the custom of business of the bank, was going to New York with a package of money to deposit with its correspondent bank; he deposited both packages there to the credit of his bank, and on the next day wrote to F., acknowledging receipt of the money, using the letterhead of the bank, and signing in his usual manner as cashier. The money so deposited in New York was drawn out by the bank, which subsequently suspended. This item of fifteen hundred dollars was not entered on the books of the institute, or credited to it on the bank-books, and it did not appear that F. was credited with it on the books of either corporation. *Held*, that the evidence failed to show, as matter of law, that the money came into the hands of B. as treasurer of the institute, and that a charge to that effect was error. *Bartow v. People*, 78 N. Y. 377; s. c., 1 Cr. L. Mag. 802.

The Secretary of a Company.—A. was secretary and cashier to a company calling themselves "The R. M. & H. Coal Co. (Limited);" the number of members exceeded twenty, but no certificate of incorporation was put in evidence. *Held*, that

A. was rightly convicted of embezzlement as servant of B. and others, there being no evidence which ought to have been left to the jury that the company was incorporated. *Reg. v. Frankland*, L. & C. 276; 9 Cox, C. C., 475; 32 L. J. M. C. 69; 9 Jur. N. S.; 7 L. T. 799; 11 W. R. 346.

The Clerk of an Institution, who has nothing to do with its fiscal affairs, but who happens to be in possession of its money, or has it under his guard, otherwise than by virtue of his office or clerkship, is not indictable for its conversion to his own use under article 771 of the Penal Code. *State v. Johnson*, 21 Tex. 776.

Under the New York Statute, it seems, by "incorporated companies" is intended only those which are composed of individuals associated together for private purposes. (2 R. S. 678, sect. 59; 3 R. S. (5th ed.) 975; *Coats v. People*, 22 N. Y. 245.

1. *State v. Johnson*, 21 Tex. 776.
2. In a case where a party is upon trial for embezzlement, his report that he had—meaning that he owed the corporation—a certain sum of money at the time of his election as treasurer, should have been submitted to the jury, for their determination, whether it was before or after such election that the money was spent by him. *Lee v. Com. (Ky.)*, 8 Cr. L. Mag. 828; 1 S. W. Rep. 4.

3. See *Reg. v. Atkinson*, Car. & M. 525; s. c., 2 M. C. C. 278; *Reg. v. Bren*, L. & C. 346; s. c., 9 Cox, C. C., 398; 33 L. J. M. C. 59; 9 L. T. 452; 12 W. R. 107; *Reg. v. Proud*, L. & C. 97; s. c., 9 Cox, C. C., 22; 31 L. J. M. C. 71, 142; 5 L. T. 331; 10 W. R. 62; *Reg. v. McDonald*, L. & C. 85; s. c., 9 Cox, C. C., 10; 31 L. J. M. C. 67; 7 Jur. N. S. 1127; 5 L. T. 330; 10 W. R. 21; *Reg. v. Tyree*, L. R. 1 C. C. 177; 38 L. J. M. C. 58; 19 L. T. 657; 17 W. R. 334; 11 Cox, C. C., 241; *Reg. v. Marsh*, 3 F. & F. 523.

A Clerk of a Banking Company, established under 7 Geo. IV. c. 46, may be convicted of embezzling the money of the company, although he is a shareholder or partner in such company. *Reg. v. Atkinson*, Car. & M. 525; 2 M. C. C. 215.

Servant of Commission Agents.—A. was a cashier and collector to commission agents. He was paid partly by salary and

VII. By Partners.—Partners sustain the character of principals as well as agents, and have a community of property and interest in partnership effects, and therefore cannot embezzle the funds of the partnership which they wrongfully apply to their individual uses without mutual consent. But this immunity does not attach as long as the partnership contract is executory only, or dependent upon unperformed conditions precedent.¹

partly by percentage on the profits, but was not to contribute to the losses, and had no control over the management of the business. *Held*, that he was a servant within the 7 & 8 Geo. IV., c. 29, sect. 47, and not a partner. *Reg. v. M'Donald*, L. & C. 85; s. c., 9 Cox, C. C., 10; 31 L. J. M. C. 67; 7 Jur. N. S. 1127; 5 L. T. 330; 10 W. R. 21.

Officers and Servants of Friendly Societies.—Two friendly societies appointed a committee, of which the defendant was a member, to conduct an excursion; the committee employed him and several others to sell tickets. It was his duty to pay over the money so received, which was to belong to the two societies, to a person appointed by the committee, but he received no remuneration for his services. *Held*, that he was joint owner of the money, and not a clerk or servant within 24 & 25 Vict. c. 96, sect. 68, liable to be indicted for embezzlement. *Reg. v. Bren*, L. & C. 346; s. c., 9 Cox, C. C., 398; 33 L. J. M. C. 59; 9 L. T. 452; 12 W. R. 107.

A member of a friendly society was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in the contribution and cash books a large number of the sums so received. On being called upon for an explanation, he admitted that he had received the sums so omitted. *Held*, that he was guilty of embezzlement. *Reg. v. Proud*, L. & C. 97; s. c., 9 Cox, C. C., 22; 31 L. J. M. C. 71; 5 L. T. 331; 10 W. R. 62.

A treasurer, who was also a member of a friendly society, whose duty it was to receive the moneys paid into the society, hold them to the order of the secretary countersigned by the chairman or a trustee, and to account whenever called upon, to which office no salary was attached, is not a clerk or servant liable to be indicted for embezzlement under 24 & 25 Vict. c. 96, sect. 68. *Reg. v. Tyree*, 1 L. R. C. C. 177; 38 L. J. M. C. 58; 19 L. T. 657; 17 W. R. 334; 11 Cox, C. C., 241.

But a member of two unenrolled benefit clubs, paid as secretary, and intrusted with the funds to deposit in the bank, in the joint names of himself and the treasurer, dishonestly appropriated the sums so intrusted to him; it was *held*, that he could

not be convicted of embezzlement as a servant. *Reg. v. Marsh*, 3 F. & F. 523.

Servant or Independent Officer.—Under an order of the poor-law commissioners, in pursuance of 4 & 5 Will. IV. c. 76, sect. 46, the board of guardians of a union appointed A. to the office of collector of rates for the S. district, which district formed a part of the union. In the order of the poor-law commissioners, the duties of the collector, and the compensation he was to receive, were fully set forth, and upon the receipt of the order the guardians appointed him verbally, which appointment was afterwards submitted for approval to the poor-law commissioners, and ratified by them. The power of dismissal rested with the poor-law commissioners alone. The collector, on his appointment, gave a bond for the proper performance of his duties to the guardians, and to them he was bound to give in a statement of his accounts weekly. There were separate rates for each parish or district of the union, and the duty of the collector was to collect the rates of the S. district, and pay in the amount to a banker, to the credit of the overseers of that district, they alone having the right of disposing of it. Out of this sum, the overseers paid the collector a percentage for his services. *Held*, that an indictment for embezzlement was not sustainable, there being no such service to any one as the 7 & 8 Geo. IV. c. 29, sect. 47, required, the collector being, under the circumstances, an independent officer. *Reg. v. Truman*, 2 Cox, C. C., 306.

1. *Napoleon v. State*, 3 Tex. App. 522; s. c., 1 Tex. L. J. 302; 6 Cent. L. J. 457. See *Reg. v. Balls*, L. R. 1 C. C. 328; s. c., 40 L. J. M. C. 148; 24 L. T. 760; 19 W. R. 876; 12 Cox, C. C., 96; *Reg. v. Wortley*, T. & M. 636; s. c., 2 Den. C. C. 333; 5 Cox, C. C., 382; 21 L. J. M. C. 44; 15 Jur. 1137.

Agreement for Joint Enterprise—Where A. and B. agree together to raise an equal sum of money for the purpose of engaging in a joint enterprise, and A. places in the possession of B. his part of the joint capital with the understanding that B. will add thereto a like sum, and will proceed to the execution of the joint undertaking, and B. wholly fails to comply with his part of the agreement, and converts the money so placed in his possession by A. to his own

VIII. By Bailee.—The statute denouncing embezzlement was directed at the bailee who stands in a fiduciary relation to his bailor,—those having possession wholly and exclusively for the benefit of the bailor; but it is not operative against that class of bailees who hire a chattel for a term.¹

use and benefit, he is guilty of embezzlement. *Napoleon v. State*, 3 Tex. App. 522; s. c., 1 Tex. L. J. 302; 6 Cent. L. J. 457.

The Prisoner was a Member of a Copartnership, and it was his duty to receive money for the copartnership, and once a week to render an account, and pay over the gross amount received during the previous week. During each of three several weeks within six months the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money. *Held*, that he might properly be charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to show how these aggregates were made up. *Reg. v. Balls*, 1 L. R. C. C. 328; s. c., 40 L. J. M. C. 148; 24 L. T. 760; 19 W. R. 876; 12 Cox, C. C., 96.

Servant or Partner.—An instrument in the following form is a contract for service by a laborer, and not a contract of partnership: "S. W. engages to take charge of the glebe land of the Rev. A. B., his wife undertaking the dairy and poultry, at 15s. a week, till Michaelmas, 1850, and afterwards at a salary of £25 a year, and a third of the clear annual profits, after all the expenses of rent, rate, labor, and interest on capital, etc., are paid, on a fair valuation made from Michaelmas to Michaelmas, three months' notice on either side to be given, at the expiration of which the cottage to be vacated by S. W., who occupies it as a bailiff, in addition to his salary. March 12, 1850. (Signed) A. B., S. W." The prisoner was directed to account, and was in the habit of accounting, with the wife of the prosecutor. On the 4th of October, the prisoner, in accounting with her, denied the receipt of two sums of money which he had received for and on account of his master, and appropriated them to his own use. *Held*, that he was properly convicted of embezzlement, although Michaelmas was the time agreed upon when a valuation was to take place, and the profits were to be ascertained. *Reg. v. Wortley, T. & M.* 636; s. c., 2 Den. C. C. 333; 5 Cox, C. C., 382; 21 L. J. M. C. 44; 15 Jur. 1137.

1. *Watson v. State*, 70 Ala. 13; s. c., 45

Am. Rep. 70; 3 Cr. L. Mag. 581; *State v. Small*, 26 Kan. 209; s. c., 3 Cr. L. Mag. 759; *Com. v. Butterick*, 100 Mass. 1; *State v. Grisham*, 90 Mo. 163; *People v. Cruger*, 102 N. Y. 510; *People v. Burr*, 41 How. (N. Y.) Pr. 293. See also, *Hutchison v. Com.*, 82 Pa. St. 472; *Epperson v. State*, 22 Tex. App. 694; s. c., 9 Cr. L. Mag. 556; *Reg. v. DeBanks* (Eng.) 5 Cr. L. Mag. 844, 910.

On trial of an indictment for embezzlement and larceny as bailees, a delivery of accepted orders for oil, *held* to be a delivery of the oil, and to constitute a bailment, and the defendants, having converted the oil to their own use, to be guilty. *Hutchison v. Com.*, 82 Pa. St. 472.

What constitutes the Offence.—If, at the time he sold the property intrusted to his care as a bailment, the bailee had conceived and had the intent to defraud his bailor of the value of the property, and appropriate the same to his own use, it is immaterial whether or not he had authority to sell the property. Harboring the intent at the time of the sale, his subsequent sale of the property and conversion to his own use of the proceeds, whether or not he had authority to make the sale, was an embezzlement of the property. *Epperson v. State*, 22 Tex. App. 694; s. c., 9 Cr. L. Mag. 556.

Same.—Conversion of Manufactured Article.—A tradesman to whom raw materials are given to be converted into manufactured articles, who contracts and receives them in good faith, is not guilty of embezzlement by a subsequent wrongful conversion of the manufactured articles. The employment of the tradesman as such does not create the relation of master and servant, but that of bailor and bailee. *People v. Burr*, 41 How. (N. Y.) Pr. 293.

Appropriation of Chattel Mortgage by Maker.—Where the owners of a chattel mortgage deliver it to the maker of the instrument as bailee, to be by him carried and delivered to the recorder of deeds for the county, who did not deliver it to such recorder, or leave it for the recorder at the recorder's office, but converted it to his own use, it is not the offence of stealing or embezzling defined in R. S. sect. 1322, it not having been an instrument purporting to be the "act of another," but his own act, and therefore not within the terms of that section. *State v. Grisham*, 90 Mo. 163.

Disposal of Collateral Security before Debt due.—The disposal of collateral se-

IX. By Attorneys.—An attorney-at-law who fraudulently keeps money collected for his client, and uses the same for his own purposes, without informing his client of its collection, is guilty of embezzlement.¹

curity by the holder before the debt, to secure the payment of which it was deposited with him to secure, becomes due and payable to him, punishable under Mass. Gen. Stat. ch. 161, sect. 64, is not indictable as embezzlement under sect. 35. *Com. v. Butterick*, 100 Mass. 1.

Fraudulently pledging Collateral.—An indictment for embezzlement will lie for fraudulently pledging, as security for one's own debt, property which may be the subject of larceny held as collateral security for the payment of the note of another, if the wrongful conversion is committed after payment of the note. *Com. v. Butterick*, 100 Mass. 1.

What Bailees are within Statute.—The statute which declares that "any private banker, commission-merchant, factor, broker, attorney, bailee, or other agent, who embezzles or fraudulently converts to his own use," etc., "any money, property, or effects, deposited with him, or the proceeds of any property sold by him for another, must be punished as if he had stolen it" (Code, sect. 4384), applies only to bailments in which the parties stand to each other in a fiduciary relation, the bailee having the possession wholly and exclusively for the benefit of the bailor; and a conviction cannot be had under it against the hirer of a domestic animal who sells the same during the term. *Watson v. State*, 70 Ala. 13; s. c., 45 Am. Rep. 70.

Where a person fraudulently removes and secretes a gelding, with which he has been intrusted as bailee, with intent to embezzle and convert the property to his own use, he may be convicted therefor under the provision of Comp. L. 1879, ch. 31, sect. 90. *State v. Small*, 26 Kan. 209; s. c., 3 Cr. L. Mag. 759.

On the trial of an indictment charging the servant of the prosecutor with receiving money and fraudulently embezzling it, and so stealing it, the evidence was that the prisoner was only employed to sell a horse for him, with the price of which he had absconded. It having been ruled at the trial that he was not a servant, *held*, he was a bailee, and might be convicted of stealing the money. *Reg. v. DeBanks (Eng.)*, 5 Cr. L. Mag. 844, 910.

Failure to Pay over the Proceeds of a Sale or Pledge of a Diamond Pin left with the defendant, by the owner, for the purpose of sale or pledge, will not sustain an indictment for larceny of the pin. *People v. Cruger*, 102 N. Y. 510.

6 C. of L. — 31

1. *People v. Treadwell*, 69 Cal. 226; s. c., 10 West. Coast Rep. 181; 7 Cr. L. Mag. 795; *Reg. v. Fullagar*, 14 Cox, C. C., 370; s. c., 44 J. P. 57; *Reg. v. Cooper*, L. R. 2, C. C. 123; s. c., 43 L. J. M. C. 89; 30 L. T. 306; 22 W. R. 555; 12 Cox, C. C., 600; *Reg. v. Newman*, L. R. 8, Q. B. Div. 706; s. c., 51 L. J. M. C. 87; 46 L. T. 394; 30 W. R. 550; 46 J. P. 617.

Embezzlement by Attorney.—Using Money received. — A verdict of embezzlement would be fully warranted in a case where an attorney at law, acting as agent for the payee of a note, received the amount from the drawee, and used the same for his own purposes, concealing from his principal the fact of the payment of the note. *People v. Treadwell*, 69 Cal. 226; s. c., 8 Cr. L. Mag. 354.

Trust money having been invested on mortgage, the mortgage was paid off, and the money left in the hands of the family solicitor, and was subsequently appropriated by him. *Held*, that this was a fraudulent conversion to his own use of property intrusted to the solicitor for safe custody with s. 70 of 24 & 25 Vict. c. 96, *Reg. v. Fullagar*, 14 Cox, C. C., 370; s. c., 44 J. P. 57.

In a protection for such embezzlement, the questions, whether at the time the money was collected the attorney was acting in behalf of the person on whose account it was paid, or whether such person had any property in the money, are for the jury. If, at such time, the attorney represented himself to the debtor as so acting, he is estopped to deny his authority. *People v. Treadwell*, 69 Cal. 226; s. c., 7 Cr. L. Mag. 795.

An Attorney was employed to raise a Loan of Money on a Mortgage, of which he was to employ a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor. He prepared the mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use. *Held*, that no offence had been committed under 24 & 25 Vict. c. 96, s. 75 or 76; *Reg. v. Cooper*, 2 L. R. C. C. 123; s. c., 43 L. J. M. C. 89; 30 L. T. 306; 22 W. R. 555; 12 Cox, C. C., 600.

Misappropriation of Property intrusted for Safe Custody.—N., a solicitor, was intrusted by a client with money to invest on mortgage on the client's behalf; he, instead of so doing, fraudulently appropri-

X. By Trustee. — A. trustee fraudulently appropriating trust money or property to his own use is guilty of embezzlement.¹

ated the money to his own use. *Held*, that N. was not intrusted with such money for "safe custody" within s. 76 of 24 & 25 Vict. c. 96; *Reg. v. Newman*, 8 Q. B. Div. 706; s. c., 51 L. J. M. C. 87; 46 L. T. 394; 30 W. R. 550; 46 J. P. 617.

"Direction in Writing to apply Money."

— Trust money had been invested on a mortgage. The mortgage was paid off, and the money left in the hands of the family solicitor, who wrote to the person beneficially interested, "R.'s money was paid on Saturday the 6th day of April, £2,500 and interest. Let me know how you would like to have the £2,500 invested, whether in the funds or on the mortgage. I can get you four per cent on a good security, but no more. More than five per cent is not to be obtained upon such securities as trustees would be justified in investing." The answer was dated the 9th of April: "Will consult C. at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it is well secured by this time." At or near the date of these letters, it was clear that the money had been fraudulently appropriated to his own use by the solicitor. *Quære* whether the above letters amounted to a direction in writing to apply the money within s. 75 of 24 & 25 Vict. c. 96; *Reg. v. Fullagar*, 14 Cox, C. C. 370; s. c., 44 J. P. 57.

1. See *Baker v. State*, 6 Tex. App. 344; *Keeller v. State*, 4 Tex. App. 527; *Reg. v. Gibbs*, *Dears. C. C.* 445; s. c., 6 Cox, C. C. 455; 24 L. J. M. C. 62; 1 Jur. N. S. 118; *Wadham v. Rigg*, 1 Drew & Sm. 216; *Reg. v. Fletcher, L. & C.*, C. C. 180; 9 Cox, C. C., 189; 31 L. J. M. C. 206; 8 Jur. N. S. 649; 6 L. T. N. S. 545; 10 W. R. 753.

Conversion of Money advanced on an Executory Contract. — **Texas Doctrine.** — A conviction for embezzlement or theft under Paschal's Tex. Dig. art. 2423, prohibiting fraudulent conversion of trust-money, is not sustained by mere proof that the money was an advanced payment on a contract which the accused wholly failed to perform. *Keeller v. State*, 4 Tex. App. 527. The definition of embezzlement in Paschal's Tex. Dig. art. 2421, does not apply to the proceeds of trust property other than such as have accrued from a sale of it. *Baker v. State*, 6 Tex. App. 344.

Servant or Trustee. — A. was a carrier, residing at Somerton, and going from that place to Stoke and back, employed, however, only between the glove-sewers at Somerton and the manufacturers at Stoke, in carrying the gloves from and to the one

and the other. The manufacturers knew nothing of the sewers, but A. gave the name of and took out a number for any woman desiring to be employed, received unsewn gloves from the manufacturers, and conveyed them to the women at Somerton, taking back the gloves when finished, and receiving the amount due to the women for their work. The manufacturers looked to the women for their work; but if any were missing, and the women not found, they held the prisoner accountable for it. In accordance with this course of proceedings, A. received sewn gloves from two of the women, delivered them to the manufacturers, and received the amount due for the work, but fraudulently applied the money so received to his own use. He was tried for, and convicted of, embezzling the money of the two women. *Held*, that the relation of master and servant did not subsist, but A. was a mere trustee, and was only guilty of a breach of trust, and not of embezzlement; and therefore the conviction was wrong. *Reg. v. Gibbs*, *Dears. C. C.* 445; s. c., 6 Cox, C. C., 455; 24 L. J. M. C. 62; 1 Jur. N. S. 118.

Who is Trustee. — A person, who was trustee, treasurer, and secretary of a savings bank, was indicted for misappropriation as trustee. As secretary he received the money deposited, which, by the rules of the savings bank, it was his duty to hand over to the treasurer, who was required by the savings bank Acts to pay it over, when demanded, to the trustees, whose duty, as defined by the rules, was to vest it in the public funds in the names of the commissioners for the reduction of the national debt. He falsified his accounts, and appropriated to his own purposes part of the money so deposited with him as secretary, with intent to defraud. *Held*, first, that he was a trustee for the benefit of other persons. *Held*, secondly, that here was an express trust created by the rules, although they were made before the appointment of the trustee and the existence of the trust-fund. *Held*, thirdly, that the rules of the savings bank were an instrument in writing. *Reg. v. Fletcher, L. & C.*, C. C. 180; s. c., 9 Cox, C. C., 189; 31 L. J. M. C. 206; 8 Jur. N. S. 649; 6 L. T. N. S. 545; 10 W. R. 753.

Sanction of Court of Chancery to Proceedings. — The Court of Chancery sanctioned criminal proceedings upon an affidavit, stating that a trustee had paid £1,409 into his private bankers, had drawn out the whole, with the exception of £28, and had paid a private debt of a hundred

XI. By Guardian.—A guardian who feloniously appropriates the property or money of his ward, will be guilty of embezzlement;¹ but where he uses or occupies the property of his ward, and becomes indebted to his ward for such use or occupation, the non-payment of such sum will not be embezzlement.²

XII. By Carrier.—A common carrier may be guilty of embezzlement by appropriating to his own use property intrusted to his care to be carried from one point to another.³ But it is otherwise when he separates the bulk, and appropriates a portion thereof. In the latter case he is guilty of larceny, and not embezzlement.⁴

XIII. By Banks, Private and National.—1. *Private Banks.*—*a. By Officers generally.*—The officers of a banking corporation, or savings society, may be indicted and punished for embezzlement, where they assign the property without authority, or convert it to their own use.⁵ An authorized loan to a bank-officer may be a conversion, and punishable as embezzlement. But it is not any

and fifty pounds out of the trust funds. *Wadham v. Rigg*, 1 Drew & Sm. 216.

1. **Embezzlement of Pension Money.**—The act of Congress (Rev. Stat. sect. 4783) which defines the offence of embezzlement by a guardian of a ward's pension money is valid and constitutional; and the circuit court is vested with the jurisdiction to try a person charged with such offence, and sentence him to the punishment imposed by such act. *United States v. Hall*, 93 U. S. (8 Otto) 343; bk. 25, L. ed. 180.

2. See *Bingham v. Beckwith*, 3 How. (N. Y.) Pr. N. S. 166; s. c., 19 Week. Dig. 422; 6 Cr. L. Mag. 125.

3. *Johnson v. Brown*, 25 Tex. App. 120; *Smith v. Com.*, 4 Gratt. (Va.) 532; *White v. State*, 20 Wis. 233.

4. *Nichols v. People*, 17 N. Y. 114.

Conversion by Carrier.—The separation and conversion to his own use, by a carrier, without the assent of the owner, of sundry bars of pig-iron, part of a large number of which had been delivered to him for transportation, and loaded upon his canal-boat, is larceny, and not embezzlement. *Nichols v. People*, 17 N. Y. 114.

Where the commodity, a part of which is separated by the carrier from the rest, is transferred in commerce by weight, and not by count, the severance is a trespass which determines the privity of contract, and a breaking of bulk equivalent to the opening of a bale or package. *Nichols v. People*, 17 N. Y. 114.

5. See *Com. v. Pratt*, 137 Mass. 98; *People v. Clements*, 42 Hun (N. Y.), 286; s. c., 9 Cr. L. Mag. 267; 25 Week. Dig. 184; *Bartow v. People*, 18 Hun (N. Y.), 22; s. c., 1 Cr. L. Mag. 261. *State v. Duggan* (R. I.), Index Z. 17; s. c., 3 New Eng. 137.

Unauthorized Assignment on Delivery of Mortgage.—An unauthorized assignment

and delivery of mortgage, the property of a savings bank, by its treasurer, is an embezzlement of the mortgage, although his act did not pass the title of the bank (*Com. v. Pratt*, 137 Mass. 98), and although the treasurer believed that he had authority to assign the same for the benefit of the bank. *Id.*

What constitutes the Offence.—To convict under section 600, Penal Code, declaring a bank officer who knowingly overdraws his account, and thereby obtains money, etc., of the bank, guilty of misdemeanor, the obtaining of the money must be actually shown. It is not enough that the account is overdrawn, and that the bank is or has been in possession of the check of said officer for the amount alleged to have been wrongfully obtained by him, nor even that said officer has repaid the said amount to the bank. *People v. Clements*, 42 Hun (N. Y.), 286; s. c., 9 Cr. L. Mag. 267; 25 Week. Dig. 184.

Where Cashier is also Treasurer.—As to what facts are sufficient to constitute embezzlement by a bank cashier of the funds of a savings institution of which he was also treasurer, and which funds were placed in his hands for deposit in the bank, but not credited on the books of the bank. See *Bartow v. People*, 18 Hun (N. Y.), 22; s. c., 1 Cr. L. Mag. 261.

The treasurer of a savings bank is indictable for embezzlement of the property of the bank, under Mass. Gen. Stats. c. 161, sect. 28. *Com. v. Pratt*, 137 Mass. 98.

Act applying to a Particular Bank Unconstitutional.—An act making it a felony for an officer or servant of a particular bank to embezzle its funds, and which does not apply to the officers and servants of all banking corporations, is unconstitutional. *State v. Duggan* (R. I.), Index Z. 17; s. c., 3 New Eng. Rep. 137.

and every loan to a bank-officer whose account is overdrawn, which constitutes the statutory offence; to support conviction it must be made to appear that the obtaining was wrongful.¹

b. By Clerk and Cashier. — Where a clerk or cashier in a bank or savings institution converts to his own use money placed under his care or management as such officer, he will be guilty of embezzlement.²

c. Private Bankers and Managers. — Where a banker, known to be doing business, in part at least, upon the profits arising from the use of deposits in his bank, is unable to meet his obligations, and fails, the depositor is a creditor of the bank, and there is nothing about his relation with the bank that can make its failure an embezzlement of the funds deposited. The deposit is considered a loan, and a mere failure to pay a loan can never be an embezzlement.³

1. *People v. Clements*, 42 Hun (N. Y.), 286; s. c., 9 Cr. L. Mag. 267; 25 Week. Dig. 184.

2. See *Ker v. People*, 110 Ill. 629; *First Nat. Bank of Monmouth v. Dunbar*, 118 Ill. 625; s. c., 6 West Rep. 530; *Barclay v. Breckinridge*, 4 Met. (Ky.) 374.

Conversion by Clerk or Cashier; Larceny at Common Law. — The fact that the felonious taking of moneys and securities out of a bank vault by a bank clerk, and converting them to his own use, may be larceny at common law, makes it no less embezzlement under the statute. It is entirely competent for the legislature to declare what acts shall constitute the crime of embezzlement, and fix the punishment. *Ker v. People*, 110 Ill. 629.

Where the clerk of a private banker converts to his own use money which he charges on the books to a depositor, the offence is not a felony. *Barclay v. Breckinridge*, 4 Met. (Ky.) 374. Ky. Rev. Stat. ch. 28, art. 12, sect. 1, declares the agent of a corporation who fraudulently converts to his own use money "placed under his care or management as such officer" guilty of felony, but the rule is different as to the agent of an individual. In the latter case the agent does not commit a felony unless he converts to his own use money intrusted to him for delivery at some place or to some person. *Barclay v. Breckinridge*, 4 Met. (Ky.) 374.

Where a Person employs a Cashier of a Bank to purchase Certain Railroad Aid Bonds for him, the cashier is his agent in the purchase of the bonds; but when the bonds are deposited as a special deposit, he ceases to be agent of the purchaser, and becomes agent of the bank; and if he afterwards embezzles the funds of the bank, and, to hide his embezzlement, takes the bonds from the special deposit, and places them

among and reports them as assets of the bank, the depositor may recover their value from the bank. *First Nat. Bank of Monmouth v. Dunbar*, 118 Ill. 625; s. c., 6 West Rep. 530.

3. *People v. Wadsworth* (Mich.), 9 Cr. L. Mag. 114; s. c., 6 West. Rep. 180; 30 N. W. Rep. 99.

Thus, where, for a number of years, it had been the practice of banks in the city of Ishpeming to supply the money necessary to secure the nomination and election of the city treasurer, and after election to furnish his bonds, and thereafter the successful bank transacted all business of the city treasurer, and held the city funds on deposit, the manager of such a banking-house is not liable for embezzlement, where the funds were used to pay other depositors, and the bank immediately thereafter made an assignment for the benefit of creditors. In this case respondent assented to the request of the mayor that the funds should be kept separate from other funds; but it did not appear that there was any agreement that the bank should abstain from using the money, or that the city treasurer was party to such agreement; and there was no evidence tending to show that defendant used the money for his own private gain or advantage, or that he knew of the insolvent condition of the bank. *People v. Wadsworth* (Mich.), 9 Cr. L. Mag. 114; s. c., 6 West. Rep. 180; 30 N. W. Rep. 99.

However, it is different under the United States statute providing that "every banker, broker, or other person not an authorized depository of public moneys, who knowingly receives from any disbursing officer . . . any public money on deposit, or by way of loan, . . . is guilty of an act of embezzlement." See *United States v. Conant*, 9 Rep. 36; 1 Cr. L. Mag. 261; 9 Cent. L. J. 129.

2. *National Banks.* — *a. Generally.* — Under the United States statute, the officers, servants, and agents of national banks will be guilty of embezzlement, if they misappropriate or misapply the moneys, funds, or other assets of the bank.¹

b. By Officers. — (1) *By President.* — A national-bank president, or other officer, who converts funds of the bank in his charge to his own use, is chargeable with embezzlement, unless he show authority for so doing.²

1. U. S. Rev. Stat. § 5209.

The National Banking Act, which provides that "every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of the association, with intent in either case to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and any person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor," is construed in United States *v.* Conant, 1 Cr. L. Mag. 261; 9 Rep. 36; 9 Cent. L. J. 129; and in a charge to the jury in United States *v.* Lee, 12 Fed. Rep. 316.

The Word "Embezzle," as found in the United States Revised Statutes, is used to describe a crime which a person has an opportunity to commit by reason of some office or employment, and which may include some breach of confidence or trust. United States *v.* Conant, 1 Cr. L. Mag. 261; 9 Rep. 36; s. c., 9 Cent. L. J. 129.

The Word "Moneys" in the United States Revised Statutes, § 5209, includes bills of national banks as well as legal-tender notes. United States *v.* Johnson, 4 Cin. L. Bul. 361; s. c., 1 N. J. L. J. 162.

Money has been construed to mean gold or silver, or the lawful currency of the country, or bank-notes. Seawell *v.* Henry, 6 Ala. 226; Bush *v.* Baldrey, 93 Mass. (11 Allen) 367; Wood *v.* Bullens, 88 Mass. (6 Allen) 516; Buchegger *v.* Shultz, 13 Mich. 420; Green *v.* Sizer, 40 Miss. 530, 543; Williams *v.* Roser, 7 Mo. 556; Frothingham *v.* Morse, 45 N. H. 545; Smith *v.* Burch, 92 N. Y. 228, 234; Frank *v.* Wessels, 64 N. Y. 155; Dusenberry *v.*

Woodward, 1 Abb. (N. Y.) Pr. 454; Beck *v.* McGillis, 9 Barb. (N. Y.) 35, 59; Judah *v.* Harris, 19 Johns. (N. Y.) 145; Legal Tender Case, 52 Pa. St. 9; Cooley *v.* Weeks, 10 Yerg. (Tenn.) 141; Danville *v.* Sutherlin, 20 Gratt. (Va.) 583; Klauber *v.* Biggerstaff, 47 Wis. 551, 560; s. c., 32 Am. Rep. 773, 778; Legal Tender Cases, 79 U. S. (12 Wall.) 457; bk. 20, L. ed. 287; Hepburn *v.* Griswold, 75 U. S. (8 Wall.) 603; bk. 19, L. ed. 513; Veazie Bank *v.* Fenno, 75 U. S. (8 Wall.) 533; bk. 19, L. ed. 482; Thompson *v.* Riggs, 72 U. S. (5 Wall.) 663; bk. 18 L. ed. 704.

The Wilful Misapplication of the Moneys and Funds of a Banking Association, which is made an offence by Rev. Stat. sec. 5209, is a different offence from the acts of official maladministration referred to in section 5239. To constitute a violation of the first-mentioned provision, there must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person, and the indictment must charge that such misapplication was so made. Where the indictment charges the fraudulent purchase by the defendant, as president of a banking association, of certain shares of stock "in trust for the use of said association, and which shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," it does not charge a criminal misapplication of funds, but a mere maladministration of the affairs of the bank. United States *v.* Britton, 107 U. S. (17 Otto) 655; bk. 27, L. ed. 520.

2. Matter of Van Campen, 2 Ben. (U. S. D. C.) 419. See United States *v.* Conant, 1 Cr. L. Mag. 261; s. c., 9 Cent. L. J. 120; 9 Rep. 36; United States *v.* Johnson, 4 Cin. L. Bul. 361; United States *v.* Fish, 24 Fed. Rep. 585; United States *v.* Voorhees, 19 Fed. Rep. 143; United States *v.* Lee, 12 Fed. Rep. 816; United States *v.* Taintor, 11 Blatchf. C. C. 374; s. c., 19 Int. Rev. Rec. 4; United States *v.* Bartow, 20 Blatchf. C. C. 351.

Unauthorized Use of Money. — The fact that the funds of the bank have been used

(2) *By Directors.* — A director of a national bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no right, by means of an over draft, made with the intent to defraud, and converts the same to his own use, in fraud of the bank, is guilty of a misapplication of the funds of the bank.¹

(3) *By Cashier or Teller.* — Embezzlement by the cashier of a bank is not a common-law offence. An indictment therefor must rest upon some statute or it cannot be sustained.²

Embezzlement by a cashier of a national bank is punishable under section fifty-two hundred and nine of the United States Revised Statutes only;³ therefore the punishment provided by a State law for embezzlement by any "officer, director, or member of any bank," cannot be imposed upon a national-bank cashier, his crime being punishable only under the United States statutes.⁴

by the president or other officer of the bank in a manner not authorized by the statute is in itself proof conclusive of guilty intent, and proof of a generous motive does not disprove such intent; the guilty intent required by the statute may still exist, although it be shown that no personal pecuniary benefit was anticipated. The requirement of the statute is fulfilled by proof of general guilty intent, involved in the act knowingly committed. *United States v. Taintor*, 11 Blatchf. C. C. 374; s. c., 19 Int. Rev. Rec. 4.

Where an Officer of a Banking Association, being Insolvent, submits his own Note, with an Insolvent Indorser as Security, to the Board of Directors for discount, and they, knowing the facts, order it to be discounted, the use by the officer of the proceeds of the discount for his own purposes will not be a wilful misapplication of the funds of the bank, and subject him to a criminal prosecution under Rev. Stat. sect. 5209. *United States v. Britton*, 107 U. S. (17 Otto) 655; blk. 25, L. ed. 520.

1. *United States v. Warner*, 26 Fed. Rep. 616; s. c., 7 Crim. L. Mag. 795.

2. *Com. ex rel. Torrey v. Ketner*, 92 Pa. St. 372; s. c., 37 Am. Rep. 692, 10 Cent. L. J. 345.

3. *Embezzlement by a Cashier of a National Bank* is punishable solely under sect. 5209, Revised Statutes of the United States. The acts of March 31, 1860, May 1, 1861, and June 12, 1878, of the General Assembly of Pennsylvania, were not intended to provide a punishment for such officers, and the penalties of said acts cannot be imposed upon them. *Com. ex rel. Torrey v. Ketner*, 94 Pa. St. 372; s. c., 37 Am. Rep. 692; 10 Cent. L. J. 345.

A national-bank cashier, under an indictment drawn on the statute of the United

States punishing such an one for embezzling, abstracting, and wilfully misapplying the moneys and funds of a national bank, with intent to injure and defraud the bank, cannot, in order to disprove the intent, prove that his taking of the funds of the bank, and using them in stock speculations, were known to the president and some of the directors, and were sanctioned by them, and that his dealings therewith were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. *United States v. Taintor*, 11 Blatchf. C. C. 374; s. c., 19 Int. Rev. Rec. 4. See *Noble v. State*, 59 Ala. 73. The violation of a statute cannot be justified by custom. Consequently, in a prosecution for a violation of the excise law, evidence as to what the revenue officer told other applicants as to the kind of license they should procure, or what the universal practice in that regard was, held to be inadmissible. *People v. Schewe* (N. Y.), 16 Week. Dig. 554. See *Haines v. State*, 7 Tex. App. 30.

4. *Com. v. Ketner*, 92 Pa. St. 372; s. c., 37 Am. Rep. 692; 10 Cent. L. J. 345; *People v. Fonda*, 29 N. W. Rep. 26.

By Teller of a National Bank. — But in the case of *State v. Tuller*, 34 Conn. 280, it was held an "agent," "officer," or "servant," within the Connecticut statute (Conn. Gen. Stat. tit. 12, sec. 191) relating to embezzlement by the officers of a bank, applies to the case of a teller in a national bank who has taken and appropriated to his own use a special deposit made by one of the customers of the bank. *State v. Tuller*, 34 Conn. 280.

XIV. By Public Officers. — 1. Of United States Officers. — (a) Generally. — Any officer of the United States, or his assistant, who steals, purloins, converts, or otherwise appropriates, any money or other property of the United States, or belonging to any person, coming into his custody or possession in the execution of his office or employment, is guilty of embezzlement.¹ But in order to sustain an indictment, under an act of Congress for embezzlement, the defendant must have violated some specific provision of the various acts of Congress.²

Under the various acts of Congress, any officer or agent of the Government who fails to deposit public moneys when required,³ or a treasurer or public depositary who fails to safely keep the same,⁴ is guilty of embezzlement. And under these statutes it has been held that consular officers,⁵ a clerk in the post-office,⁶ a clerk in the office of an assistant treasurer of the United States,⁷ a paymaster,⁸ and an additional paymaster in the army,⁹ and any conversion of property by persons in the military¹⁰ or naval¹¹ service of the United States, is embezzlement.

1. See U. S. Rev. Stats. § 5497; Act of Feb. 3, 1879; 20 Stat. at Large, 281; 1 Sup. U. S. Rev. Stat. 406.

2. See *United States v. Forsythe*, 6 McL. C. C. 584.

Thus, where the expenditures of a collector's office are greater than its receipts, to convict of embezzlement, the evidence must show beyond a reasonable doubt that the collector has used the public money, or refused to pay it over in violation of the law. *United States v. Forsythe*, 6 McL. C. C. 584.

The Acts of Aug. 13, 1841, and Aug. 7, 1846, refer only to persons intrusted, under some act of Congress, with the possession of public moneys, and not to subordinates not specially intrusted, and who are punishable for fraudulent conversion without any congressional legislation. A clerk for the treasurer of the mint, appointed under the act of Jan. 18, 1837, cannot be indicted under the acts of 1841 and 1846 for embezzlement of public moneys. The act of 1846 does not apply to clerks, workmen, or other servants. *United States v. Hutchinson*, 7 Pa. L. J. 365; s. c., 4 Pa. L. J. Rep. 211.

The Third Act of April 14, 1866, is confined to officers of banks and banking associations, and does not embrace such a clerk in the office of an assistant treasurer. *United States v. Hartwell*, 73 U. S. (6 Wall.) 385; bk. 18, L. ed. 830.

3. See U. S. Rev. Stat. §§ 5489-5496; Act of Feb. 3, 1879; 20 Stat. at Large, 280; 1 Sup. U. S. Rev. Stat. 406.

4. See U. S. Rev. Stat. §§ 5489, 5496; Act of Feb. 3, 1879, 20 Stat. at Large, 280; 1 Sup. U. S. Rev. Stat. 406.

5. U. S. Rev. Stat. § 1734.

6. A Clerk in a Post-Office, acting as a cashier, is a public officer within the meaning of the acts of 1841 and 1846. 5 Opp. Atty-Gen. 685.

7. A Clerk in the Office of an Assistant Treasurer of the United States is liable to indictment under the act of Aug. 6, 1846, sect. 16, as an "officer or other person" charged "with the safe keeping, transfer, and disbursement of the public money." *United States v. Hartwell*, 73 U. S. (6 Wall.) 385; bk. 18, L. ed. 830.

8. Paymaster in Army. — No exception or proviso of any kind is contained in the act of Aug. 6, 1846 (9 Stat. 63), making a paymaster in the army who embezzles public money guilty of felony. The only limitation applicable to the offence is enacted in the act of April 30, 1790, sect. 32. *United States v. Cook*, 84 U. S. (17 Wall.) 168; bk. 21, L. ed. 538.

9. An Additional Paymaster of the Army is an officer charged with the safe keeping of public moneys, within the act of Aug. 6, 1846, sect. 16, and punishable under that section for embezzlement of public money. *United States v. Cook*, 84 U. S. (17 Wall.) 168; bk. 21, L. ed. 838.

Such paymaster is amenable to be indicted and punished under the provisions of said act of Aug. 6, 1846, by reason of embezzlement of public money, whereof he had the safe keeping and disbursement, solely and exclusively, by acts of Congress enacted subsequently to the date of said act of Aug. 6, 1846. *United States v. Cook*, 84 U. S. (17 Wall.) 168; bk. 21, L. ed. 838.

10. See U. S. Rev. Stat. § 1342, art. 60.

11. See U. S. Rev. Stat. § 1624, art. 14.

The persons embraced in the act of March 2, 1863, § 1,¹ providing that any person in the land or naval forces, etc., who embezzles money of the United States, shall be subject to criminal punishment, are not liable to the penalties imposed by § 3 of the act. That section applies only to persons not in the military or naval forces.²

2. *By State, County, and Municipal Officers.* — Statutes punishing the felonious appropriation or conversion by an officer of property which comes into his possession in the course of his employment, and by reason of his official position have been passed in the various States, to which special reference must be made for detailed statements of the doctrine and rules of the various States.

a. *What constitutes Offence by, generally.* — The improper neglect or refusal of a public officer to deliver to his successor in office all money remaining in his hands, upon demand therefor, is, under the statute, embezzlement *per se* of such moneys, although no particular sum was demanded.³

b. *De facto Officers.* — An indictment will lie for the embezzlement of public moneys against one who is an officer *de facto* only, as well as against a *de jure* officer.⁴

1. 12 U. S. Statutes at Large, 696.

2. United States v. Bogart, 3 Ben. (U. S. D. C.) 257.

Inmates of the National Military Home at Dayton, O., are not in the military service of the United States, and clothing issued to them is not used in such service, within Rev. Stat. sects. 5438, 5439, forbidding sale, or use by any other person, of clothing furnished to a person in the military service. United States v. Murphy, 9 Fed. Rep. 26.

3. State v. Ring, 29 Minn. 78; s. c., 4 Cr. L. Mag. 762. See State v. Hunnicut, 34 Ark. 562 Hollingsworth v. State, 111 Ind. 289 Stat v. Mason, 108 Ind. 48; Com. v. Hussey 11 Mass. 432; Com. v. Tuckerman, 7 Mass. (10 Gray) 173; State v. Leonard, 6 Coldw. (Tenn.) 307.

Failure to pay over—Evidence of Conversion. — Thus a failure by an officer to pay over money found due from him upon settlement, is, without a good or satisfactory reason, evidence in proof of a conversion; but where there has been no conversion or misapplication of the money or funds, a failure to pay over is not of itself sufficient to constitute the offence of embezzlement by an officer. State v. Hunnicut, 34 Ark. 562.

Demand of Retiring Treasurer. — A demand by a successor of a treasurer who has been removed from office for the funds officially received by the treasurer, is not necessary to establish a conversion and embezzlement of the funds. Hollingsworth

v. State, 111 Ind. 289; State v. Mason, 108 Ind. 48; Com. v. Hussey, 111 Mass. 432; Com. v. Tuckerman, 76 Mass. (10 Gray) 173.

The Failure or Refusal of a County Trustee to pay over Money in his hands belonging to the county is, unexplained, evidence of a conversion of the money to his own use; and, if proved, will establish the allegation in the indictment that the defendant did embezzle and convert the money to his own use. The defendant may introduce evidence relieving his refusal of its felonious intent. State v. Leonard, 6 Coldw. (Tenn.) 307.

Matters of Defence. — The unlawful expenditure by a public officer of public moneys intrusted to him as such cannot be excused, or justified by him, merely because he believed that their expenditure was necessary or proper; he is bound to know the law, and cannot escape responsibility for his acts, when they are unlawful, by asserting his good faith. United States v. Adams, 2 Dak. 305; s. c., 5 Cr. L. Mag. 448.

4. State v. Goss, 69 Me. 22; s. c., 3 Am. Cr. L. Rep. 66; 1 Cr. L. Mag. 124; 8 Rep. 558; Fortenberry v. State, 56 Miss. 286; s. c., 1 Cr. L. Mag. 405; State v. Goss, 69 Me. 22; s. c., 3 Am. Cr. L. Rep. 66; 1 Cr. L. Mag. 124; 8 Rep. 558; State v. Sellers, 7 Rich. (S. C.) 368; State v. Maberry, 3 Strobb. (S. C.) 144; State v. McEntyre, 3 Ired. (N. C.) L. 171; Diggs v. State, 49 Ala. 311; Rex v. Borrett, 6 Car.

c. State Treasurer. — The State treasurer is an "officer" within the terms of a statute¹ making any officer, clerk, or other person employed in the treasury of the State, liable to punishment for embezzlement.²

d. County Officers. — (1) *Treasurer* — A county treasurer will be guilty of embezzlement, if he fraudulently appropriates to his own use moneys belonging to the State;³ and a failure of the county treasurer to pay over to the proper officer, on demand, a draft upon him by the State auditor, in favor of the State treasurer for moneys in his hands belonging to the State, as evidenced by the last certificate of settlement between him and the county auditor, is *prima facie* evidence of an embezzlement.⁴

(2) *County Auditor.* — It would seem that a county auditor is not an officer charged with the custody of moneys belonging to

* P. 124; *Rex v. Gardner*, 2 Camp. N. P. 513.

There is no conflict in the authorities as to whether a *de facto* officer is liable criminally for embezzlement of funds in his hands. In Maine it is held that he is (*State v. Goss*, 69 Me.; s. c., 1 Cr. L. Mag. 124; 8 Rep. 558; 3 Am. Cr. L. Rep. 66); and in Mississippi (*Fortenberry v. State*, 56 Miss. 236; s. c., 1 Cr. L. Mag. 405). It is generally true that a *de facto* officer is liable criminally for a violation of his official duties. *State v. Sellers*, 7 Rich. (S. C.) 368; *State v. Maberry*, 3 Strobb. (S. C.) 144; *State v. McEntyre*, 3 Ired. (N. C.) L. 171; *Diggs v. State*, 49 Ala. 311; *Rex v. Barrett*, 6 Car. & P. 124; *Rex v. Gardner*, 2 Camp. N. P. 513.

1. See Mich. Comp. Laws, § 5771.

2. *People v. McKinney*, 10 Mich. 54.

If the State Treasurer omits to charge himself, in the county where his office is kept, with the receipt of money, or if he denies its receipt there, it is evidence of an embezzlement in that county. *People v. McKinney*, 10 Mich. 54.

Under Michigan Comp. Laws, sect. 5771, the word "Treasury" refers to no particular building or locality; and money is "in the treasury" when within the custody or control of the treasurer; and if embezzled when so within his custody or control, it is an embezzlement in the treasury. *People v. McKinney*, 10 Mich. 54.

Payment of Taxes by Drafts maturing at Different Times. — A corporation gave to the State treasurer, in payment of taxes, divers drafts maturing at different times. Held, that on payment of each one of these drafts the amount thereof was money paid into the treasury, for the embezzlement of which the treasurer would be liable, and that it was an incorrect view to claim that, until the entire amount had been received,

no payment into the treasury had been made, but that the treasurer held the instalments as trustee for the company. *People v. McKinney*, 10 Mich. 54.

3. See *State v. Smith*, 13 Kan. 274.

4. *State v. Mims*, 26 Minn. 83; s. c., 1 Cr. L. Mag. 261; 3 Cr. L. Mag. 259.

Indiana Rev. Stats. 1881, Section 1913, was enacted upon the theory that the fraudulent failure or refusal of a county treasurer to account for and pay over to his successor the public funds in his hands constituted sufficient evidence of misappropriation or conversion of such funds to his own use, no proof of subsequent demand and refusal being required. A refusal to deliver up on demand is not a conversion, but only evidence thereof. *State v. Mason*, 108 Ind. 48; s. c., 9 Cr. L. Mag. 123.

When Statute of Limitations begins to run. — Under § 1943, Rev. Stat. Ind. 1881, the crime of embezzlement was committed, and the statute of limitations began to run, when the treasurer of a county failed to pay over the county's money in his hands to his successor in office, and the mere fact of a subsequent demand and refusal did not take the case out of the operation of the statute of limitations. *State v. Mason*, 108 Ind. 48; s. c., 9 Cr. L. Mag. 123.

Prosecution for Embezzlement. — Repeal of Law. — When a law authorizing a prosecution has been repealed, there can be no further prosecutions under it, unless the law contains a saving clause authorizing it. An indictment against a county treasurer for embezzlement, therefore, which charged an offence under R. S. 1881, sect. 1943, after the repeal of that section by act of March 5, 1883, was properly quashed on motion. *State v. Mason*, 108 Ind. 48; s. c., 9 Cr. L. Mag. 123.

the State within the meaning of a statute defining and punishing embezzlement.¹

(3) *Deputy Sheriff*. — A deputy sheriff is an officer within the meaning of the law punishing the embezzlement of public money.²

e. Township Trustees. — A township trustee is an officer liable under a law providing for the punishment of public officers converting to their own use the public money.³

f. Municipal Officers. — (1) *School Treasurer*. — A school treasurer is an officer of a municipality of specific statutory creation, and is indictable under a statute punishing defaulters.⁴

(2) *City Clerk*. — A city clerk is an officer within the meaning of, and liable under, a statute punishing public officers for the conversion of public moneys coming into his hands as such officer.⁵

(3) *Town Treasurer*. — A town treasurer will be liable under a statute punishing for embezzlement conversion of public moneys.⁶ But where the treasurer of a town obtains money from a bank on

1. *State v. Newton*, 26 Ohio St. 265. See *State v. Heath*, 70 Mo. 565; reversing s. c., 8 Mo. App. 99.

Embezzlement by Auditor. — Instructions. — Upon the trial of an indictment for embezzlement, alleged to have been committed by the defendant in the capacity of servant and agent of the county, the proof showed that he held the position of county auditor, and that, in addition to his salary as auditor, he was allowed by the county court, and drew, a salary as custodian of the funds embezzled. The defence was that these funds came into his hands as auditor; and the court instructed the jury that if they so found they should acquit. The court further instructed the jury as follows: "If he received them (the funds embezzled) whilst he actually held the dual official relation to the county of auditor and agent, or auditor and servant, and it was his duty to receive them, not as auditor, but as agent or servant, it is immaterial whether he received them as auditor or agent, or as auditor or servant, for the law will not in such case heed such a distinction." *Held*, that taking the instructions together, the latter instruction could not be understood as submitting to the jury the question whether it was the duty of the defendant to receive the money as auditor, or as agent or servant. *State v. Heath*, 70 Mo. 565; s. c., 2 Cr. L. Mag. 262.

2. *State v. Brooks*, 42 Tex. 63.

3. *State v. Cleveland*, 80 Mo. 108; s. c., 7 Cr. L. Mag. 840; *State v. Hays*, 78 Mo. 600; s. c., 5 Cr. L. Mag. 910.

Who deemed a "Public Officer." — Section 41 of article iii., chapter 42, Wagner's Missouri Statutes (p. 459), providing for the punishment of public officers embezzling public funds, was applicable as well to officials whose offices were created afte.

that section became law as to those already existing. It included in its operation the "township trustee," provided for by the township organization law of 1873 (Acts 1873, p. 100), and under it that officer was liable for school funds misappropriated. *State v. Hays*, 78 Mo. 600; s. c., 5 Cr. L. Mag. 910.

4. *Com. v. Morrissey*, 86 Pa. St. 416. See Pennsylvania Act, 1860, § 65.

5. Thus in a case where the defendant was city clerk, and by ordinance it was his duty to prepare and seal city licenses upon production to him of the receipt of the city treasurer showing that the license-money had been paid. In fact, for years the custom had been for the licensee to pay the money directly to the clerk, and receive from him the license, and the clerk thereafter handed the money to the treasurer. The entire business was transacted by the clerk. This was done to the knowledge of the mayor, council, and other officers of the city. Defendant embezzled certain of the moneys thus received by him. It did not appear that the city ever disavowed this authority, or ever made any effort to recollect from the licensees these moneys. *Held*, that a conviction under an information charging the embezzlement of these as the moneys of the city must be sustained; and that though neither the city nor the licensees might have been concluded by his acts, yet that he, by the issue of the license, was estopped from denying that the moneys which he had received in payment thereof were the moneys of the city. *State v. Spaulding*, 24 Kans. 1; s. c., 2 Cr. L. Mag. 566.

6. See *Com. v. Este*, 140 Mass. 279; s. c., 7 Cr. L. Mag. 380; *Bork v. People*, 91 N. Y. 5; *Pollock v. Hatch*, 2 Disn. (Ohio) 181.

a promissory note of the town, and uses the money in paying proper town charges, he cannot be convicted of an embezzlement of the money, although he does not account for it to the town, and although such use of the money is contrived as a part of a scheme to defraud the town, to cover up an embezzlement of money already made, or one intended to be made.¹

(4) *Comptroller*.—A comptroller who is *ex officio* secretary of the Board of County Commissioners, and, as such, has the custody of certain municipal bonds, has such a possession thereof as will render a wrongful conversion of them embezzlement.²

g. *Tax Collector*.—A town collector of taxes is a "public officer," within the meaning of the statute, and is liable to an indictment for the conversion to his own use of money which has come under his control by virtue of his office, although it be not the town's money until it is paid into the treasury, and his bond renders him liable to account to the town.³

1. *Com. v. Este*, 140 Mass. 279; s. c., 7 Cr. L. Mag. 380.

Evidence to Convict.—The fact that a town treasurer paid certain town notes given by him, while in office, out of his private funds after he ceased to be treasurer, does not of itself constitute sufficient proof to warrant a conviction on an indictment charging him with embezzlement; neither do false entries in the books of the town, which could only have been a step in the direction of the crime. To constitute the crime of embezzlement, it is essential that the owner should be deprived of the property embezzled by an adverse holding or use. *Com. v. Este*, 140 Mass. 279; s. c., 7 Cr. L. Mag. 380.

On the trial of an indictment under N. Y. Laws, 1875, c. 19, it appeared that the prisoner, who was treasurer of the city of Buffalo, as such received for sale, in accordance with the usual custom, certain negotiable bonds of the city, which the common council had authorized to be issued and sold for city purposes; these he put into the hands of a broker, with directions to sell and credit the proceeds to a firm of which the prisoner was a member, which was done. Said firm was at the time indebted to the broker in a sum exceeding the sum realized from the sale of the bonds. No entry of the sale was made in any manner in the treasurer's books. The indictment charged that the accused "feloniously, wickedly, and wrongfully did obtain and receive . . . and convert" to his own use, bonds, and, assuming that the prisoner did not wrongfully receive or obtain them, his wrongful conversion thereof was sufficient to sustain a conviction. *Bork v. People*, 91 N. Y. 5.

2. *State v. White*, 66 Wis. 343; s. c., 8 Cr. L. Mag. 354.

Unissued Negotiable Bonds of a City in the custody of the city comptroller are property for the taking and conversion of which he may be found guilty of embezzlement under sect. 4418, Wisconsin R. S., even though the city may not be liable on such bonds. *State v. White*, 66 Wis. 343; s. c., 8 Cr. L. Mag. 354.

3. *State v. Walton*, 62 Me. 106; following *People v. Bedell*, 2 Hill (N. Y.) 196. See also *Britton v. State*, 77 Ala. 202; *Fuller v. State*, 73 Ga. 408.

Embezzlement by Tax-Collector.—The Failure to "make Returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law," as these words are used in the statute (Ala. Code, § 4266), "comprises the duty of making monthly reports of collections, and monthly payments of taxes collected, both State and county, in the manner and at the times specified in sects. 417-18;" and this is made a felony, without regard to the amount of default, although the failure to make a final settlement on or before the first day of May in each year is only a misdemeanor under sect. 4265. *Britton v. State*, 77 Ala. 202.

If a tax-collector received money from taxpayers, and with it speculated upon jury scrip, and then made up the deficit resulting from such use, or any part of it, with scrip so procured at a discount; or if, before the deficit was made known to the grand jury, he had collected money from the people, and turned it into scrip to make payment, buying the scrip at a discount; or if, after having collected moneys for the county taxes, he bought up with them county orders, and passed them to the county authorities, or their attorneys or collecting officer, in lieu of the money collected for taxes which he had appropriated

h. Clerks and Servants of Public Officers. — Clerks and servants of public officers who convert to their own use public moneys coming into their hands as such clerks and servants, and by reason of their employment as such, are punishable for embezzlement.¹

i. Persons aiding or abetting Public Officers in Embezzlement. — Under a statute defining and punishing the offence of embezzling public money, and making any participation in the act itself an act of embezzlement, any person aiding or participating in the conversion of public money by an officer intrusted with it, is guilty of embezzlement, though such person is not himself an officer intrusted therewith.²

to buy such orders at a discount; or, in general, if he used money collected as county taxes in any way whatever for his own profit, of any sort, he is guilty of embezzlement. But if he did not collect any money for the county, but waited on the people, and had executions issued, and not collected, or waited on them without issuing executions, and all the deficit arose from this failure of duty, he would be guilty of another offence, but not of embezzlement. *Fuller v. State*, 73 Ga. 408.

1. See *Coats v. People*, 22 N. Y. 245; s. c., 4 Park Cr. Cas. 662; *Culp v. Com.*, 109 Pa. St. 363; s. c., 6 Cr. L. Mag. 791; 42 Leg. Int. 288; *Reg. v. Welch*, 2 C. & K. 296; s. c., 1 Den. C. C. 199; 2 Cox C. C. 85; *Rex v. Squire*, 2 Stark. 349; s. c., R. & R. 349; *Reg. v. Adey*, 2 New Sess. Cas. 360; s. c., 1 Den. C. C. 571; T. & M. 296; 3 C. & K. 339; 4 Cox C. C. 208; 19 L. J. M. C. 149; 14 Jur. 556.

Clerk at Gas-Works. — A clerk in the employment of the gas trustees of the city of Philadelphia is an employee of a municipal corporation under the act of June 12, 1878, and can be convicted of embezzlement under the provisions of that act. *Culp v. Com.*, 109 Pa. St. 363; s. c., 6 Cr. L. Mag. 791; 42 Leg. Int. 288; 41 Leg. Int. 134.

The Keeper of a County Poorhouse is not the servant of a "private" person or of an "incorporated company," though his employer, the superintendent of the poor, may be a corporation; and embezzlement by him is not within 2 N. Y. Rev. Stat. 678, sec. 59. *Coats v. People*, 22 N. Y. 245.

Where the keeper of a county poorhouse, employed for that purpose by the superintendent of the poor of the county, and holding under him, secretly sold and converted to his own use articles of food provided for the support of the county poorhouse, *held*, that he was guilty of embezzlement within the statute (2 R. S. 678; 3 R. S. 5th ed. 957), and could be convicted of that offence under an indictment charging that the articles embezzled were the property of such superintendent of the poor. *Coats v. Peo-*

ple, 22 N. Y. 245; s. c., 4 Park Cr. Cas. 662.

The relation between the keeper of a county poorhouse and the superintendent who employs him is of a public nature, and the former cannot be deemed the agent or servant of a private person within the statute of embezzlement. 2 R. S. 678, sect. 59; 3 R. S. 5th ed. 957; *Coats v. The People*, 22 N. Y. 245; s. c., 4 Park Cr. Cas. 662. Nor is such keeper the agent or servant of an incorporated company within the same statute. Though the superintendents of the poor, or the sole superintendent, be a corporation, they or he are not an incorporated company. (2 R. S. 678, sect. 59; 3 R. S. 5th ed. 957.) *Coats v. The People*, 22 N. Y. 245; s. c., 4 Park. Cr. Cas. 662.

Accountant and Treasurer to Overseers.

— One who was employed at a yearly salary under the appellation of accountant and treasurer to the overseers of a township whose duty it was to receive all moneys receivable or payable by them, was a clerk and servant within 39 Geo. 3, c. 85. *Rex v. Squire*, 2 Stark. 348; s. c., R. & R. 349.

A Collector of Poor-Rates, as a servant of the overseers, has authority to receive the rates from the landlord, if he will pay them to him, and therefore receives such sums by virtue of his employment. *Reg. v. Adey*, 2 New Sess. Cas. 360; 1 Den. C. C. 571; T. & M. 296; 3 C. & K. 339; 4 Cox, C. C. 208; 19 L. J. M. C. 149; 14 Jur. 556.

Time of Embezzlement not fixed. — A treasurer to guardians of the poor, not accounting for a portion of money received for the guardians, is an embezzlement, although no precise time could be fixed at which it was the prisoner's duty to pay over the money alleged to be embezzled. *Reg. v. Welch*, 2 C. & K. 296; 1 Den. C. C. 199; 2 Cox, C. C. 85.

2. *Brown v. State*, 18 Ohio St. 496. See *Noble v. State*, 59 Ala. 73.

A person who, representing the State auditor, and acting for him in his official character, receives national currency as a part of the revenue of the State, and, sub-

XV. Justices of the Peace. — A justice of peace is a county officer within the purview of a statute providing for the punishment of county officers for misapplication of funds.¹

XVI. Constables. — Constables are not within the purviews of a statute punishing for embezzlement conversion to their own use moneys coming into the hands of a public officer as such officer, and by reason of his position;² and where employed to make collections, he is not a servant within the statute punishing for embezzlement conversion of money of master or employer by servants or agents.³

XVII. Assignee in Bankruptcy. — There is no statute making it embezzlement for an assignee in bankruptcy to convert to his own use trust funds which come into his hands.⁴

XVIII. Public Administrator. — A failure of a public administrator to pay over funds collected by him in his official capacity, pursuant to his duty, is punishable as embezzlement.⁵

XIX. From the Mails. — 1. *Generally.* — Abstracting and secreting a letter from the mails, and a fraudulent conversion of the same, or of its contents, by any one connected with a post-office or in the postal service, and having possession, charge, custody, or access to such a letter, by reason of such position or employment,

stituting for it a currency of less value, knowingly converts or applies any part of it to his own use, or to the use of another person, is guilty of a felony. *Noble v. State*, 59 Ala. 73.

1. *Edwards v. State*, 2 Tex. App. 525; *Crump v. State*, 23 Tex. App. 615, s. c., 9 Cr. L. Mag. 973.

Instructions to the Jury. — On the trial of an indictment for the misapplication of public moneys, an instruction that it was the duty of the defendant (a justice of the peace), having collected a fine, "to forthwith pay the same over" to the county treasurer, though technically incorrect, is not ground for reversal, where the evidence shows that the defendant had never accounted for the money received. *Crump v. State*, 23 Tex. App. 615; s. c., 9 Crim. L. Mag. 974.

2. See *Stoker v. People*, 114 Ill. 320; s. c., 7 Cr. L. Mag. 379, 380; *People v. Allen*, 5 Den. (N. Y.) 76.

3. *People v. Allen*, 5 Den. (N. Y.) 76.

If a Constable appropriates to his own Use and fails to pay over money collected by him in his official capacity as constable, upon an execution which came into his hands as an officer, he cannot be proceeded against under section 74 of the Criminal Code of Illinois. *Stoker v. People*, 114 Ill. 320, s. c., 7 Cr. L. Mag. 379, 380.

Where a constable was employed to collect certain demands without suit, if the debtors would pay, and by procuring and

serving process before a justice of the peace, if they would not, *held*, that he was not a servant of the creditor within the meaning of the statute concerning embezzlement. *People v. Allen*, 5 Den. (N. Y.), 76.

The fact that money was collected by a constable without a levy does not bring his offence, in case he appropriates the same, within the terms of section 74 of the Criminal Code. *Stoker v. People*, 114 Ill. 320; s. c., 7 Cr. L. Mag. 380.

4. *United States v. Bixby*, 10 Biss. C. C. 238; s. c., 6 Fed. Rep. 375; 2 Cr. L. Mag. 566; 4 Cr. L. Mag. 762; 27 Int. Rev. Rec. 163.

While an Assignee in Bankruptcy is an Officer of the Court, he is not an officer within the purview of United States Rev. Stat. sect. 5504, defining the offence of embezzlement by court officers, and there seems to be no other statute embracing assignees in bankruptcy for the specific offence of embezzlement. *United States v. Bixby*, 10 Biss. C. C. 238; s. c., 2 Cr. L. Mag. 566; 4 Cr. L. Mag. 762; 6 Fed. Rep. 375; 27 Int. Rev. Rec. 163.

Under that section an officer can only be guilty of embezzling such moneys as he is required to deposit with the treasurer, assistant treasurer, or a designated depository of the United States in the name and to the credit of the court. *United States v. Bixby*, 10 Biss. C. C. 238; s. c., 6 Fed. Rep. 375; 27 Int. Rev. Rec. 163; 4 Cr. L. Mag. 762; 2 Cr. L. Mag. 566.

5. *State v. Borowsky*, 11 Nev. 119.

and which shall have come into his possession in the regular course of his official duties, or in any other manner whatever, is embezzlement;¹ and any person who takes a letter from the post-office containing any thing of value, and converts such letter or its contents to his own use, is guilty of embezzlement under the statute.²

The United States statute³ relating to the funds of the post-office, intends that those funds should be kept absolutely separate and sacred, as the best method not only of keeping the funds themselves secure, but of guarding the officers from temptation and delinquency. The diversion of money-order funds in any way prohibited by this section for any time, however short, constitutes embezzlement under this act, and is punishable as such.⁴

1. U. S. Rev. Stat. sects. 5467, 5468; Act June 8, 1872, c. 335, sects. 279, 280. See also *United States v. Hardyman*, 38 U. S. (13 Pet.) 176; bk. 10 L. ed. 113; *United States v. Wilson*, Baldw. C. C. 78, 102; *United States v. Hamilton*, 11 Biss. C. C. 85; *United States v. Pelletreau*, 14 Blatchf. C. C. 126; *United States v. Jenther*, 13 Blatchf. C. C. 335; *United States v. Okie*, 5 Blatchf. C. C. 516; *United States v. Winter*, 13 Blatchf. C. C. 333; *United States v. Marselis*, 2 Blatchf. C. C. 108; *United States v. Crow*, 1 Bond, C. C., 51; *United States v. Belew*, 2 Brock. C. C. 280; *United States v. Clark*, Crabbe, C. C., 584; *United States v. Golding*, 2 Cr. C. C. 212; *United States v. Foye*, 1 Curt. C. C. 365; *United States v. Randall*, Deady U. S. D. C. 524; *United States v. Braham*, 3 Hughes, C. C., 557; *United States v. Taylor*, 1 Hughes, C. C., 514; *United States v. Laws*, 2 Low. C. C. 115; *United States v. Sander*, 6 McL. C. C. 598; *United States v. Patterson*, 6 McL. C. C. 466; *United States v. Emerson*, 6 McL. C. C. 406; *United States v. Whitaker*, 6 McL. C. C. 342; *United States v. Lancaster*, 2 McL. C. C. 431; *United States v. Martin*, 2 McL. C. C. 256; *United States v. Nott*, 1 McL. C. C. 499; *United States v. Long*, 4 Woods, C. C., 454; s. c., 17 Fed. Rep. 879; *United States v. Brent*, 17 Int. Rev. Rec. 53; *United States v. Hamilton*, 9 Fed. Rep. 442, 449; *United States v. Baugh*, 1 Fed. Rep. 784.

United States Revised Statutes, sect. 5467, defines two distinct offences,—embezzlement of a letter, and stealing the contents of a letter. An indictment which charges embezzlement of a letter only is good, although it does not allege that the accused also stole its contents. *United States v. Taylor*, 1 Hughes, C. C., 514.

Under Revised Statutes, sect. 5467, declaring the offence of taking any article of value from a letter to be conveyed by mail, by a post-office employee, it is not material whether such employee received the letter

from a private individual. *United States v. Hamilton*, 9 Fed. Rep. 442; s. c., 27 Int. Rev. Rec. 394.

It is not material under section 5467, Revised Statutes, how a letter, intended to be conveyed by mail, comes into the possession of a post-office employee. *United States v. Hamilton*, 9 Fed. Rep. 442; s. c., 3 Cr. L. Mag. 259.

Embezzling Letters from the Mail.—Sect. 279 of the act approved June 8, 1872, itself a revision, has been transcribed verbatim into section 5467 of the Revised Statutes until the latter and concluding part of the section is reached, when the words "every such person shall, on conviction thereof, for every such offence," have been omitted, and no penalty is prescribed for any offence under the section, save for stealing the valuable contents of a letter. *United States v. Long*, 17 Fed. Rep. 879; s. c., 3 Cr. L. Mag. 607.

The section does not punish the offence of embezzling a letter with valuable contents. *United States v. Long*, 4 Woods, C. C., 454; s. c., 17 Fed. Rep. 879. Under the post-office law of 1825, sect. 21 (4 Stat. at L. 107), to convict a person who is employed in the department of the post-office, etc., of stealing a letter, such employment must be distinctly alleged and proved. *United States v. Nott*, 1 McL. C. C. 499.

2. U. S. Rev. Stat. sect. 5469; Act June 8, 1872, c. 335, sect. 281. See also *United States v. Parsons*, 2 Blatchf. C. C. 104; *United States v. Cottingham*, 2 Blatchf. C. C. 470; *United States v. Marselis*, 2 Blatchf. C. C. 108; *United States v. Parsons*, 2 Blatchf. C. C. 104; *United States v. Pond*, 2 Curt. C. C. 265; *United States v. Foye*, 1 Curt. C. C. 364; *United States v. Driscoll*, 1 Low. C. C. 303; *United States v. Sander*, 6 McL. C. C. 598; *United States v. Fisher*, 5 McL. C. C. 23; *United States v. Pearce*, 2 McL. C. C. 14.

3. Act of June 8, 1872, c. 335, sect. 122.

4. *United States v. Gilbert*, 17 Int. Rev. Rec. 54.

2. *Postal Clerks generally.*—A postmaster cannot defend a prosecution for opening a letter addressed to an individual and using money enclosed therein by proof of an agency to do so, because such an agency would be contrary to the spirit of the postal laws.¹

3. *Mail Carriers and Riders.*—Under the statute punishing embezzlement of letters, etc., or of valuables enclosed, by persons in the postal service, a person may be convicted as a "mail-carrier" for stealing from the mails, although he has not taken the oath of office.²

4. *By Individuals.*—A bar-keeper in an inn, intrusted to carry letters to and from the post-office, who fraudulently converts to his own use a letter enclosing money, given to him to carry to the post-office, is guilty of embezzlement; and to convict him it is not necessary to show that he broke open the letter or fled after the commission of the offence, or to show the dissent of his employer; it is enough that there be a fraudulent conversion, and that being shown, a felonious intent is established.³

XX. Indictment.—1. *In General.*—a. *Sufficiency, Certainty.*—An indictment for embezzlement must set forth the actual fiduciary relation and its breaches.⁴ Every thing must be averred which is necessary to bring the case within the statute.⁵

1. *United States v. Bramham*, 3 Hughes, C. C. 557.

2. *United States v. Wilson*, Baldw. C. C. 78, 102; *United States v. Foye*, 1 Curt. C. C., 365. Compare *United States v. Marselis*, 2 Blatchf. C. C. 108.

Embezzlement by Carrier.—Overcharge.—If a wife of a party to whom a letter is directed pays the postage of the letter, she is entitled to demand an overcharge made for it; and a refusal on the part of the letter-carrier to account for it to her is evidence of an embezzlement by him. *Rex v. Borrett*, 6 C. & P. 124.

Embezzlement from the Mails.—The offence of embezzlement by mail-carriers, under Rev. Stat. sect. 5467, is not confined to taking things out of a letter, packet, or bag; an indictment which charges a carrier with having embezzled a letter which was intended to be conveyed by mail and contain an article of value, and had been intrusted to him as such letter-carrier, is good. *United States v. Pelletreau*, 14 Blatchf. C. C. 126.

Evidence of Service.—On an indictment for embezzlement against a letter-carrier, as a person employed in the public service of her Majesty, it is not necessary to prove his appointment as a letter-carrier, but evidence of his having acted as such is sufficient. *Rex v. Borrett*, 6 C. & P. 124.

3. *People v. Dalton*, 15 Wend. (N. Y.) 582. See also authorities cited, *supra*, xix. note 2.

4. *McCann v. United States*, 2 Wyom. T. 267; s. c., 4 Cr. L. Mag. 762. See also *State v. Messenger*, 58 N. H. 348; s. c., 4 Cr. L. Mag. 459.

Sufficiency of the Indictment, generally.—An indictment must set forth facts sufficient to constitute the given offence, so as to notify the accused of the issue he has to meet; and unless it does this, it charges nothing on which an issue can be raised by a plea of not guilty. This rule is founded on a principle that inheres in all criminal cases. *McCann v. United States*, 2 Wyom. T. 267; s. c., 4 Cr. L. Mag. 762.

A count in an indictment which alleges that by one and the same act the defendant embezzled and stole the property, by one act committed upon it two dissimilar crimes, the commission of one of which negatives the possibility of the commission of the other, nullifies itself and charges nothing, tenders no issue, and will not support a verdict of guilty. *McCann v. United States*, 2 Wyom. T. 267; s. c., 4 Cr. L. Mag. 762.

An indictment containing in one count so much of the language of two sections of the statute of embezzlement as to leave it uncertain which of the two different crimes of embezzlement is charged is insufficient. *State v. Messenger*, 58 N. H. 348; s. c., 4 Cr. L. Mag. 459.

5. *People v. Allen*, 5 Den. (N. Y.) 76. See *Hoyt v. State*, 50 Ga. 313; *State v. Sweet*, 2 Oreg. 127; *Com. v. Leisenring*, 11 Phila. (Pa.) 389; s. c., 2 Cr. L. Mag. 556; 32 Leg.

b. In Language of Statute, negating Exceptions.—An indictment for embezzlement charging the crime substantially in the terms of the statute is sufficient.¹

Where an exception is contained in the same clause of the act creating the offence, the indictment must show, negatively, that the defendant does not come within the exception.²

c. Averment of Intent.—An indictment for embezzlement must contain an allegation of intent to injure and defraud.³

d. Averment as to Demand.—An indictment for embezzlement, alleged to consist in neglecting to account for and pay over money, must allege that a demand for the money was made.⁴

Int. 160, 168; *Golden v. State*, 22 Tex. App. 1; s. c., 9 Cr. L. Mag. 267; *State v. Longworth*, 41 Tex. 162; *Wise v. State*, 41 Tex. 139; *Coats v. People*, 4 Park Cr. Cas. N. Y. 662.

Money received for Benefit of Master.—An indictment charging a defendant with having received a certain amount of money to be applied for the use or benefit of his principal, with an allegation that on a certain day the defendant fraudulently converted a specific portion thereof to his own use, is not demurrable on the ground that it is too general, vague, and indefinite, or that it does not give the accused notice of what he is called on to answer. Proof which clearly and definitely shows such a fraudulent conversion as that charged would be admissible under such an indictment, and would sustain a conviction. *Hoyt v. State*, 50 Ga. 313.

Charging Theft and Embezzlement in same Count.—The first count of the indictment charged the appellant with the theft of a certain money, and the second count charged him with the embezzlement of the same money. He was convicted under the second count, and objects because the evidence sufficed to prove him guilty of theft as charged in the first count. *Held*, that the objection is not maintainable, and the conviction is sustained. *Golden v. State*, 22 Tex. App. 1; s. c., 9 Cr. L. Mag. 267.

Defendant was bound over by an alderman for embezzlement. The indictment found by the grand jury charged him with embezzlement under the penal code, secs. 114, 116, and in the second count under sec. 117. *Held*, that the indictment was not irregular, as it did not describe another and different offence, but only the particular form of the same offence. *Com. v. Leisenring*, 11 Phila. (Pa.) 389; s. c., 2 Cr. L. Mag. 566; 32 Leg. Int. 160, 168.

Under Oregon Rev. Stat. 216, sect. 22, which calls embezzlement "larceny," an indictment is good which, after describing in the words of that statute the act of an agent fraudulently converting the

money of his employer, names the offence "embezzlement." *State v. Sweet*, 2 Oreg. 127.

1. *Ker v. People*, 110 Ill. 629; *People v. Tomlinson*, 66 Cal. 344; s. c., 6 Cr. L. Mag. 425; *Golden v. State*, 22 Tex. App. 1; s. c., 9 Cr. L. Mag. 267; *Lowenthal v. State*, 32 Ala. 589; *Crump v. State*, 23 Tex. App. 615; s. c., 9 Cr. L. Mag. 973; *Com. v. Bennett*, 118 Mass. 443.

An Indictment upon a Statute must state all the Circumstances which constitute the statutory offence, no case being brought within a statute unless it is completely within its words. The precise words of the statute need not be followed. Words of equivalent import, or more extensive signification, which necessarily include the words of the statute, may be sustained. *Wood v. State*, 47 Ark. 488.

2. *State v. Lanier*, 88 N. C. 658; s. c., 5 Cr. L. Mag. 448.

Hence, an indictment for embezzlement under Bat. Rev. Stat. (N. C.) ch. 32, sect. 16, must aver that the defendant is not an apprentice or within the age of eighteen years; and, if drawn under section 136 of same chapter, it must be averred that he is not an apprentice or under the age of sixteen years. The latter act makes the offence a felony, punishable as in case of larceny. *State v. Lanier*, 88 N. C. 658; s. c., 5 Cr. L. Mag. 448.

3. See *State v. Lyon*, 45 N. J. L. (16 Vr.) 272; *State v. Hill*, 91 N. C. 561; s. c., 7 Cr. L. Mag. 795; *United States v. Voorhees*, 9 Fed. Rep. 143; s. c., 3 Cr. L. Mag. 259; 12 Rep. 713.

Failure to pay over School Funds.—An indictment framed under section 3678 of the code, charging the defendant with embezzlement in "wilfully, knowingly, and corruptly" failing to pay over a fine to the school fund, is sufficient. Such offence is a misdemeanor, and therefore it was error in the court to arrest judgment upon the ground that the word "feloniously" was omitted. *State v. Hill*, 91 N. C. 561; s. c., 7 Cr. L. Mag. 795.

4. *State v. Munch*, 22 Minn. 67. *Com-*

e. Averment in Case of Embezzlement of Several Articles.—Where several articles have been embezzled at different times they may all be included in one count of an indictment,¹ or the defendant may be indicted and convicted of embezzling each article separately.²

2. Averment as to whose Service.—*a. In General.*—*Relation of Master and Servant; Principal and Agent.*—An indictment for embezzlement must set out the service, and allege that the money or property came into the defendant's possession because of, and by reason of, such employment or service, and was by him converted to his own use,³ without the knowledge or consent of the

pare State v. New, 22 Minn. 76. And see State v. Porter, 26 Mo. 201.

Missouri Doctrine.—It is not necessary in a count for embezzlement based on sect. 37 of the Missouri act concerning railroad corporations, to aver or prove a demand or a refusal to pay on the part of the defendant. State v. Porter, 26 Mo. 201.

1. See Coats v. People, 4 Park Cr. Cas. (N. Y.) 662; Gravatt v. State, 25 Ohio St. 162; s. c., 3 Cent. L. J. 392.

On the Trial of an Indictment for Embezzlement, the fact that the money alleged to have been embezzled was received in several sums at different times, and from different persons, affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction. Gravatt v. State, 25 Ohio St. 162; s. c., 3 Cent. L. J. 392.

2. Com. v. Pratt, 137 Mass. 98; Com. v. Butterick, 100 Mass. 1; Com. v. Concanon, 87 Mass. (5 Allen) 502.

3. See Record v. Cent. Pac. R. R. Co., 15 Nev. 168; People v. Bailey, 23 Cal. 577; State v. Johnson, 21 Tex. 775; Lycan v. People, 107 Ill. 423; s. c., 5 Cr. L. Mag. 911; Ritter v. State, 111 Ind. 324; s. c., 9 Cr. L. Mag. 973; People v. Treadwell, 69 Cal. 226; s. c., 7 Cr. L. Mag. 795; 8 Cr. L. Mag. 355; Gravatt v. State, 25 Ohio St. 162; s. c., 3 Cent. L. J. 393; State v. Meyers, 68 Mo. 266; s. c., 1 Cr. L. Mag. 665; State v. Dodson, 72 Mo. 283; s. c., 3 Cr. L. Mag. 120; People v. Allen, 5 Den. (N. Y.) 76; Griffin v. State, 4 Tex. App. 390; Reg. v. Frankland, L. & C. 276; s. c., 9 Cox, C. C., 273; 32 L. J. M. C. 69; 9 Jur. N. S. 388; 7 L. T. 799; 11 W. R. 346; Rex v. Leech, 3 Stark 70; Reg. v. White, 8 C. & P. 742; Reg. v. Adey, 1 Den. C. C. 571; s. c., 4 New Sess. Cas. 360; T. & M. 296; 3 C. & K. 339; 4 Cox, C. C., 208; 19 L. J. M. C. 149; 14 Jur. 556; Reg. v. Carpenter, L. R. 1 C. C. 29; s. c., 35 L. J. M. C. 169; 12 Jur. N. S. 380; 14 L. T. 572; 14 W. R. 773; Reg. v. Townsend, 2 C. & K. 163; s. c., 1 Den. C. C. 167; 2 Cox, C. C., 24; Reg. v. Welch, 2 C. & K. 296; 1 Den. C. C. 199; 2 Cox, C. C., 85; Reg. v. Glover, L. & C.

6 C. of L.—32

466; s. c., 9 Cox, C. C., 500; 33 L. J. M. C. 169; 10 Jur. N. S. 710; 10 L. T. 582; 12 W. R. 885.

Sufficiency of the Indictment.—A count in an indictment charging that the defendant, as the agent of the prosecutor, by virtue of his employment, received moneys of the prosecutor, stating the amount, which he did feloniously embezzle, and fraudulently convert to his own use, with intent to steal the same, without the consent of the owner, is substantially good as a count for embezzlement under the statute. Lycan v. People, 107 Ill. 423; s. c., 5 Cr. L. Mag. 911.

An Indictment under Rev. Stat. Ind. 1881, sect. 1944, defining and prescribing the punishment for embezzlement by an "officer, agent, attorney, clerk, servant, or employee of any person or persons," is not bad, upon motion to quash, for simply charging that the accused was an "employee" of a certain person, without stating the position held by him, or the capacity in which he was engaged. Ritter v. State, 111 Ind. 324; s. c., 9 Cr. L. Mag. 973.

An Averment in an Information that the defendant received the money as "agent and servant," is a sufficient allegation of the capacity in which it was received. People v. Treadwell, 96 Cal. 226; s. c., 7 Cr. L. Mag. 795.

Designating "Agent" as "Servant."—In the sense of service, an agent is the servant of his principal; hence designating him in an information or indictment for embezzlement, as agent and servant, is not such a misnomer of his capacity as affects any of his substantial rights. People v. Treadwell, 69 Cal. 226; s. c., 8 Cr. L. Mag. 355.

Under New York Statute.—An indictment for embezzlement, under 2 N. Y. Rev. Stat. 678, sect. 59, must aver that the defendant was a "clerk" or "servant" of some person (or an officer or agent of a corporation), and that the property he is charged with embezzling came to his possession or under his care by virtue of such employment; and a count charging

that the defendant received the property as the "agent" of an individual is bad. So also is such a count bad, although it afterwards proceeds to aver that the property came to the defendant's possession and under his care "as such servant as aforesaid," and that, while he was "such servant," he converted it, the construction being that "such servant" meant such a servant as an agent may be. *People v. Allen*, 5 Den. (N. Y.) 76.

Indictment charging Two Crimes. — An information charging in one count the embezzlement by the defendant of certain property received by him as the "agent, servant, employee, and bailee," of the owner, is not objectionable as charging two separate and distinct crimes. *State v. Lillie*, 21 Kans 728; s. c., 1 Cr. L. Mag. 405.

An Indictment of an Express-Agent for Embezzlement of ten thousand dollars, alleging the same to be the property of a certain bank, and not alleging that the express company had any property therein, nor that any fiduciary relation existed between the bank and the accused. *Held* to be fatally defective. *Griffin v. State*, 4 Tex. App. 390.

Against Persons employed by Partners. — A servant in the employment of two persons, as partners, must be considered as the servant of each. *Rex v. Leech*, 3 Stark. 70.

Whilst Prisoner a Clerk. — An indictment for embezzlement of money received by a clerk, whilst such, was good under 2 & 3 Will. 4, c. 4, without alleging the embezzling to have taken place whilst he was clerk. *Reg. v. Lovell*, 2 M. & R. 236.

Naute of the Crime. — A person employed at a monthly salary, who, in the discharge of his duties, is subject to the immediate direction and control of his employer, is, in an indictment for embezzlement, properly described as a servant. *Gravatt v. State*, 25 Ohio St. 162; s. c., 3 Cent. L. J. 392.

A., being one of several proprietors of a coach, employed B. to drive it when he did not himself drive it. It was B.'s duty, on each day he drove, to tell a bookkeeper how much money he had taken, the bookkeeper entering that sum in a book, and also on the way-bill; B.'s duty then was to pay over the sums to A. B. gave true accounts to the bookkeeper, who made true entries; but B. accounted for smaller sums to A., saying that those were all, and paid over to A. these smaller sums. All the proprietors were interested in the money, but A. was the person to receive it, and he was accountable to his co-proprietors. *Held*, on an indictment for embezzlement, that B. was rightly described in the indictment as the servant of A. *Reg. v. White*, 8 C. & P. 742.

Under an order of the Poor Law Commissioners, founded on 4 & 5 Will. 4, c. 76, s. 46, the board of guardians of a union appointed A. an assistant overseer of a district in the union, of which the township of F. formed a part, and his duty was to assist the overseers of each of the townships of the district. A. was paid a salary by the guardians. A. received sums for the poor-rate from rate-payers of the township of F., which he ought to have paid over to the bankers of the overseers of that township, instead of which he embezzled them. *Held*, that A. was not indictable for embezzling this money as the money of the overseers, as he was not their servant; and that he was not indictable for this embezzlement as the servant of the guardians, because if he was their servant it was not their money. *Reg. v. Townsend*, 2 C. & K. 168; s. c., 1 Den. C. C. 167; 2 Cox, C. C., 24.

Clerks of Joint Stock Companies. — A. was indicted for embezzlement whilst the clerk to B. and others. A. was secretary and cashier to a company calling themselves "The R., M. & H. Coal Company (limited);" the number of members exceeded twenty; the name of the company was over the door; the shares were transferable without the consent of the other shareholders; and a minute-book, in which the resolutions were entered, was kept. No certificate of incorporation was put in evidence. *Held*, that he was rightly convicted as the servant of B. and others, there being no evidence which ought to have been left to the jury that the company was incorporated. *Reg. v. Frankland, L. & C.* 276; s. c., 9 Cox, C. C., 273; 32 L. J. M. C. 69; 9 Jur. N. S. 388; 7 L. T. 799; 11 W. R. 346.

Servant of Joint Committee. — A. was employed at a railway station belonging to four different companies, and which was maintained out of a joint fund. The servants at this station were appointed and paid, and might be dismissed by a committee of directors of the several companies. A.'s duty was to deliver parcels which arrived at the station by the trains of the different companies, and to pay over the money received for them to the chief clerk of the parcels office. The chief clerk then paid over such money to the cashier of the committee, who kept a separate account for each company, and paid the money over directly to the company to which it belonged or its bankers. A. having embezzled money received by him in the course of his duty, he was charged in different counts of an indictment as being the servant of the particular company whose money he had embezzled, of the four companies, of the committee, and of the station-master. *Held*, that, at all events, he was properly charged as being the servant

owner, his master or employer.¹ But it is not necessary to set out in detail the nature and purposes of the agency. The proof, however, must establish an agency within the meaning of the statute, and not an ordinary bailment.²

b. In Case of Officers of Societies. — The officers of a friendly society, or other voluntary association, may be indicted for embezzlement as a servant in case the fraudulent conversion of moneys belonging to the society and which came into his hands as such officer and by reason of his employment and duties as such officer.³

of the four companies. *Reg. v. Bayley, Dears. & B. C. C. 121; s. c., 7 Cox, C. C., 179; 26 L. J. M. C. 4; 2 Jur. N. S. 1171.*

Collector of Poor-Rates. — A collector of poor-rates, employed by the overseers, is properly charged with embezzlement, as servant to the overseers, although there are church-wardens for the same parish, who took part in making the rate. *Reg. v. Adey, 1 Den. C. C. 571; s. c., 4 New Sess. Cas. 360; T. & M. 296; 3 C. & K. 339; 4 Cox, C. C., 208; 19 L. J. M. C. 149; 14 Jur. 556.*

Bailiff of County Court. — A bailiff of a county court who has fraudulently appropriated the proceeds of levies made under the process of the county court, cannot for this misconduct be convicted as a servant of the high bailiff with having embezzled the moneys of the high bailiff his master. *Reg. v. Glover, L. & C. 466; s. c., 9 Cox, C. C. 500; 33 L. J. M. C. 169; 10 Jur. N. S. 710; 10 L. T. 582; 12 W. R. 885.*

Treasurer to Guardians. — The treasurer to the guardians of the poor of Birmingham, appointed under a local and personal act, is a servant of the guardians, and as such is indictable for embezzlement. *Reg. v. Welch, C. & K. 296; s. c., 1 Den. C. C. 199; 2 Cox, C. C., 85.*

Assistant Overseer. — An assistant overseer of a parish, elected by the parishioners in vestry, under 59 Geo. 3, c. 12, s. 7, who fix his duties and salary, is to be deemed the servant of the inhabitants of the parish, and to receive money collected by him for the poor-rate levied upon the parish as such servant, and such servant may be so described in an indictment for embezzling such moneys so received. *Reg. v. Carpenter, 1 L. R. C. C. 29; s. c., 35 L. J. M. C. 169; 12 Jur. N. S. 380; 14 L. T. 572; 14 W. R. 773.*

Effect of Re-assignment by Creditor's Trustee to Debtor. — The prisoner was engaged by U. at weekly wages to manage a shop. U. assigned all his estate and effects to R., and a notice was served on the prisoner to act as the agent of R. in the management of the shop. For fourteen days afterwards R. received from U. the shop money. Then the shop money was taken by U. as before. The prisoner re-

ceived his weekly wages from U. during the whole time. Some time after a composition deed was executed by R. and U. and U.'s creditors, by which R. reconveyed the estate and effects to U.; but this deed was not registered until after the embezzlement charged against the prisoner. *Held*, that he was the servant of U. at the time of the embezzlement. *Reg. v. Dixon, 11 Cox, C. C., 178; s. c., 19 L. T. 324; 17 W. R. 180.*

1. *State v. Foster, 11 Iowa, 291.*

2. *State v. Meyers, 68 Mo. 266; s. c., 1 Cr. L. Mag. 665.*

Missouri Doctrine. — An indictment for embezzlement, framed under § 35, p. 438, Wagner's Statutes, need not directly aver the defendant's agency: it is sufficient if the agency distinctly appears. *State v. Dodson, 72 Mo. 283; s. c., 3 Cr. L. Mag. 120.*

3. See *Com. v. Leisenring, 11 Phila. (Pa.) 389; s. c., 32 Leg. Int. 160; 2 Cr. L. Mag. 566; Reg. v. Stanfields (Can.), 8 Montreal Leg. News, 123; s. c., 6 Cr. L. Mag. 618; Reg. v. Redford, 11 Cox, C. C., 367; 21 L. T. 508; Reg. v. Proud, 9 Cox, C. C., 22; L. & C. 97; 37 L. J. M. C. 71. 5 L. T. 331; 10 W. R. 62; Reg. v. Miller, 2 W. C. C. 249; Reg. v. Woolley, 4 Cox, C. C., 251; Reg. v. Diprose, 11 Cox, C. C., 185; s. c., 19 L. T. 292; 17 W. R. 180; Reg. v. Blackburn, 11 Cox, C. C., 157; Reg. v. Taffs, 4 Cox, C. C., 169.*

Secretary of a Society Servant of Members. — Thus, where the trustees of a benefit building society borrowed money for the purposes of their society on their individual responsibility (there being no rule of the society authorizing them to borrow money), the money on one occasion was received by the secretary and embezzled by him. *Held*, that he might be charged in an indictment for embezzlement as the servant of W. and others, W. being one of the trustees and a member of the society. *Reg. v. Redford, 11 Cox, C. C., 367; s. c., 21 L. T. 508.*

A member of and secretary to a society, fraudulently withholding money received from a member to be paid over to the trustees, may be indicted for embezzlement, and may be alleged to be the clerk and ser-

c. In Cases of Bailment.—To charge a bailee with embezzlement the indictment must, by direct averment, allege that the embezzled property came into his possession, or was under his care or control, by virtue of his agency or of the bailment.¹

vant of the trustees; and the money may be properly stated to be their property, though the society is not enrolled, and though the money ought in the ordinary course to have been received by a steward. *Rex v. Hall*, 1 M. C. C. 474.

A member of and secretary to a benefit society, deriving a percentage from the funds of the society, receiving in the course of his duty certain money from the members of the society, which it was his duty to pay into an account in the savings bank kept in the names of certain other members of the society. Instead of paying the money into the bank he appropriated it. *Held*, that he could not be convicted of embezzling the money upon an indictment charging him to be the servant of "A. B. and others," and laying the money to be that of "A. B. and others," A. B. being an ordinary member of the society. *Reg. v. Taffs*, 4 Cox, C. C., 169.

Trustee.—Sufficiency of Indictment.—In an indictment of a trustee for fraudulently converting property, it is sufficient to set out that A., "being a trustee," did, etc. Instead of that, A. was a trustee; and "being such trustee," did, etc. It is necessary to set out the trust in the indictment. *Reg. v. Stanfield* (Can.), 8 Montreal Leg. News, 123; 6 Cr. L. Mag. 618.

A Secretary of a Friendly Society under 18 & 19 Vict. c. 63, in which no trustee had ever been appointed, was convicted on an indictment for embezzlement, the indictment describing him as the servant of the treasurer, and also as the servant of C. (a member) and others. *Held*, that the conviction was wrong. *Reg. v. Diprose*, 11 Cox, C. C., 185; s. c., 19 L. T. 292; 17 W. R. 180; *Reg. v. Blackburn*, 11 Cox, C. C., 157.

Indictment.—Surplusage.—An indictment charged defendant with embezzlement as secretary and treasurer, an officer. *Held*, that the words, an officer, were mere surplusage, and not fatal. Under the penal procedure act, sect. 28, the description of the money embezzled need not be very specific. *Com. v. Leisenring*, 11 Phila. (Pa.) 389; s. c., 32 Leg. Int. 160; 2 Cr. L. Mag. 566.

The Secretary of an Unenrolled Friendly Society, whose duty it is to receive the weekly contributions of the members, to enter them in a book, and hand over the amount to the treasurer who, in his turn, pays it into a bank in the names of the trustees of the society, may be properly

described as the servant of the trustees in an indictment charging him with embezzling sums so received, and he cannot be described as the servant of the treasurer. *Reg. v. Woolley*, 4 Cox, C. C., 251.

Clerk of Savings Bank.—In an indictment against the clerk of a savings bank for embezzlement, he is properly described as clerk to the trustees, though elected by the managers. *Rex v. Jenson*, 1 M. C. C. 434.

Clerk of Society withholding Rents.—It is embezzlement in a clerk of a friendly society fraudulently to withhold the rents of a house collected in the course of his duty as clerk, and he may be laid to be the clerk or servant of the trustees to whom the house was conveyed, if appointed either by them or the society. *Reg. v. Miller*, 2 M. C. C. 249.

A. was indicted for embezzlement as being a clerk and a servant of B., C. & D. A. was a member of and secretary to a properly certified friendly society, of which B., C. & D. were the trustees, and had, from time to time, received (though not in his capacity of secretary) funds belonging to the society, some part of which he appropriated. *Held*, that A. was properly convicted of embezzlement as the clerk and servant of B., C. & D. *Reg. v. Proud*, 9 Cox, C. C., 22; s. c., L. & C. 97; 31 L. J. M. C. 71; 5 L. T. 331; 10 W. R. 62.

1. See *Gaddy v. State*, 8 Tex. App. 127; s. c., 1 Cr. L. Mag. 801; *People v. Johnson*, 71 Cal. 384; s. c., 9 Cr. L. Mag. 114; *People v. Flores*, 64 Cal. 426; s. c., 5 Cr. L. Mag. 285; *Alderman v. State*, 57 Ga. 367; *Com. v. Doherty*, 127 Mass. 20; s. c., 1 Cr. L. Mag. 802; *State v. Mims*, 26 Minn. 191; s. c., 3 Cr. L. Mag. 259; *State v. Grisham*, 90 Mo. 163; s. c., 9 Cr. L. Mag. 267.

Sufficiency of the Information or Indictment—An information charging the defendant with the crime of embezzlement is not demurrable for describing him as a "bailee accommodatum," if otherwise unobjectionable. *People v. Flores*, 64 Cal. 426; s. c., 5 Cr. L. Mag. 285; 1 West Coast Rep. 137.

If the terms of the contract between the defendant and the person alleged to have been specially injured are specifically set forth, and the contract clearly shows that the defendant was thereby constituted a bailee, and received the property in that capacity, an information or indictment will not be demurrable (under sect. 507 of the Penal Code of California), because the

It has been said that an indictment, framed in the language of the statute, charging the embezzlement of property intrusted to the defendant "as bailee," without setting forth the facts and circumstances of the bailment, is sufficient.¹

But it seems that an indictment against a bailee for felonious

defendant is not named as "bailee," or "tenant," or "lodger," as the case may be. *People v. Johnson*, 71 Cal. 384; s. c., 9 Cr. L. Mag. 114.

Sufficiency of Indictment. — How tested.

— The sufficiency of an indictment is to be tested by the requirements of the criminal practice act, and not by the rules of the common law. Under such an act an indictment for embezzlement by a bailee is sufficient, which charges that the defendant, on a day and at a place certain, "having been intrusted as bailee by one Hill with two certificates of deposit of money in a certain bank, — to wit, one for the sum of five thousand dollars and the other for the sum of four thousand dollars, both payable to the order of, and both being the property of, said Hill, — did collect and receive thereon and therefore from said bank; and as bailee, was by said bank and said Hill intrusted to carry and convey from said bank to Hill money to the amount and value of nine thousand dollars, proceeds of said two certificates; and said defendant being so as aforesaid intrusted as bailee with said certificates and said money to said amount of nine thousand dollars, the property of said Hill, afterward on, etc., at, etc., did fraudulently and feloniously convert the same and the proceeds thereof to his own use, contrary," etc. Such indictment does not charge more than one offence, and need not specify the nature of the bailment. *People v. Hill*, 3 Utah, 334; s. c., 5 Cr. L. Mag. 616.

An indictment which alleges the delivery to the defendant at D., in the county of N., of a deed of mortgage, on, etc., to be carried by him to the grantee named therein, and to be delivered by him to said grantee at B., in the county of S., and that the defendant did then and there take and receive the same into his possession, to be by him carried and delivered as aforesaid, and that he afterwards, on the same day, at D., in the county of N., and before the same was by him delivered to the grantee at B., feloniously did embezzle and fraudulently convert the same to his own use, sufficiently sets forth the general facts necessary to constitute the crime of embezzlement in the county of N. *Com. v. Concannon*, 87 Mass. (5 Allen) 502.

Larceny after Trust. — Georgia Code.

— An indictment for larceny after trust, under Georgia Code, sect. 4422 or 4224, which charges that defendant did fraudu-

lently convert the goods intrusted to him to his own use, need not charge that the same was done without the consent of the owner or bailor, and to his injury, and without paying him on demand the full value thereof. These clauses of the sections, or either of them, apply to other disposition of the goods than to the bailee's fraudulent conversion to his own use, and need only be charged and proved in such cases. *Alderman v. State*, 57 Ga. 367.

Failure to deliver Bank-Book. — Massachusetts Statute. — An indictment under Mass. Gen. Stat. ch. 161, sect. 35, charging defendant with having embezzled a bank-book, the property of A., delivered to defendant on a day named by A., "in the trust and confidence with the direction that the defendant would and should thereby receive only the custody of said book, and would and should hold the same until said book was demanded by A., when the defendant would and should deliver up and return said book to A." sufficiently alleges the possession of the bank-book, at the time of its embezzlement, to have been in the defendant. *Com. v. Doherty*, 127 Mass. 20; s. c., 1 Cr. L. Mag. 802.

By Carrier of Money. — Minnesota Statute. — To maintain an indictment under the provisions of Minnesota General Statutes, ch. 95, sect. 24, as amended by Laws of 1876, ch. 55 (Gen. Stat. 1878, ch. 95, sect. 33), for an embezzlement of money received by defendant from the owner, for the purpose of being sent and delivered to another, when the wrongful act complained of consisted in "the use and disposal of such money by defendant to his own use and benefit," it must allege that such use and disposition were without the consent of owner. *State v. Mims*, 26 Minn. 191; s. c., 3 Cr. L. Mag. 259.

Of Written Instrument. — Missouri Statute. — Missouri Revised Statutes, sect. 1312, applies only to the theft or embezzlement of an instrument of writing that is or purports to be the act of another; and an indictment that charges a party who has executed a chattel mortgage, and had the same intrusted to him to deliver to the recorder of deeds for registration, with failure to deliver it to the recorder, is sufficient. *State v. Grisham*, 90 Mo. 163; s. c., 9 Cr. L. Mag. 267.

1. *People v. Hill*, 3 Utah, 334; s. c., 5 Cr. L. Mag. 616.

conversion of coin must state the character of the bailment and the description of the coin.¹

3. *Averment as to Ownership.* — In an indictment for embezzlement, where known, the ownership of the property should be alleged;²

1. *People v. Cohen*, 8 Cal. 42. See also *People v. Peterson*, 9 Cal. 313.

2. See *State v. Lyon*, 45 N. J. L. (16 Vr.) 272; s. c., 5 Cr. L. Mag. 616; 17 Rep. 598; *Washington v. State*, 72 Ala. 272; s. c., 4 Cr. L. Mag. 611; 6 Cr. L. Mag. 289; *State v. Mohr*, 68 Mo. 303; s. c., 1 Cr. L. Mag. 262; *Alden v. State*, 18 Fla. 187; s. c., 4 Cr. L. Mag. 762; *People v. Treadwell*, 69 Cal. 226; s. c., 8 Cr. L. Mag. 355; *Com. v. Doherty*, 127 Mass. 20; s. c., 9 Cent. L. J. 77.

Rule in England. — The same rule prevails in England. See *Rex v. McGregor*, 3 Bos. & P. 106; s. c., R. & R. 23; *Rex v. Beacall*, 1 M. C. C. 15; *Reg. v. Adey*, 4 New Sess. Cas. 360; s. c., 1 Den. C. C. 571; *T. & M.* 296; 3 C. & K. 339; 4 Cox, C. C., 208; 19 L. J. M. C. 149; 14 Jur. 556; *Reg. v. Pritchard*, 1 L. & C. 34; s. c., 8 Cox, C. C., 461; 30 L. J. M. C. 169; 7 Jur. N. S. 557; *Reg. v. Woolley*, 4 Cox, C. C., 255; *Rex v. Jensen*, 1 M. C. C. 434; *Rex v. McGregor*, R. & R. 23.

In an Indictment for Embezzlement by an Agent, the name of the principal must be alleged; and it is the safer practice, though it may be unnecessary, to allege the ownership of the property as a fact distinct from the necessary inference of ownership by the named principal; yet, when such ownership is alleged, it becomes material, and must be proved as laid. *Washington v. State*, 72 Ala. 272; s. c., 4 Cr. L. Mag. 611.

In Case of Corporations. — In an indictment against an officer of a corporation for embezzlement of the property of such corporation, the corporation name, as fixed by law, should appear in such indictment as the owner of the property, and the name of office by such officer, as prescribed by law, should be set out therein. *Alden v. State*, 18 Fla. 187; s. c., 4 Cr. L. Mag. 762.

Embezzlement from Copartnership. — In an indictment under Mo. Wagn. Stat. 458, sect. 35, for embezzling the money of a copartnership, the names of the individual partners need not be set out. *State v. Mohr*, 68 Mo. 303; s. c., 1 Cr. L. Mag. 262.

Misnomer. — Judgment will be arrested when it appears that there is a misnomer in either the name of the corporation or in the title of the officer of the corporation so charged with embezzlement. *Alden v. State*, 18 Fla. 187; s. c., 4 Cr. L. Mag. 762.

That the company from which the alleged embezzlement was made was called "Railroad Company" in the indictment and in-

structions, while its corporate name was "Railway Company," held to be immaterial. *State v. Goode*, 68 Iowa, 593.

Indictment against Trustee. — An indictment for embezzlement which alleges that a bank-book was delivered to the defendant by the owner in trust and confidence, and with the direction that the defendant should thereby receive only the custody of it and should hold it until demanded by the owner and should then deliver it up and return it to him, sufficiently states that the actual and legal possession was parted with by the owner, and vested in the defendant. *Com. v. Doherty*, 127 Mass. 20; s. c., 9 Cent. L. J. 77.

Indorsee of Note. — The absolute indorsement of a promissory note does not relieve the indorser from liability upon it. He has still an interest in it to see that any agent of his authorized to collect and pay it over performs his duty; and if, after his indorsement, the indorsee gives such indorser the possession and control of the note to collect interest upon it for his benefit, or to otherwise control it, that would be sufficient to sustain an averment of an ownership in an information for embezzlement. *People v. Treadwell*, 69 Cal. 226; s. c., 8 Cr. L. Mag. 355.

"Clerk or Servant," or "In the Capacity of Clerk or Servant." — The secretary of an unenrolled friendly society, who is paid a yearly salary out of its funds, is properly described in the indictment as clerk and servant to the trustees, and it would be incorrect to designate him as employed in the capacity of clerk and servant. The latter description only applies where the prisoner is employed on temporary occasions, and does not usually fill the situation of clerk or servant. *Reg. v. Woolley*, 4 Cox, C. C., 255.

Friendly Societies. — Where, by the rules of certain unenrolled friendly societies, the members of one lodge were at liberty to pay their contributions to another lodge, if more convenient to them to do so, in an indictment against the secretary of a lodge for embezzling moneys received from a member of another lodge, it was held that the moneys may be laid as the property of the trustees of his lodge, to whose account all moneys received by him ought to be paid, although the trustees, in their turn, would, in this instance, have to account to the other lodge for the particular sum received on its behalf. *Reg. v. Woolley*, 4 Cox, C. C., 255.

but the indictment need not set out from whom the money embezzled was received.¹

4. *Description, Nature, and Value of Money and Property.* — *a. Generally.* — An indictment for embezzlement or larceny should describe the goods, at least in part, with such certainty as to identify them, and show judicially that they could be the subject of the offence, and enable the defendant to plead in bar on a subsequent indictment for the same chattels.²

Amendment of Allegation — The secretary of a friendly society, of which A., B., and others were trustees, was charged with embezzling money belonging to the society. In the indictment the property was laid as "of A., B., and others," without alleging that they were trustees of the society. The court held that the indictment might be amended by adding the words "trustees of," etc. *Reg. v. Marks*, 10 Cox, C. C., 367.

That Money embezzled is Property of Master. — In an indictment under 39 Geo. 3, c. 85, against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation that the money was the property of the master. *Rex v. McGregor*, 3 Bos. & P. 106; s. c., R. & R. 23; *Rex v. Beacall*, 1 M. C. C. 15.

Embezzling Funds of Joint-Stock Banking Company. — It is sufficient in an indictment for embezzling the property of a joint-stock banking company to allege the stolen property to belong to one of the partners named and others, under 7 Geo. 4, c. 64, s. 14; *Reg. v. Pritchard*, 1 L. & C. 34; s. c., 8 Cox, C. C., 461; 30 L. J. M. C. 169; 7 Jur. N. S. 557.

Against Servant employed by Partners. — A., being one of several proprietors of a Hereford and Birmingham coach, horsed it from Hereford to Worcester, and employed B. to drive it when he did not himself drive it; B. having all the gratuities as well when A. drove as when B. himself did so. It was the duty of B., on each day when he drove, to tell the bookkeeper at Malvern how much money he had taken, the bookkeeper entering that sum in a book and on the way-bill, together with what he had taken himself; and he then had to pay over the latter to B., who was to give the two sums to A. B. gave true accounts to the bookkeeper, who made true entries; but B. accounted for smaller sums to A., saying that those were all, and paid over to A. these smaller sums. All the proprietors were interested in the money; but A. was the person to receive it, and he was accountable to his co-proprietors. The court held that the money embezzled was properly laid as the money of A. *Reg. v. White*, 8 Car. & P. 742.

Against Collectors of Rates. — A. was employed by the overseers of a parish to collect poor-rates on their account. As their agent he demanded the amount of the rate from the landlord of a house who usually paid his tenants' poor-rates: he entered the amount in his book as uncollected and as legally excused, and embezzled the sum. Held, that although the overseers might not have been able to enforce the payment of the sum so embezzled, he received it in virtue of his employment, and on account of his employers, and that it was not necessary to lay the money as the joint property of the church-wardens and overseers. *Reg. v. Adey*, 4 New Sess. Cas. 360; s. c., 1 Den. C. C. 571; T. & M. 296; 3 C. & K. 339; 4 Cox, C. C., 208; 19 L. J. M. C. 149; 14 Jur. 556.

In such case it is sufficient to describe the money received by the collector for the rate as the property of the overseers only, naming them. *Reg. v. Adey*, 4 New Sess. Cas. 360; s. c., 1 Den. C. C. 571; T. & M. 296; 3 C. & K. 339; 4 Cox, C. C., 208; 19 L. J. M. C. 149; 14 Jur. 556.

1. *State v. Lanier*, 89 N. C. 517; s. c., 5 Cr. L. Mag. 616; *Rex v. Jenson*, 1 M. C. C. 454; *Rex v. McGregor*, R. & R. 23. However, it is said that if the judge should consider it fair to the person charged to order the persecutor to furnish particulars of the crime alleged against him, such particulars ought at least to state the names of the persons from whom the money is claimed to have been received. *Rex v. Jenson*, 1 M. C. C. 454.

In North Carolina. — An indictment for embezzlement of money need not state the name of the person from whom the money was received; and the averment that the defendant is neither an apprentice nor under the age of sixteen is a substantial compliance with the statute. *State v. Lanier*, 89 N. C. 517; s. c., 5 Cr. L. Mag. 616.

2. *State v. Edson*, 10 La. An. 229. See *State v. Thompson*, 42 Ark. 517; s. c., 6 Cr. L. Mag. 289; *State v. Ward*, 48 Ark. 36; *Woodward v. State*, 103 Ind. 127; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 380; *People v. Cox*, 40 Cal. 275; *People v. Cohen*, 8 Cal. 42; *Com. v. Leisenring*, 11 Phila. (Pa.) 392; s. c., 32 Leg. Int. 160-168; 2 Cr. L. Mag. 566.

The indictment should give a description of the property embezzled with the same particularity as is required in an indictment for larceny.¹ The omission in an indictment for embezzlement to state any description or character whatever of the money stolen is fatal, whenever presented during the progress of the trial.²

It is not necessary, however, that the property or money embezzled should be fully described;³ but the object for which the money embezzled was originally received by the accused should be set out.⁴

b. Certainty. — An indictment must be specific and certain in description; but words constitute a sufficient description.⁵

1. *State v. Thompson*, 42 Ark. 517; 68 Mo. 266; s. c., 1 Cr. L. Mag. 665; *Com. v. Pratt*, 137 Mass. 98; *Com. v. Concanon*, 87 Mass. (5 Allen) 502; *Mayo v. State*, 30 Ala. 32.

2. *State v. Ward*, 48 Ark. 36; *People v. Cox*, 40 Cal. 275.

The indictment should set out specifically some article of property embezzled, and the evidence should support the statement. *Rex v. Tyers*, R. & R. 402; *Rex v. Furneaux*, R. & R. 334.

Description of Money embezzled. — An indictment for the embezzlement of money must definitely describe the money embezzled. A general description by amount, as so many dollars of good and lawful money of the United States, is not sufficient. *State v. Ward*, 48 Ark. 36.

An indictment for embezzlement describing the property as "certain money to a large amount, to wit, to the amount of one hundred dollars," was held insufficient. *State v. Thompson*, 42 Ark. 517.

In Louisiana. — The description of money, as contained in the indictment, being "a general allegation of the amount and the thing," is sufficient in a proceeding under the same section (Rev. Stat. sect. 907), as provided in sect. 906 of the same. *State v. Palmer*, 32 La. An. 565; s. c., 2 Cr. L. Mag. 706.

3. See *Com. v. Leisenring*, 11 Phila. (Pa.) 392; s. c., 32 Leg. Int. 160-168; 2 Cr. L. Mag. 566; *Woodward v. State*, 103 Ind. 127; s. c., 8 Cr. L. Mag. 355. 7 Cr. L. Mag. 380.

Embezzlement of Lottery-Ticket. — It is not necessary in an indictment for the embezzlement of the proceeds of a lottery-ticket to set out the ticket in full. *Woodward v. State*, 103 Ind. 127; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 380.

4. *Territory v. Maxwell*, 2 N. M. Ter. 250; s. c., 4 Cr. L. Mag. 762.

5. *People v. Dorr*, 39 Cal. 428. See *Hollingsworth v. State*, 111 Ind. 289; s. c., 9 Cr. L. Mag. 973; 12 N. E. Rep. 490; *Com. v. Butterick*, 100 Mass. 1; *Com. v. Bennett*, 118 Mass. 443; *State v. Meyers*,

68 Mo. 266; s. c., 1 Cr. L. Mag. 665; *Com. v. Pratt*, 137 Mass. 98; *Com. v. Concanon*, 87 Mass. (5 Allen) 502; *Mayo v. State*, 30 Ala. 32.

An indictment for embezzlement, describing the property as "certain books, letter-files, knives, bank-shears, slates, and sealing-wax, to about the value of forty dollars," is sufficiently certain and definite, under the forms prescribed by the Alabama Code. *Mayo v. State*, 30 Ala. 32.

An Indictment for Embezzlement of "a Deed of Mortgage of certain land situated in R., in the county of N., before then made and executed by the said C. (the defendant) to one D., and delivered to said D. by said C. of the property, goods, and chattels of the said D., and of the value," etc., sufficiently describes the article embezzled. *Com. v. Concanon*, 87 Mass. (5 Allen) 502.

An indictment (under Mass. Gen. Stat. chap. 161, § 12) charging one with embezzling, at time and place stated, "certain money, to the amount and value of \$25,000," sufficiently describes the property embezzled. *Com. v. Bennett*, 118 Mass. 443.

An Indictment against a County Treasurer for Embezzlement is not bad for failure to particularly specify each fund charged to have been embezzled, especially when attacked after verdict. *Hollingsworth v. State*, 111 Ind. 289; s. c., 9 Cr. L. Mag. 973.

Against Treasurer of Savings Bank. — In an indictment (under the Massachusetts Gen. Stats. chap. 161, § 38) against the treasurer of a savings bank, for embezzlement of its property, an allegation of the embezzlement of money to a certain amount, and of mortgages and notes, so described as to identify them, is a sufficient description of the property alleged to have been embezzled. *Commonwealth v. Pratt*, 137 Mass. 98.

Bonds of United States. — In an indictment for embezzlement, a description of the property taken as "bonds of the United States of America for the payment of

Thus if an indictment alleges the embezzlement of certain mortgages and notes, and certain "pieces of paper writing," and the mortgages and notes are so described as to identify them, it is immaterial, on a motion to quash, whether the pieces of paper writing are so described.¹

But the indictment must allege intent or it will be bad.²

c. Description of Coin or Money; Character of Funds, etc. — An information for embezzlement of money need not specify the coin, number, or kind of money embezzled; nor is it necessary to prove such facts on the trial.³

It is no defect in the indictment that it does not describe the sum of money alleged to be embezzled in coin or bank-notes,⁴ because all that is required is the best description which the circumstances will permit, both in the indictment and upon the trial.⁵

money, issued by authority of law," and of an aggregate value of \$1,000, is held to be sufficiently specific. No greater particularity is requisite than in an indictment for larceny. *Com. v. Butterick*, 100 Mass. 1.

An indictment for embezzlement described the property embezzled as "certain United States five-twenty Government bonds, which were valuable securities, of the value of \$5,000." *Held*, a sufficiently particular description. *State v. Meyers*, 68 Mo. 266; s. c., 1 Cr. L. Mag. 665.

It was necessary to set out in detail the nature and purpose of the agency, the agency and the receipt of the bonds by the defendant in his capacity of agent being distinctly averred. The contract between defendant and owner of the bonds need not be set out; but such contract, when proven, must establish an agency within the meaning of the statute under which he was indicted, and not an ordinary bailment. *State v. Meyers*, 68 Mo. 266; s. c., 7 Cent. L. J. 49.

1. *Com. v. Pratt*, 137 Mass. 98.

Description as so many Dollars Bad. — When, in the trial of an indictment for the embezzlement of money, the only description given of the money is so many dollars, good and lawful money of the United States, in the absence of an excuse alleged in the indictment for the want of a more full and definite description of the money embezzled, the description given is bad for uncertainty. *State v. Ward*, 48 Ark. 36; s. c., 9 Cr. L. Mag. 267; 2 S. W. Rep. 191.

2. **"Certainty to a Common Intent."** — Thus an indictment charging that the accused "knowingly converted or applied to his own use one hundred and eighty dollars, or other large sum of money," *held*, to be bad for want of "certainty to a common intent." *Noble v. State*, 59 Ala. 73.

3. *People v. Treadwell*, 69 Cal. 226; s. c., 3 Cr. L. Mag. 355; 7 Crim. L. Mag. 796.

See *Territory v. Maxwell*, 2 New Mex. Tr. 250; s. c., 4 Cr. L. Mag. 762; *State v. Thompson*, 32 La. An. 796; s. c., 2 Cr. L. Mag. 706; *State v. Munch*, 22 Minn. 67; *State v. New*, 22 Minn. 76; *State v. Smith*, 13 Kans. 274; *State v. Carrick*, 16 Nev. 120; s. c., 3 Cr. L. Mag. 883.

4. *State v. Thompson*, 32 La. An. 796; s. c., 2 Cr. L. Mag. 706.

5. *Territory v. Maxwell*, 2 New Mex. Tr. 250; s. c., 4 Cr. L. Mag. 762; *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 763.

It is not necessary that an indictment for embezzlement of money set forth the whole amount of money received by defendant, a part of which is alleged to have been embezzled. Under an indictment alleging the receipt of a gross sum "exceeding" a sum named, proof may be made of the receipt of any amount, although it greatly exceed the sum thus named. *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 763.

An Indictment against a State Treasurer for Embezzlement of State funds need not state the character or amounts of the various funds embezzled, nor that the same is unknown to the grand jury. *State v. Munch*, 22 Minn. 67. Compare *State v. New*, 22 Minn. 76.

In an information against a county treasurer for embezzling public funds in the county treasury, it is impossible and unnecessary to set forth the particular kind of funds embezzled, whether United States treasury notes, or bank-notes, or gold, or silver. *State v. Smith*, 13 Kan. 274; *State v. Carrick*, 16 Nev. 120; s. c., 3 Cr. L. Mag. 883.

When Indictment insufficient. — An indictment for the conversion of \$400,000, moneys, goods, and chattels, not specifying which, nor alleging the amount to be lawful currency of the United States, is not sufficiently certain. *People v. Cohen*, 8 Cal. 42. The indictment must describe the coin. *Id.*, *People v. Peterson*, 9 Cal. 313.

d. Averment of Value or Amount. — An indictment for embezzlement must allege the value or amount of the money or property embezzled; ¹ but the exact amount need not be specified. ²

e. Averments as to Directions for Application of Proceeds. — An indictment for embezzlement, where the money or property was intrusted for a particular purpose, such as safe-keeping, or to deliver to a third person, or the like, must set out the purpose for which the same was intrusted to the defendant, ³ and allege a written direction as to the application. ⁴

5. Averment as to Time. — The time of the commission of the

1. *Reside v. State*, 10 Tex. App. 675; s. c., 3 Cr. L. Mag. 424; *People v. Donald*, 48 Mich. 491; s. c., 4 Cr. L. Mag. 459; *Bork v. People*, 16 Hun (N. Y.), 476; *Britton v. State*, 77 Ala. 202. Compare *McDaniels v. People*, 118 Ill. 301; s. c., 9 Cr. L. Mag. 115; 8 N. E. Rep. 687; 5 West. Rep. 903; *State v. Small*, 26 Kans. 209; s. c., 3 Cr. L. Mag. 759.

Allegation of Value. — The value is not sufficiently alleged by describing the embezzled property as "eight dollars in money, consisting of one five-dollar bill, one two-dollar bill, and one one-dollar bill, circulating medium current as money." *Reside v. State*, 10 Tex. App. 675; s. c., 3 Cr. L. Mag. 424.

An information for the embezzlement or statutory larceny of "money" is defective for not stating its value, if the money embezzled consists of checks and certificates of deposit. But the defect is open to amendment. *People v. Donald*, 48 Mich. 491; s. c., 4 Cr. L. Mag. 459; 3 Cr. L. Mag. 759.

A large sum of money, to wit, the sum of \$1,100." *Held*, to be fatally defective in not stating the value. *Bork v. People*, 16 Hun (N. Y.), 476.

There is no legal presumption for the purposes of a criminal prosecution that bank-notes, checks, bills of exchange, and other securities for money are worth the sums which they represent, or any sum. *People v. Donald*, 48 Mich. 491; s. c., 4 Cr. L. Mag. 459.

Averment as to Amount embezzled. — An indictment against a tax-collector for the embezzlement of public funds, in failing to make returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law, must allege some particular sum or amount as to which the offence is charged, but it is sufficient to allege that it is "about" a named sum, and it is not necessary to prove the precise sum specified. *Britton v. State*, 77 Ala. 202.

Illinois Doctrine. — Embezzlement of Railroad Ticket. — In an indictment for larceny,

at common law, under sects. 167, 168 of the Criminal Code, it would be necessary to allege the value of the property stolen, and to prove the same on the trial; but it is otherwise in an indictment under sect. 77 of the Crim. Code, which provides for the punishment of stealing or embezzling any coupon or other railroad ticket or pass, without any provision in regard to the value of the article stolen. *McDaniels v. People*, 118 Ill. 301; s. c., 9 Cr. L. Mag. 115.

Same. — Embezzlement of Gelding. —

Where the information charges the embezzlement of a gelding which has been delivered to the accused as bailee, the information need not allege the value of the property, as the statute provides that upon conviction therefor, the party so charged shall be adjudged guilty of larceny, and punished in the manner prescribed by law for stealing property of the nature so embezzled; and the punishment for persons convicted of stealing a horse or gelding is by confinement and hard labor not exceeding seven years. *State v. Small*, 26 Kans. 209; s. c., 3 Cr. L. Mag. 759.

2. *Rex v. Carson*, R. & R. 303; *Rex v. Grove*, 1 M. C. C. 447.

3. An indictment for embezzlement, which avers that the defendant "was intrusted by J. S. with certain property, the same being the subject of larceny (described), and to deliver the same to said S. on demand," and afterwards "refused to deliver said property to S., and feloniously did embezzle and fraudulently convert to his own use, the same then and there being demanded of him by said S." is fatally defective, by reason of omitting to state the purpose for which the defendant was intrusted with the property, or what property he fraudulently converted to his own use. *Com. v. Smart*, 72 Mass. (6 Gray) 15.

4. An indictment under 7 & 8 Geo. 4. c. 29, s. 49, against a banker for embezzling a security for money, must allege a written direction to him as to the application of the proceeds. *Reg. v. Golde*, 2 M. & Rob. 425.

act must be alleged in an indictment for embezzlement.¹ But in an indictment for embezzlement, or in one for aiding and counselling embezzlement, the day named for the commission of the offence is not material, and evidence may be given, referring to any other day before the finding of the indictment.²

6. *Time when must be found—Statute of Limitations.*—The time within which an indictment for embezzlement must be found is regulated in most of the States by statute.³ Where the statutory period has expired before the finding of an indictment for embezzlement, the better practice is to allege the time of commission of offence, and set forth the facts which avoid the bar of the statutes of limitations as an excuse for not having preferred the indictment sooner, though it has been held that the offence may be alleged to have been committed within the time fixed by the statute, and that the facts which suspend the running of the statute may be proved at the trial.⁴

7. *Counts.*—*a. Joinder.*—In an indictment for embezzlement, the conversion should be distinctly set forth in an independent count;⁵ but the fact that the money alleged to have been em-

1. *State v. Lyon*, 45 N. J. L. (16 Vr.) 272.

Embezzlement by County Treasurer.—Yet it has been said that in an indictment against a county treasurer for embezzlement, it is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession, or was under his control by virtue of his office, without specifying with certainty the particular kind of funds embezzled, or the time when the money was received. *State v. Carrick*, 16 Nev. 120; s. c., 3 Cr. L. J. 883.

2. *State v. Cushing*, 11 R. I. 313.

3. **The 32d Section of the Original Crimes Act of April 30, 1790**, enacts the only statute of limitation applicable to the offence of embezzlement by a public officer, and requires an indictment to be found in two years. *United States v. Cook*, 84 U. S. (17 Wall.) 168; bk. 21 L. ed. 538.

Embezzlement of Money-Order.—On an indictment for embezzlement of money from a money-order office, the defendant cannot be prosecuted or punished, unless the indictment is found within two years from the committing of the offences, under the act of April 30, 1790. It is not a crime under the revenue laws, for which five years is allowed, under the act of March 26, 1804. *United States v. Norton*, 91 U. S. (1 Otto) 566; bk. 23 L. ed. 454.

Statute of Limitations.—How raised.—The defence of the statute of limitations under that section cannot be taken under a demurrer to the indictment. *United States v. Cook*, 84 U. S. (17 Wall.) 168; bk. 21 L. ed. 538.

A Prosecution of a Clerk for Embezzlement is not barred by the fact that he was witness for the commonwealth in the prosecution of a fellow clerk of the same employer for larceny in the same shop. *Com. v. Woodside*, 105 Mass. 594.

4. *State v. Meyers*, 68 Mo. 266; s. c., 7 Cent. L. J. 499.

5. But where an indictment for embezzlement contains several counts, if some of the several counts are good, the indictment will not be quashed for defects in the other counts. *Com. v. Pratt*, 137 Mass. 98.

Inconsistent Allegations.—A charge of secreting and making away with public moneys is inconsistent with a charge of investing it in property in the sense of the statute, and, if it is intended to arraign the accused on each, they must be inserted in different counts. *State v. Flint*, 62 Mo. 393.

Charging Offence.—Different Forms.—Charging the accused, in the first count of the indictment, with embezzling and converting to his own use money belonging to the bank, and in the second count with embezzling and converting to his own use money deposited with the bank, thus charging, conjunctively, both embezzlement and conversion, and the embezzlement and conversion of both money belonging to the bank and money deposited with it, does not render the indictment obnoxious to the objection of either duplicity or uncertainty under the provisions of Rev. Stat. sect. 907. *State v. Palmer*, 32 La. An. 565; s. c., 2 Cr. L. Mag. 706.

Charging One Offence in Two Counts.—An indictment for embezzlement contained

bezzled by the accused was received in several sums, at different times, and from different persons, affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction.¹

b. Joinder of Embezzlement and Larceny. — Counts for larceny and embezzlement may be included in the same indictment, and the court will not compel the prosecutor to elect on which count he will proceed, if one offence only is charged.²

two counts, each identical as to the time and place, names of persons, and description of property. *Held*, that the indictment charged but one offence. *State v. Malin*, 14 Nev. 288; s. c., 2 Cr. L. Mag. 113.

Surplusage — Rejection. — Where, in an indictment for embezzlement, there is a second count charging another act of embezzlement within six months from the first, under 7 & 8 Geo. 4, c. 29, s. 48, but alleging the money to be the property of a different person from that mentioned in the first count, the words connecting the second count with the first may be rejected as surplusage, and the second count dealt with as an independent count. *Reg. v. Woolley*, 4 Cox, C. C., 251.

1. *Gravatt v. State*, 25 Ohio St. 162; s. c., 3 Cent. L. J. 392.

2. *Mayo v. State*, 30 Ala. 32; *State v. Porter*, 26 Mo. 201; *Murphy v. People*, 104 Ill. 528; s. c., 4 Cr. L. Mag. 459; 15 Rep. 300; *Coats v. People*, 4 Park. Cr. Cas. (N. Y.) 662; *Com. v. Simpson*, 50 Mass. (9 Metc.) 138; *State v. Walton*, 62 Me. 106; *Ker v. People*, 110 Ill. 629. See *Rex v. Johnson*, 3 M. & S. 539; *Reg. v. Holman*, 9 Cox, C. C., 201; s. c., L. & C. 177, 10 W. R. 718; 8 Jur. (N. S.) 1082.

Joinder of Counts. — Embezzlement and larceny from a storehouse may be joined, in different counts, in the same indictment. *Mayo v. State*, 30 Ala. 32. A count for embezzling bank-notes upon the statute may be joined with a count for larceny. *Rex v. Johnson*, 3 M. & S. 539. An indictment under Maine Rev. Stat. ch. 120, sec. 7, designating three classes of principals and abettors in embezzlement or breach of trust as guilty of larceny, need only allege the acts and facts therein declared to be deemed larceny. *State v. Walton*, 62 Me. 106. In *Com. v. Simpson*, 50 Mass. (9 Metc.) 138, it was *held* that an indictment alleging that the defendant "did embezzle, steal, and carry away," etc., was not bad for duplicity because it charged the two offences of embezzlement and larceny; embezzlement being rejected as surplusage. It is customary to add a separate count for larceny, in order that, should the count for embezzlement not be sustained, the prisoner may be convicted of simple larceny.

Compelling an Election as to a Single Act. — On an indictment for embezzlement

and larceny of moneys, funds, and securities, there is no error in the court refusing to compel the prosecution to elect upon what alleged act of embezzlement or larceny a conviction will be asked, as embezzlement may, and most often does, consist of many acts done in a series of years by virtue of the confidential relations existing between the employer and employee. *Ker v. People*, 110 Ill. 629.

A prisoner was indicted in the first count for embezzlement, and in the second for larceny, as a bailee. After plea pleaded and the jury was charged, and in the course of the trial it was objected for the prisoner that the indictment was bad for misjoinder of counts. The court overruled the objection, and directed the prosecutor to elect upon which count he would proceed; and the prosecutor having elected to proceed upon the second count, the prisoner was found guilty thereon. *Held*, that the conviction was right. *Reg. v. Holman*, 9 Cox, C. C., 201; L. & C. 177; 6 L. T. 474; 10 W. R. 718; 8 Jur. (N. S.) 1082.

When Indictment defective. — Under the statute of Texas, embezzlement is punishable as theft. The minimum and maximum punishment for horse theft is respectively five and fifteen years. The minimum and maximum punishment for the theft of property of or exceeding the value of \$20 is respectively two and ten years. A count in an indictment which charges two distinct offences is bad — burglary and theft being an exception to this rule. The indictment in this case charged in a single count the embezzlement of a horse, and also a gun and pistol of the combined value of twenty dollars. *Held*, that the two kinds of theft charged constitute two separate offences, and the indictment was bad for duplicity. *Heineman v. State*, 22 Text. App. 44.

If a count in an indictment (under the Mass. Gen. Sts. c. 161) against the treasurer of a savings bank, for embezzlement of its property, after describing the acts done, alleges that, by force of the statute, the defendant "is deemed to have committed the crime of simple larceny," and that he did steal, take, and carry away the property "in the banking-house aforesaid," thus leaving it in doubt whether the count is framed under § 38 or § 39, the count is

8. *Averments necessary in Embezzlement from National Banks.* — An indictment of a president, or other officer or servant, of a national bank, under the statute¹ for embezzling the moneys thereof, must show that such moneys were lawfully intrusted to his possession.²

The indictment should also show the facts relied upon as constituting the offence. To use the word "embezzle" alone is not enough; for this is not a word of definite common-law meaning, but is used in the statutes to designate a variety of crimes which a person has the opportunity to commit, by reason of his being in some office or confidential employment.³

An indictment seeking to charge defendants with embezzling or aiding and abetting a director, or other officer, of a national bank in misapplying the funds of the bank, must state facts showing a misapplication of money of the bank by such officer or director.⁴

9. *Public Officers. — a. Averment as to Official Capacity.* — In an indictment for embezzlement by a public officer it must be set forth that he was a public officer in the discharge of his duties;⁵

bad, and will be quashed on motion. *Com. v. Pratt*, 137 Mass. 98.

Where an indictment for embezzlement could not be supported because the offence was not an embezzlement but a larceny, and the larceny count stated the larceny to have been committed "in manner and form aforesaid," held, that the prisoner could not be convicted. *Rex v. Murray*, 5 C. & P. 145; 1 M. C. C. 276.

1. U. S. Rev. Stat. sect. 5209.

2. *United States v. Johnson*, 4 Cin. L. Bul. 361.

But it is not necessary that the indictment should charge that the president or other officer of the bank had the actual custody or possession of the money embezzled or converted. In that section, which applies only to bank officers, the ingredient of "custody," "possession" or "being intrusted with," is not mentioned as a requisite to constitute the offence therein denounced, as it is in other statutes defining and punishing of embezzlement. *State v. Palmer*, 32 La. An. 565; 1 Cr. L. Mag. 706.

3. *United States v. Conant*, 9 Cent. L. J. 129.

4. *United States v. Warner*, 26 Fed. Rep. 616; s. c., 7 Cr. L. Mag. 795; *United States v. Britton*, 107 U. S. (17 Otto) 655; bk. 27 L. ed. 520.

A count that charges that defendant, the president of a banking association, failed to apply certain funds standing to the credit of a debtor of such association to the payment of his indebtedness, and permitted such debtor to withdraw his funds from the association and transfer them to another bank, does not charge a criminal misappli-

cation by defendant of the moneys and funds of the association, and is bad. *United States v. Britton*, 107 U. S. (17 Otto) 655; bk. 27 L. ed. 520.

"Wilfully misapplied." — The words "wilfully misapplied" have no settled technical meaning. Hence an averment in such an indictment, that defendant, "being president of the association, wilfully misapplied its moneys and funds by buying therewith certain shares of its stock with intent to injure and defraud the association, and certain persons to grand jurors unknown," is not sufficient; the manner in which the application was made, and that it was an unlawful one must be shown. *United States v. Britton*, 107 U. S. (17 Otto) 655; bk. 27 L. ed. 520; s. c., 2 Sup. Ct. Rep. 512.

5. See *People v. Potter*, 35 Cal. 110; *State v. Parsons*, 54 Iowa, 405; s. c., 2 Cr. L. Mag. 706; 1 Cr. L. Mag. 802; *State v. Goss*, 69 Me. 22; s. c., 1 Cr. L. Mag. 405.

By Municipal Officer. — Where the act of incorporation of a city vested the municipal government in certain officers, including "a city marshal;" held that an indictment charging a person with embezzling moneys of the city, alleging that he was at the time of the act "the city marshal of," etc., sufficiently averred that he was then an officer of the corporation. *People v. Potter*, 35 Cal. 110.

"Treasurer of the Board of Directors" of an independent school-district is an officer recognized by the law, and may be indicted by that name for embezzlement of district-school funds. An indictment for the embezzlement of public funds should allege that the funds appropriated are also, "un-

but it is held that in an indictment under the New-York statute for the unlawful conversion of property or funds belonging to a municipal corporation by an officer thereof, it is not necessary to aver the fiduciary character of the accused.¹

b. Averment as to Manner of Acquisition of Office. — The manner of acquisition of office by a public officer charged with embezzlement is an unimportant matter, and need not be averred in the indictment.² In some States, however, it is held that an indictment against an agent of the State and county for embezzlement should allege when and how he was appointed and the authority for his appointment.³

c. Averment as to Ownership of Money. — Where the substance of the offence of embezzlement by a public officer, as defined by statute, consists in the conversion of public money, an indictment for the embezzlement of money belonging to several municipalities need not state the amount belonging to each. It is sufficient to allege that the money was public money, belonging to the municipalities named in the statute, or to one or more of them.⁴

accounted for." *State v. Parsons*, 54 Iowa, 405; s. c., 2 Cr. L. Mag. 706; 1 Cr. L. Mag. 802.

Collector of Taxes. — An indictment which avers that the accused, "being a public officer, to wit, the collector of taxes of the town of M.," did embezzle, etc., sufficiently describes the official character of the accused, without stating how he came into the office, or that he was duly qualified to act by taking the oath and giving the bond required by law. *State v. Goss*, 69 Me. 22; s. c., 1 Cr. L. Mag. 405.

1. *Bork v. People*, 91 N. Y. 5.

The same is true of an indictment under the statutes of many of the States.

This is a fact, however, proper to be proved on the trial. *Bork v. People*, 91 N. Y. 5.

2. See *State v. Goss*, 69 Me. 22; s. c., 1 Cr. L. Mag. 124; 8 Rep. 558; *State v. Nicholson*, 67 Md. 1; s. c., 9 Cr. L. Mag. 556; 6 Atl. Rep. 817; *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 762.

Sufficiency of Indictment. — An indictment for the embezzlement of public moneys need not set out the manner in which the party charged came into office. *State v. Goss*, 69 Me. 22; s. c., 1 Cr. L. Mag. 124; 8 Rep. 558. Thus it need not be averred that the defendant had duly been appointed tax-collector, if it contain an averment in express terms that he was collector of the State and county taxes for a certain county, and, as such, did collect a specified sum on account of taxes due the State. *State v. Nicholson*, 67 Md. 1; s. c., 9 Cr. L. Mag. 556.

And in an indictment for embezzlement by a county treasurer, committed by a re-

fusal to deliver to his successor in office the moneys in his hands, it is not necessary to set forth all the steps by which such successor became county treasurer. It is enough to allege that he was properly appointed by the board of county commissioners, duly qualified, and thereby became the successor in office of the defendant, without alleging that a vacancy existed in the office by reason of which the right to make such appointment existed. But, if the indictment purports to set forth, particularly, the means by which the appointee became county treasurer, and some event, legally necessary to that end, is not averred, the particular allegations modify and control the general averment of the ultimate fact, and such fact is not well pleaded. *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 762.

3. *State v. Flint*, 62 Mo. 393.

4. *Brown v. State*, 18 Ohio St. 496. See also *State v. Arnold*, (Mo.), 9 Cr. L. Mag. 267; 2 S. W. Rep. 269; 7 West. Rep. 283; *State v. Flint*, 62 Mo. 393; *State v. Hays*, 78 Mo. 600; s. c., 1 Cr. L. Mag. 911; *People v. Potter*, 35 Cal. 110; *People v. De La Guerra*, 31 Cal. 416.

Under section 243 of the Cal. Crim. Pract. Act, an indictment charging one with embezzling moneys of the "city of J., a municipal corporation of C. County," etc., is not fatally defective, although the act of incorporation of the city of J. provides for a city government to be a body politic and corporate by the name and style of "the mayor and common council of the city of J." *People v. Potter*, 35 Cal. 110.

Tax-Collector. — Where an indictment against a tax-collector for embezzlement

d. Averment as to Failure to Account. — The crime of embezzlement by the custodian of public funds, under the statute, consists of the conversion of public money to his own use and a failure to account for the same, and an indictment for the offence must charge not only the conversion but also the failure to account.¹

alleged the receiving certain moneys due the county and certain moneys due the State, and the embezzlement charged was of the sum total, *held*, that the indictment charged but one offence. *People v. De La Guerra*, 31 Cal. 416.

Revenue Collector — Indictment — When sufficient. — An indictment that charges that defendant, being a duly elected and qualified collector of State and county revenue of a county named, by virtue of his office was intrusted with the custody of the revenue belonging to such county, and, on a day named, did of such public moneys, the sum of \$12,000 good and lawful money, the denomination and particular description of which were to the grand jurors unknown, unlawfully, fraudulently, and feloniously make way with and convert to his own use, and feloniously embezzle, steal, and carry away, is sufficient, under Rev. Stat. Mo. sect. 1326. *State v. Arnold* (Mo.), 2 S. W. Rep. 269; s. c., 7 West. Rep. 283; 9 Cr. L. Mag. 267.

Township Trustees. — An indictment against a township trustee charged that he had embezzled "public moneys belonging to the school fund of North Township," in Dade County. Strictly speaking, the moneys belonged to the sub-districts of North Township, rather than the township itself. *Held*, however, that this did not invalidate the indictment. It was sufficient to allege that the funds embezzled were "public moneys," and the amplification in the charge did not vitiate or limit the proof. *State v. Hays*, 78 Mo. 600; s. c., 1 Cr. L. Mag. 911.

Sheriff. — An indictment under the Missouri statute (Wagn. Stat. 1872, 459, sect. 41) against a sheriff for embezzling public money of the State and county need not state from whom he received the money, nor the proportion that belonged respectively to the State and county. It is sufficient to allege that it was public money belonging to the State or county or both. *State v. Flint*, 62 Mo. 393.

1. *State v. Parsons*, 54 Iowa, 405; s. c., 2 Cr. L. Mag. 706. See also *State v. Govan*, 48 Ark. 76; s. c., 9 Cr. L. Mag. 267; *State v. Hebel*, 72 Ind. 361; *State v. Nicholson*, 67 Md. 1; s. c., 9 Cr. L. Mag. 556; 8 Atl. Rep. 817.

But it has been *held* that an indictment against a county treasurer for embezzlement, which charges that the defendant on, etc., then and there being county treasurer of said county, duly elected in pursuance

of law to said office of public trust in said State, did feloniously and fraudulently embezzle a large sum of money, to wit, the sum of \$4,508.37, then and there in possession of such officer by virtue of his said office, contrary, etc., is sufficient even on motion to quash. *Goodhue v. People*, 94 Ill. 37; s. c., 2 Cr. L. Mag. 113.

An Indictment against a County Treasurer for Embezzlement of public funds must allege a settlement of his accounts by the county court, and a failure by him to pay over the amount found due. *State v. Govan*, 48 Ark. 76; s. c., 9 Cr. L. Mag. 267.

An indictment against a county treasurer for an alleged defalcation, in failing to pay over certain moneys to his successor in office, under the statute in relation thereto, 2 R. S. 1876, p. 450, must charge that at the expiration of such officer's term there remained in his hands, either actually or constructively, a sum of money received by him by virtue of his office, which, upon proper demand, after his term had expired, he fraudulently failed or refused to account for and pay over to his successor in office. But such statute does not require any officer named therein to account to his successor until the expiration of his term. *State v. Hebel*, 72 Ind. 361.

Tax-Collector. — **Maryland Statute.** — An indictment under the Maryland Act of 1872, c. 329, which provides that any collector shall, when there is no fixed date for the payment of taxes collected by him to the State treasurer, "neglect to pay the same for the space of six months," he shall be liable to punishment, is sufficient, if he alleges that the collector failed to pay moneys into the treasury for the space of "six months after he had collected and received" the same. *State v. Nicholson*, 67 Md. 1; s. c., 9 Cr. L. Mag. 556; 3 Atl. Rep. 817. Nor is it necessary to aver that the taxes collected were levied by the county commissioners, or that the taxes were placed in the hands of the defendant for collection; these averments being implied in the averment that he was collector and had collected a specified sum on account of taxes. *Id.* And under the provision of the statute that upon payment of the money for which the collector is in default, he shall be charged, the collector must plead such payment as a defence, and the indictment need not aver that the money is still detained. *Id.*

10. *In Embezzlement from Mails.*—In an indictment it is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster, or other person in the postal service, nor particularly to describe bank-notes, or other articles, alleged to have been enclosed in and stolen with the letters.¹ But if either the letter or the articles it

1. *United States v. Lancaster*, 2 McL. C. C. 431; *United States v. Patterson*, 6 McL. C. C. 466. See *United States v. Martin*, 2 McL. C. C. 256; *United States v. Jenther*, 13 Blatchf. C. C. 335; *United States v. Okie*, 5 Blatchf. C. C. 516; *United States v. Clark, Crabbe* (U. S. D. C.), 584.

In an indictment under the act of March 3, 1825 (4 Stat. 102), for embezzling a letter containing a bank-note, it is not necessary to state the particular office held by the accused, nor to allege the note to have been of an incorporated bank, or of any value. *United States v. Clark, Crabbe* (U. S. D. C.), 584.

Sufficient Allegation.—Charging Offence in Words of Statute.—It is sufficient to allege that the letter came into the hands of the postmaster, in the words of the statute of March 3, 1825 (4 Stat. 102), without showing where it was mailed, or on what route it was conveyed. *United States v. Lancaster*, 2 McL. C. C. 431.

In an indictment for unlawfully abstracting from the mail a letter containing bank-notes, it is sufficient to allege that the letter was put into the post-office to be conveyed by post, and came into the possession of the defendant as a driver of a mail-stage. *United States v. Martin*, 2 McL. C. C. 256.

Sufficiency of indictments against persons in the postal service for embezzling, destroying, and stealing from letters. *United States v. Jenther*, 13 Blatchf. C. C. 335; *United States v. Okie*, 5 Blatchf. C. C. 516; *United States v. Golding*, 2 Cr. C. C. 212; *United States v. Laws*, 2 Low. C. C. 115.

Insufficient Allegation.—An indictment under Rev. Stat. sect. 5467 against an employee in a post-office for stealing money from a letter, which does not aver that the letter was one intended to be conveyed by mail, or that it had been deposited in any post-office, or was in the charge of the defendant, or that it came into his possession in the regular course of his official duty is bad. *United States v. Winter*, 13 Blatchf. C. C. 333. To same effect under act of March 3, 1825, sect. 21 (4 Stat. 102), *United States v. Foye*, 1 Curt. C. C. 364. But see, under act of April 30, 1810, sec. 18 (2 Stat. 597), *United States v. Golding*, 2 Cr. C. C. 212.

Charging Several Distinct Acts as One Count.—Where a statute made it an offence to "secrete, embezzle, or destroy" any let-

ter, etc., a count in an indictment on such statute, alleging that the defendant did "secrete and embezzle" is good. Generally, when a statute makes one or more distinct acts connected with the same transaction indictable, they may be charged as one act. *United States v. Sander*, 6 McL. C. C. 598.

Charging Distinct Offences.—Where several letters were embezzled from the post-office by the same person, the several offences of stealing may be charged in the separate counts of the same indictment; and if separate indictments are found, the court may order them consolidated. The court will protect the prisoner from being prejudiced in his defence by joinder of offences, and if satisfied that the prisoner was so prejudiced, a new trial will be granted. *United States v. Brent*, 17 Int. Rev. Rec. 53.

Stealing Matter not Lawfully Mailable.—The fact that an article contained in a letter in course of transmission is not lawfully "mailable matter," is no defence to an indictment for stealing it, under the act of July 1, 1864, sect. 12 (13 Stat. 337). *United States v. Randall, Deady* (U. S. D. C.), 524.

Letter-Carrier embezzling Letter.—An indictment against a letter-carrier for embezzling a letter need not negative in terms that the letter had been delivered to the true owner. If it was fully delivered so as to be beyond the purview of the postal law before the acts charged against defendant were committed. This is a matter of affirmative defence to be shown by him. *United States v. Jenther*, 13 Blatchf. C. C. 335.

Dead-letter Clerk.—In an indictment, under section 12 of act July 1, 1864, for embezzling and destroying a letter containing money which had come into defendant's hands as dead-letter clerk in a post-office, an averment that the letter was intended to be conveyed by post is sufficient, without designating the place to which it was to be conveyed. *United States v. Okie*, 5 Blatchf. C. C. 516.

In such an indictment an averment that the letter was intended to be conveyed by post, without fixing the *termini* of the conveyance, followed by an averment that the letter was addressed and directed to a man at Philadelphia, does not charge that the letter was intended to be conveyed to that city. *United States v. Okie*, 5 Blatchf. C. C. 516.

contained be particularly described in the indictment, they must be proved as laid.¹

In an indictment for embezzlement from the mails the official character of the accused should be alleged; but it will be sufficient to charge "that the defendant was a person employed in one of the departments of the post-office establishment of the United States."² It is not necessary that the particular office held by the accused be stated.³ The indictment should also set out the ownership of the letter embezzled, and of the bank-notes or other articles it contained, must allege that it was the property of some person,⁴ except in cases of the embezzlement of dead letters from the dead-letter office, when no averment as to the ownership is necessary.⁵

XXI. The Venue and Jurisdiction. — 1. *Venue.* — An indictment for embezzlement may be laid either in the county in which the money or property was received, or in the county into which it has been taken, or where the prisoner disowned having received the same.⁶ It is not essential that the venue of the offence be

1. United States v. Lancaster, 2 McL. C. C. 431.

2. United States v. Patterson, 6 McL. C. C. 466.

3. United States v. Clark, Crabbe (U. S. D. C.), 584.

Descriptive Words are Surplusage. — "Carrier." — In an indictment for stealing from the mails, the defendant being charged as "carrier," held, that the word "carrier" should be considered descriptive of his person, and as surplusage. United States v. Burroughs, 3 McL. C. C. 405; s. c., 2 West. L. J. 119.

4. United States v. Cummins (Pa.), 3 Pittsb. L. J. 405. Compare United States v. Baugh, 4 Hughes, C. C., 501; s. c., 1 Fed. Rep. 784.

Allegation as to Ownership. — Where A. deposited certain bank-notes with C., to be forwarded to a bank, with certain other notes on the same bank, owned by C., and all the notes were stolen from the mail, held, that they might be laid in the indictment as the property of C. United States v. Burroughs, 3 McL. C. C. 405; s. c., 2 West. L. J. 119.

5. United States v. Okie, 5 Blatchf. C. C. 516.

6. See *Beatty v. State*, 82 Ind. 228; s. c., 4 Cr. L. Mag. 459; *People v. Murphy*, 51 Cal. 376; *Brown v. State*, 23 Tex. App. 214; s. c., 9 Cr. L. Mag. 973; 4 S. W. Rep. 588; *State v. Small*, 26 Kans. 209; s. c., 3 Cr. L. Mag. 759; *Rex v. Hobson, R. & R. C. C.* 56; s. c., 1 East P. C. Add. xxiv, 2 Leach, C. C., 975; *Rex v. Taylor*, 3 B. & P. 596; *Reg. v. Murdock*, 2 Den. C. C. 298; s. c., 5 Cox C. C. 360; T. & M. 604; 21 L. J. M. C. 22; 16 Jur. 19; *Reg. v.*

Treadgold, 39 L. T. 291; *Reg. v. Rogers*, L. R. 3 Q. B. Div. 28; 47 L. J. M. C. 11; 37 L. T. 473; 26 W. R. 61; 14 Cox C. C. 22.

Embezzlement, like theft, may be prosecuted in any county through or into which the property was transported by the accused; and the fact of transportation may, like any other fact, be proved by circumstantial evidence. *Brown v. State*, 23 Tex. App. 214; s. c., 9 Cr. L. Mag. 973; 4 S. W. Rep. 588.

Where Case triable. — If a person in one county is intrusted by another with personal property, to be returned to the owner, and afterwards takes it to another county, and there embezzles it, he cannot be tried for the crime in the county where he received it, unless he had conceived the intent of committing the crime when he received it. *People v. Murphy*, 51 Cal. 376.

Embezzlement by Bailee. — **Demand in County where received the Property.** — Where an accused charged with embezzlement of a gelding had such gelding delivered to him as bailee, in Sedgwick County, and thereafter fraudulently removed the animal, for the purpose of applying it to his own use, from Sedgwick to Sumner County, and traded off the same in that county, and then, upon demand in Sedgwick County, refused to return the animal to the person entitled thereto, in accordance with the terms of the bailment, and falsely represented and stated that the animal had strayed away from him, held, the offence of embezzlement was complete in Sedgwick County, and the accused properly tried and convicted in that county. *State v. Small*, 26 Kans. 209; s. c., 3 Cr. L. Mag. 759.

laid in the body of the indictment; when the indictment is otherwise sufficiently drawn, if the venue is on the margin, it is sufficiently alleged.¹

2. *Jurisdiction*.—A State court has jurisdiction of a case of alleged embezzlement where the offence was committed in whole or in part in that State,² except in those cases where the United

Embezzlement by Servant.—Property received in one County, Demand in Another.

—If a servant receives money for his master in the county of A., and being called upon to account for it in the county of B., there denies the receipt of it, he may be indicted for the embezzlement in the latter county. *Rex v. Taylor*, 3 B. & P. 596.

Appellant's principal lived in B. County, whence he directed his business throughout the State, and in that county employed appellant as travelling agent. Appellant sold goods in R. County, and received the money for same in the said R. County. Thence he returned to B. County, and, in liquidating with his principal, his embezzlement of the money he received in R. County was disclosed. *Held*, that at common law, and without reference to our code, the proper court of B. County had jurisdiction of the offence, inasmuch as the code, if it does not provide for such jurisdiction, does not exclude it. *Brown v. State*, 23 Tex. App. 214; s. c., 9 Cr. L. Mag. 973; 4 S. W. Rep. 588.

Same.—A Clerk, whose duty it was to remit at once to his employers, collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex, letters making no mention of the money so collected; and on 21st of April he wrote and posted at Doncaster, in Yorkshire, to his employers in Middlesex, a letter which was then intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex. *Held*, that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex. *Reg. v. Rogers*, 3 Q. B. Div. 28; s. c., 47 L. J. M. C. 11; 37 L. T. 473, 26 W. R. 61; 14 Cox C. C. 22.

Embezzlement by Travelling Salesman.

—A prisoner, who was employed as a travelling salesman by a tradesman living at Nottingham, received two sums of money for his master in the county of Derbyshire, and, having appropriated them to his own use, neglected to return and account to his master for the money, as it was his duty to do; and having been, about two months after the receipt of the money, met by his

master in Nottingham, and on being asked by him respecting the two sums of money, said he was sorry for what he had done—that he had spent the money. *Held*, that there was evidence to go to the jury of an embezzlement in Nottingham, and that the prisoner was rightly tried there. *Reg. v. Murdock*, 2 Den. C. C. 298; s. c., 5 Cox, C. C., 360; T. & M. 604; 21 L. J. M. C. 22; 16 Jur. 19.

It was his duty as a commercial traveller to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. He, on the 1st and 2d of March, 1878, collected at Newark two sums of money, which he did not remit or account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him and taxed him with receiving moneys and not accounting to them for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned to Grantham on either of the days or at what time of the respective days, he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money. *Held*, that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham. *Reg. v. Treadgold*, 39 L. T. 291.

1. *State v. Arnold* (Mo.), 7 West. Rep. 283; s. c., 9 Cr. L. Mag. 261; 2 S. W. Rep. 269.

2. See *Ex parte Hedley*, 31 Cal. 108; *State v. Haskell*, 33 Me. 127.

Jurisdiction exists at common law. See *State v. Ellis*, 3 Conn. 186; *Ferrill v. Com.*, 1 Duv. (Ky.) 153; *Myers v. People*, 26 Ill. 173; *State v. Bennett*, 14 Iowa, 479; *State v. Underwood*, 49 Me. 181; *Cummings v. State*, 1 Har. & J. (Md.) 340; *Com. v. Andrews*, 2 Mass. 14; *Com. v. Holder*, 75 Mass. (9 Gray) 7; *Watson v. State*, 36 Miss. 593; *State v. Williams*, 35 Mo. 229; *People v. Williams*, 24 Mich. 156; *State v. Newman*, 9 Nev. 48; *State v. Brown*, 1 Hayw. (N. C.) 100; *Stanley v. State*, 24 Ohio St. 166; *Hamilton v. State*, 11 Ohio, 435; *State v. Johnson*, 2 Oreg. 115; *Compare State v. Reonnals*, 14 La. An. 747; *People v. Gardner*, 2 Johns. (N. Y.) 276; *People v. Schenck*, 2 (Johns. N. Y.)

States courts have exclusive jurisdiction, such as embezzlement by the cashier or other officer or servant of a national bank.¹ And it is held that in cases to which the jurisdiction of the State courts might extend, in the absence of any action by Congress, where Congress does assume jurisdiction, its control then becomes paramount and exclusive.²

XXII. Defences.—Pleas in Bar.—The general rules as to defences in criminal prosecutions apply to a prosecution for embezzlement.³ Any defence which excuses or justifies the use or conversion will be a sufficient defence. Thus, where the defendant was authorized to use the money he cannot be convicted of embezzlement;⁴

479; *State v. La Blanche*, 2 Brown (Mich.), 8; *Simmons v. Com.* 5 Bin, (Pa.) 617.

Offence committed partly in one State, and partly in Another.—Where an agent of a company in California embezzled its money by drawing a check in another State, in his official capacity, in favor of his broker, who obtained the money in California, and converted it to his principal's use, it was held that the California courts have jurisdiction of the offence, the agent having been arrested here. *Ex parte Hedley*, 31 Cal. 108.

Under Maine Rev. Stat. ch. 156, sec. 7, if a person to whom property is intrusted in Maine, to be by him carried for hire, and delivered in another State, shall, before such delivery, fraudulently convert the same to his own use, the offence is punishable in Maine, whether the act of conversion be in that State or another. *State v. Haskell*, 33 Me. 127.

1. See *Com. ex rel. Torrey v. Ketner*, 92 Pa. St. 372; s. c., 37 Am. Rep. 692; 1 Cr. L. Mag. 227; *People v. Fonda* (Mich.), 8 Cr. L. Mag. 281, 828; *Com. v. Tenney*, 97 Mass. 50.

Exclusive Jurisdiction of Federal Courts.

—The embezzlement of the funds of a national bank being an offence over which the Federal courts have jurisdiction, any prosecution thereof by the State courts is in violation of U. S. Rev. St. sec. 711; *People v. Fonda* (Mich.), 8 Cr. L. Mag. 281, 828.

The offence of fraudulent conversion, by an officer or person in the employment of a bank, incorporated under the laws of the United States and located in Massachusetts, of property of individuals deposited in such bank, is not punishable under any existing law of the United States, and the courts of the commonwealth have jurisdiction thereof under Gen. Stat. ch. 161, sec. 39; *Com. v. Tenney*, 97 Mass. 50.

Person employed in United-States Mint.

—The act of Congress of 1825, making it a crime for any person employed in the United-States mint to embezzle any of the

metals used in coining, or in the process of being coined, does not apply to a clerk or servant employed in the mint who has nothing to do with those articles in relation to coinage. If he feloniously takes the money of the Government after it is coined and set apart for use, the common law or local statutes, as administered by the State courts, gives authority for the punishment of such clerk or servant when, from his employment, he is not brought within the act of Congress. *Com. v. Hutchinson*, 2 Pars. Sel. Cas. (Pa.) 384.

Discharge on Habeas Corpus.—Where a person is being prosecuted in a court for a matter which is not an indictable offence by the law of Pennsylvania, or is one over which the court below has no jurisdiction, the Supreme Court will discharge such person on *habeas corpus*. *Com. ex rel. Torrey v. Ketner*, 92 Pa. St. 372; s. c., 37 Am. Rep. 692; 1 Cr. L. Mag. 227.

2. *The Moses Taylor*, 71 U. S. (4 Wall) 411; bk. 18, L. ed. 397; *Ex parte Bridges*, 2 Woods C. C. 428; *Ex parte Houghton*, 7 Fed. Rep. 657; *Brown v. United States*, 14 Am. Law Reg. (N. S.) 566; *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 139; bk. 4, L. ed. 529; *Prigg v. Com.*, 41 U. S. (16 Pet.) 539; bk. 10, L. ed. 1060; *Martin v. Hunter*, 14 U. S. (1 Wheat.) 304; bk. 4, L. ed. 97; *Houston v. Moore*, 18 U. S. (5 Wheat.) 1; bk. 5, L. ed. 19; *State v. Pike*, 15 N. H. 83; *State v. Adams*, 4 Blackf. (Ind.) 146; *Com. v. Fuller*, 49 Mass. (8 Metc.) 313; *Com. v. Tenney*, 97 Mass. 50; *Com. v. Felton*, 101 Mass. 204; *People v. Kelly*, 38 Cal. 145; 3 Story Const. Law. 623.

3. See, for a full discussion of this subject, 4 Am. & Eng. Encyc. of L. 729, tit. "Criminal Procedure."

4. On trial of the accused for embezzlement of money intrusted to him by the prosecutrix, he introduced evidence to prove that the prosecutrix authorized him to use it, and he asked the court to instruct the jury to acquit him if they believed from the evidence that he was so authorized. *Held*, that the refusal of the in-

but any defence which falls short of showing authority, that is excusing or justifying the use or conversion, must fail.¹

Pleas in abatement and pleas in bar in prosecutions for embezzlement are regulated by the general rules governing these subjects.*

XXIII. Bill of Particulars.—If a prisoner does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and, if it is refused, the judge will, on motion supported by proper affidavits, grant an order for such particular to be given, and postpone the trial if necessary. Such particular ought at least to state the persons from whom money is alleged to have been received.³

XXIV. The Trial.—I. *Practice.*—The conduct of a trial for embezzlement is governed by the general rules regulating criminal

struction was error. *Henderson v. State*, 1 Tex. App. 432.

1. Thus, where in defence to an indictment for embezzlement of cotton, alleged to belong to a national bank, it was urged that the national banking law disables such banks from owning personal property or taking mortgages or liens thereon, and therefore the alleged ownership was an impossibility, incapable of proof, it was held that the doctrine of *ultra vires* cannot thus avail as a defence in cases of theft, embezzlement, and the like. *Leonard v. State*, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 528.

Conclusive Presumptions and Estoppels have no place in the criminal law in establishing the body of the crime charged; and a defendant in a criminal prosecution is not estopped from proving the actual fact in dispute, notwithstanding admissions or confessions may have been made to the contrary. *State v. Hutchinson*, 60 Iowa, 478; s. c., 4 Cr. L. Mag. 612; 15 N. W. Rep. 298.

But where a county treasurer, is prosecuted for embezzlement of county funds, he may, in order to establish a defence that the embezzlement in fact occurred more than three years previous to the finding of the indictment, impeach the previous settlements made by him, and show that in such settlements, the certificates of deposit and other vouchers produced by him were false, and that the amounts of cash represented thereby were not to his credit in the banks at the time of such settlements. *State v. Hutchinson*, 60 Iowa, 478; s. c., 4 Cr. L. Mag. 612; 15 N. W. Rep. 298, distinguishing *Boone Co. v. Jones*, 58 Iowa, 373; s. c., 4 Cr. L. Mag. 612; 2 N. W. Rep. 987, and *Webster Co. v. Hutchinson*, 60 Iowa, 721; s. c., 4 Cr. L. Mag. 612; 9 N. W. Rep. 901.

2. See 4 Am. & Eng. Encyc. of L. 780, *passim*.

Prosecution of County Treasurer.—A defendant in a prosecution for embezzlement of county funds while acting as treasurer will not be permitted to impeach his own settlements, in order to show that the bar of limitations has run against the prosecution for the offence. *State v. Hutchinson*, 60 Iowa, 478; s. c., 4 Cr. L. Mag. 612; 15 N. W. Rep. 298.

Pleading Settlement in Bar.—When money is embezzled, the owner has a right to settle as for a debt upon an implied contract; and such settlement is no bar to a criminal prosecution. *Fagnan v. Knox*, 66 N. Y. 526.

Plea of Former Acquittal.—Where by statute a defendant under a charge of theft cannot be convicted of embezzlement, a conviction of embezzlement under such a charge is not a good plea in bar of a second prosecution charging him with embezzlement. *Simco v. State*, 9 Tex. App. 338; s. c., 2 Cr. L. Mag. 27.

Plea to Jurisdiction—Value of Property Embezzled.—The fact that, in an indictment for embezzlement or larceny, the value of the property is alleged to be a sum exceeding the jurisdiction of the inferior court, does not prevent a plea of former acquittal therein from being a good bar thereto, if the value did not in fact exceed the sum named in the statute defining the jurisdiction. *Com. v. Bosworth*, 113 Mass. 200.

3. *Rex v. Hodgson*, 3 C. & P. 422; *Rex v. Bootyman*, 5 C. & P. 300.

In New Jersey, however, a motion for a bill of particulars is rarely granted in the criminal practice of that State; and where a defendant has had ample time to go over his books, which are to prove his embezzlement, and to prepare his case for trial, the motion for a bill of particulars will be denied. *State v. Miller* (N. J.), 3 N. J. L. J. 381; s. c., 2 Cr. L. Mag. 113.

procedure generally, which has already been fully treated in this series.¹

2. *Charge to Jury.*—In a prosecution for embezzlement, where no felony is made out, the defendant is entitled to have the benefit of defects in the proof by an instruction that, on the evidence, the defendant is entitled to an acquittal.² An instruction as to what constitutes the offence and fraudulent intent, given substantially in the language of the statute, is not error.³

3. *Evidence.*⁴—*a. Presumptions.*—*Burden of Proof.*—Where a person is charged with the duty of receiving public moneys, in a prosecution for embezzlement of such money, if it be shown that the amount was actually paid, it will be presumed that it was paid in money.⁵ But the burden of proof is on the person making the charge of embezzlement to sustain it. It is not incumbent on the other party to show what has become of the money, even though it be traced to his hands.⁶

b. Of Venue.—Proof that the defendant received the money or property in question from his employer in the county named in the indictment is, in the first instance, sufficient proof of venue, in embezzlement, in the absence of evidence from defendant

1. See 4 Am. & Eng. Encycl. of L. 840, *passim*.

On the trial of an indictment charging a bookkeeper, as "clerk, servant, or agent," with embezzling the money of his employer on Sept. 1, the Government put in evidence the books of the employer containing entries by the defendant from Oct. 1, of the same year, to Feb. 6 of the next year; also evidence of admissions by the defendant, in regard to the false entries of said Feb. 2 and 6, to the effect that he took seventy-five dollars on Feb. 2, and three hundred dollars on Feb. 6; but there was no evidence that he took money on any of the previous dates, except what appeared upon the books as introduced. The judge ruled, as requested by the defendant, that the evidence presented by the books would not in itself amount to an embezzlement, or alone warrant a conviction. The Government was then allowed to elect and rely upon the transaction of Feb. 6 as the principal embezzlement, and that of Feb. 2 as evidence of the intent with which that act was done. *Held*, that the defendant had no ground of exception. *Com. v. Bennett*, 118 Mass. 443.

2. *People v. Parkhurst*, 49 Mich. 22; s. c., 3 Cr. L. Mag. 759; 12 N. W. Rep. 894.

3. *People v. Treadwell*, 69 Cal. 226; s. c., 10 West Coast Rep. 181; 7 Cr. L. Mag. 796; 8 Cr. L. Mag. 355.

Upon a trial for embezzlement, an instruction as to what constitutes embezzlement, and another relating to the question of fraudulent intent in the offence, both in substance containing the provisions of sec-

tions 506 and 508 of the Penal Code, were proper to be given by the court to the jury for their information. *People v. Treadwell*, 69 Cal. 226; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 796.

Instruction as to Formation of Intent.—Where the jury had been instructed as to what was necessary to constitute embezzlement, and that in order to convict the accused the offence must have been committed in the county laid as the venue, instructions directing the jury to inquire as to the county in which the accused formed the criminal intent, disconnected from acts designed to carry such intent into execution, were immaterial and calculated to mislead, and were therefore properly refused. *Gravatt v. State*, 25 Ohio St. 162; s. c., 3 Cent. L. J. 392.

4. The general rules of evidence applicable in criminal proceedings generally apply to cases of prosecutions for embezzlement. For a full discussion of this subject see tit. "Criminal Procedure," XV., 4 Am. & Eng. Encycl. of L. 842, *passim*.

5. Thus a county treasurer is, under the law, chargeable as with money to the amount of all taxes paid to him, although he may receive payment in certain orders. The amount so charged to him, and upon trial proved to have been paid, is presumed, *prima facie*, to have been received in money; and it is for the defendant, if he would overcome this presumption, to present proof of the manner of payment. *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 763.

6. *Thomas v. Dunaway*, 30 Ill. 373.

that he carried the money into another county, in the course of his duty and before any unlawful conversion of it.¹

c. Documentary Evidence. — (1) *Transcripts from Public Offices.* — *Written Statements, etc.* — In a prosecution for embezzlement, transcripts from official records, required by law to be kept by the officer from periodical report of defendant as a public officer, and the like, are admissible in evidence; but where such records are made up by hearsay they are not competent.² And it has been held that the written indorsement of a county treasurer officially as such county treasurer, upon a certificate of settlement had between him and the county auditor, pursuant to law, made at the time of the settlement, and acknowledging its correctness, is competent evidence against him as an admission of the truth of the matters stated in the certificate. When such certificate of settlement is properly admitted in evidence to prove the facts therein stated, the basis upon which the settlement was made may also be shown as part of the *res gestæ*.³

(2) *Books of Account; Receipts, etc.* — In a prosecution for embezzlement against an officer, servant, or agent, entries in books of account made by the defendant, or under his direction, and receipts given by him, are competent evidence,⁴ where such

1. *State v. New*, 22 Minn. 76.

2. See *Shivers v. State*, 53 Ga. 149; *State v. Ring*, 28 Minn. 78; s. c., 4 Cr. L. Mag. 763; *Bork v. People*, 16 Hun (N.Y.), 476; *United States v. Adams*, 2 Dak. 305; s. c., 2 Cr. L. Mag. 823; 9 N. W. Rep. 718; *United States v. Forsythe*, 6 McL. C. C. 584.

Transcripts from Treasurer's Office. — By the sub-treasury law a duly certified transcript from the treasury is made competent and *prima facie* evidence of embezzlement; but where its items were made up by hearsay, they are not admissible. *United States v. Forsythe*, 6 McL. C. C. 584.

Prosecution of City Treasurer. — On trial for an indictment against a city treasurer for embezzlement, tax-rolls placed in his hands for collection, and receipts given by him therefor, held not to be admissible in evidence, without evidence that he had received the money thereby authorized to be collected. *Bork v. People*, 16 Hun (N. Y.), 476.

The Stub Duplicates of Tax-Receipts, made by a county treasurer, as required by law, are evidence of the receipt of the tax presented thereby, although they have never been returned by him to the auditor, as he is required to do. *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 763.

Upon the Trial of a Tax-Collector for Embezzlement, transcripts from the books of the comptroller-general and treasurer of the State, certified under sect. 3816 of the Georgia Code, are admissible in evidence to show a failure on the part of such defend-

ant to pay over the taxes collected by him. *Shivers v. State*, 53 Ga. 149.

The Semi-annual Statement of Moneys in the County Treasury, required by statute to be made by county treasurers, and shown to have been executed by defendant, is competent evidence of the amount of money in his hands, although the amount of money therein expressed is only indicated by figures, without other index of denomination than the separating of the two right-hand figures in a column from the others by a perpendicular line. *State v. Ring*, 29 Minn. 78; s. c., 4 Cr. L. Mag. 763.

Transcripts of Quarterly Account. — Upon the trial of an indictment of a postmaster for embezzlement of public moneys, transcripts of the defendant's quarterly accounts to the department, accompanying vouchers of settlement by auditors for post-office department, statements of defendant's account from books and proceedings of the treasury department, order appointing person to make demand for the balance due, and return thereon, properly certified, held, properly admitted in evidence. *United States v. Adams (Dak.)*, 2 Cr. L. Mag. 823; 9 N. W. Rep. 718.

3. *State v. Mims*, 26 Minn. 183; s. c., 3 Cr. L. Mag. 260.

4. See *Com. v. Pratt*, 137 Mass. 98; *Com. v. Smith*, 129 Mass. 104; *Humphrey v. People*, 18 Hun (N. Y.), 393; s. c., 1 Cr. L. Mag. 262.

In Prosecution of Officer of Savings Bank. — At the trial of an indictment against the

entry was made, or receipt given, before the finding of the indictment, otherwise it will be inadmissible.¹

d. Parol Evidence. — Where there has been a written agreement between master and servant, in which the nature of the service is defined, on an indictment for embezzlement against the latter, parol evidence of the service is not admissible, unless notice has been given to produce the agreement.² But in the trial of an alleged bailee for embezzlement of his bailor's property, there being no agreement in writing, it is competent for the State to prove the terms of the contract of bailment, by virtue of which the property went into the defendant's possession.³

Where the prosecution is by a company employing the accused, its incorporation may be proved by parol.⁴

e. Confessions, Admissions, and Statements made by the Accused.

— On the trial of an indictment for embezzlement, the confessions of the accused, when voluntarily made and properly corroborated, are admissible in evidence against him; ⁵ and an admission by the

treasurer of a savings bank, for embezzlement of its property, the defendant has no ground of exception to the admission in evidence of a book of records of the bank, kept by the defendant as its secretary, containing the record of a vote authorizing the treasurer of the bank to release and discharge the mortgages of the bank, which the Government contends has been fraudulently altered by striking out the word "and" before "discharge," and by adding the words "and assign" before the words "the mortgages." *Com. v. Pratt*, 137 Mass. 98.

The plaintiff in error was indicted and convicted of embezzling the funds of a savings bank of which he was the secretary. Upon the trial, the books of the bank, which were kept by the accused, and in his handwriting, and also a book kept by the treasurer of the bank, showing the amounts paid over to the bank by the accused, were received in evidence. *Held*, that as the treasurer's book was kept in the regular course of business of the bank, and as the accused was an officer thereof, it was admissible against the accused to show the amounts received. *Humphrey v. People*, 18 Hun (N. Y.), 393; s. c., 1 Cr. L. Mag. 262.

Check as Evidence. — At the trial of an indictment for embezzlement, there was evidence that the defendant, an agent, was authorized to receive payment for goods sold by him, and was entitled to receive commissions on such sales; that he received a check, deposited it to his credit, and sent his own check for the amount to his employer, which was not paid. *Held*, that the check sent by him was admissible in evidence, and that evidence was also admissible to show that his commissions were

always paid by his employer, and that he was not authorized to deduct them from the proceeds of sales. *Com. v. Smith*, 129 Mass. 104.

1. Thus, in a prosecution for embezzlement, the receipt of the prosecuting witness for the amount alleged to have been embezzled, given subsequently to the indictment and arrest of the prisoner, is not admissible in evidence. *State v. Thompson*, 32 La. An. 796; s. c., 1 Cr. L. Mag. 706.

2. *Re Clapton*, 3 Cox, C. C., 126.

3. *Leonard v. State*, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 528. See *Hoyt v. State*, 50 Ga. 313.

4. *State v. Cheek*, 63 Mo. 364.

5. See *Com. v. Sawtelle*, 141 Mass. 140; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 762.

A Confession which relates to a Course of Conduct pursued by the defendant during his whole employment in the service of a person whose property he is alleged to have embezzled, necessarily has reference to and characterizes all the acts and matters charged to have been done within that time. *Com. v. Sawtelle*, 141 Mass. 140; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 762.

What does not amount to a Confession. — The confessions of a party, not made in open court or on examination before a magistrate, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction. *People v. Hennessey*, 15 Wend. (N. Y.) 147.

Thus at the trial of an indictment for embezzlement containing several counts, where there was evidence that, in a conversation between the defendant and his employer, the defendant admitted that he had been taking money from his employer "all

defendant of a material fact, in support of the indictment against him, is competent evidence at the trial, when the fact itself and the admission both occurred before the commission of the offence charged, and neither involves any criminal intent or conduct, or any acknowledgment of guilt on his part.¹

f. Declarations of Owner of Property.—The declarations of the owner of the property are admissible to show non-consent to the conversion of the property;² but the declarations of the person alleged to be the owner of the property, though deceased, are inadmissible to disprove his title.³

g. Proof of Service.—In a prosecution for embezzlement, the service or relation of trust and confidence must be shown.⁴

along, ever since he began to work for him, and could not say how much he had taken," but no allusion was made to the specific matters charged in the indictment by name, words, or figures, and the judge instructed the jury that they should not consider this confession, unless it had reference to some of the specific matters charged in the indictment. *Held*, that the defendant had no ground of exception. *Com. v. Sawtelle*, 141 Mass. 140; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 762.

1. *State v. Mims*, 26 Minn. 183; s. c., 3 Cr. L. Mag. 259. See *Com. v. Sawtelle*, 141 Mass. 140; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 726; *State v. Carrick*, 16 Nev. 120; s. c., 3 Cr. L. Mag. 883.

In a conversation subsequent to the Alleged Acts of Embezzlement, there was evidence that the defendant admitted that he had been taking money from his employer ever since he began to work for him, but could not tell how much he had taken; no allusion being made to the specific matter charged in the indictment in words or figures. *Held*, that the instruction of the presiding judge that the jury should not consider the confession, unless it had reference to some of the specific matters charged in the indictment, was sufficiently favorable to the defendant. *Com. v. Sawtelle*, 141 Mass. 140; s. c., 7 Cr. L. Mag. 762; 8 Cr. L. Mag. 355.

Statement made by County Treasurer.—A statement made by the defendant, a county treasurer, to two of his bondsmen that he was short in his accounts, at a time when he was not charged with crime, or under arrest, when no proceedings were threatened, or any promise made to shield him from a criminal prosecution, *held*, admissible in evidence. *State v. Carrick*, 16 Nev. 120; s. c., 3 Cr. L. Mag. 883.

2. It is competent to prove by the employer that he never authorized the defendant to do the acts complained of, and that the defendant has never accounted or reported to him for the property charged to

have been embezzled; and such evidence may be given before the proving of the secreting or converting to his own use, by the defendant, of the property in question. *Coats v. People*, 4 Park. Cr. Cas. (N. Y.) 662.

In the Prosecution of a Clerk or Servant for Embezzlement of the goods of his master, the testimony of the master is not exclusively primary evidence of his non-consent to the conversion, but it may be inferred by the jury from the circumstances of the transaction. *State v. Porter*, 26 Mo. 201.

3 *Com. v. Sanders*, 80 Mass. (14 Gray) 394.

4. See *Calkins v. State*, 18 Ohio St. 366; *Rex v. Beacall*, 1 C. & P. 312; *Rex v. Wellings*, 1 C. & P. 454, 457; *Reg. v. Welch*, 1 Den. C. C. 199; s. c., 2 C. & K. 296.

An Allegation that the Accused was a Clerk of an Incorporated Railroad Company is sufficiently established by proof that the company so employing him assumed to be, and notoriously exercised the franchise of, a railroad corporation. *Calkins v. State*, 18 Ohio St. 366.

If a Person receives Money as Steward of another, proof of that circumstance is sufficient evidence of his being a steward to support an indictment for embezzling such money. *Rex v. Beacall*, 1 C. & P. 312, and *Rex v. Wellings*, 1 C. & P. 454, 457.

A Person indicted as Servant to Guardians of the Poor of a Parish.—*Held*, that the admission by him contained in the condition of his bond for the performance of his duties as treasurer, coupled with an act of Parliament specifying those duties, was sufficient evidence of the nature of his appointment; viz., that he was to receive money for the guardians, and account to them for his receipts. *Reg. v. Welch*, 1 Den. C. C. 199; s. c., 2 C. & K. 296.

Embezzlement of Wheat.—An allegation that one fraudulently embezzled and converted to his own use wheat, the prop-

*h. To show Intent. — Similar Acts.*¹ — In a prosecution for embezzlement, evidence as to similar transactions of the same general character is admissible to show criminal intent, although it does not in terms refer to the specific matters charged in the indictment.²

i. Of Time. — Days stated. — Formerly it was necessary to show the exact day on which the crime was committed, and the exact property that was taken;³ the tendency, however, in many of the States is to relax the old rule.⁴

erty of a certain corporation then under his care by virtue of his employment as clerk thereof, *held*, to be established by proof that the wheat could not leave the warehouse except upon a "shipping order" issued by him to the foreman, and that he clandestinely set afloat in the market fictitious "grain orders," and thereupon issued "shipping orders," and appropriated the proceeds to his own use. *Calkins v. State*, 18 Ohio St. 366.

1. As to evidence of intent generally see 4 Am. & Eng. Encycl. of L. 858, *passim*.

2. *Com. v. Sawtelle*, 141 Mass. 140; s. c., 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 726. See *People v. Gray*, 66 Cal. 271; s. c., 6 Cr. L. Mag. 289; 4 West Coast Rep. 69. *Com. v. Shepard*, 83 Mass. (1 Allen) 575, *Reg. v. Richardson*, 8 Cox, C. C., 448; s. c., 2 F. & F. 343; *Reg. v. Proud*, 9 Cox, C. C., 22, s. c., L. & C. 97; 31 L. J. M. C. 71; 5 L. T. 331; 10 W. R. 62; *Reg. v. Williams*, 7 C. & P. 338.

Evidence of Another Act of Embezzlement, committed by a defendant in the same week with one charged against him in an indictment, is competent only for the purpose of proving a guilty intent on his part in the commission of the principal act, and the admission of such evidence in a case which, after a verdict of guilty, is reported by a judge of the Superior Court for the determination of this court, is sufficient ground for a new trial, if it does not appear that it was limited to its legitimate effect by instructions to the jury. *Com. v. Shepard*, 83 Mass. (1 Allen) 575.

In a Prosecution for Embezzlement of Public Moneys, evidence of similar acts of embezzlement is admissible for the purpose of showing a guilty knowledge and a criminal intent on the part of the accused. The court should instruct the jury as to the purpose of such evidence, if so requested by the defence; but, in the absence of such a request, a failure to so instruct is not ground for a reversal. *People v. Gray*, 66 Cal. 271; s. c., 4 West Coast Rep. 69; 6 Cr. L. Mag. 289.

A Member of a Friendly Society was employed to receive weekly payments made by other members, and appropriated certain

sums thus paid. Upon the trial, the books of the society were tendered generally in evidence, and received, although it was objected that the evidence ought to be confined to the entries forming the subject of the indictment. *Held*, that they were rightly admitted. *Reg. v. Proud*, 9 Cox, C. C., 22; s. c., L. & C. 97; 31 L. J. M. C. 71; 5 L. T. 331; 10 W. R. 62.

Embezzlement by Clerk. — Sums of Money unaccounted for. — An indictment charged the prisoner with having embezzled three sums of twenty-one pounds, the moneys of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums; and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion. *Held*, that such evidence was admissible. *Reg. v. Richardson*, 8 Cox, C. C., 448; s. c., 2 F. & F. 343.

When Evidence of Like Transaction not admissible. — On the trial of an indictment under the national banking act of 1864, June 3 (13 Stat. at L. 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of a bank, of which defendant was cashier, with intent to injure and defraud the bank, the defendant cannot, in order to disprove the averment of intent, prove that his taking the funds of the bank and using them in stock speculations were known to the president and some of the directors of the bank and were sanctioned by them, and that his dealings therewith were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. *United States v. Taintor*, 11 Blatchf. C. C. 374.

3. See *Rex v. Williams*, 6 Car. & P. 626; *Rex v. Tyers*, R. & R. 402.

4. See *Ker v. People*, 110 Ill. 629; *Com.*

j. To show obtaining of Money, and Application of Proceeds.—A prosecution for embezzlement will fail, unless it is shown that the defendant received the property, and converted it or the proceeds to his own use.¹

k. Of Demand and Refusal.—Demand and refusal, in case of embezzlement, are *prima facie* evidence of embezzlement,² and not necessary to conviction;³ and where it appears that a demand would have been ineffectual, proof of such demand is not necessary.⁴

l. Of Custom.—Evidence of custom may be admissible to disprove intent; but a custom by which a broker on receipt of an

v. O'Malley, 97 Mass. 584; *Green v. Tanner*, 49 Mass. (8 Metc.) 417.

Under Compiled Laws of Michigan (1871). § 7811, providing that, in a prosecution for embezzlement, evidence may be given of "any such embezzlement committed within six months next after the time stated in the indictment." *Held*, that under this statute an information for embezzlement cannot be sustained by evidence of acts committed before the time stated. *People v. Donald*, 48 Mich. 491; s. c., 4 Cr. L. Mag. 459; 3 Cr. L. Mag. 759; 12 N. W. Rep. 669.

Whether confined to Days stated.—A. was indicted for embezzlement as being clerk and a servant of B., C., and D. A first count laid the offence, to wit, on the 18th of August, 1861. A second count laid a second act of embezzlement within six months, to wit, on the 1st of September. A third count laid a third act of embezzlement, also within six months, under the same indictment. A. was a member of and secretary to a properly certified friendly society, of which B., C., and D. were the trustees, and had from time to time received, though not in his capacity of secretary, funds belonging to the society, some part of which he had appropriated. *Held*, that the evidence of the acts of embezzlement need not be confined to the days stated under the indictments. *Reg. v. Proud*, 9 Cox, C. C., 22; L. & C. 97; 31 L. J. M. C. 71; 5 L. T. 331; 10 W. R. 62.

1. See *Com. v. Butterick*, 100 Mass. 1; *State v. Dodson*, 72 Mo. 283; s. c., 3 Cr. L. Mag. 120; *United States v. Forsythe*, 6 McL. C. C. 584; *Reg. v. Keena*, L. R. 1 C. C. 113; s. c., 37 L. J. M. C. 43; 17 L. T. 515; 16 W. R. 375, 11 Cox, C. C., 123.

Evidence.—Where the expenditures of a collector's office are greater than his receipts, in order to convict him of embezzlement under the sub-treasury law, it must be clearly shown that he has used the money, or refused to pay it over, contrary to the law. An offer to deposit a certain sum to secure the Government for any balance found due from him is no evidence of

indebtment. *United States v. Forsythe*, 6 McL. C. C. 584.

In Embezzlement of Horses.—Under an indictment charging embezzlement of horses, it is error to admit evidence, or to instruct the jury in regard to embezzlement of the proceeds of the horses. *State v. Dodson*, 72 Mo. 283; s. c., 3 Cr. L. Mag. 120.

An Indictment for Embezzlement of a Note taken to be discounted at a bank for another person, *held* to be sustained by proof that the accused got it discounted on his own account, and the proceeds passed to his own credit, although he afterwards paid part of the proceeds on the other's account at the other's request. *Com. v. Butterick*, 100 Mass. 1.

In Embezzlement of Check.—An indictment for embezzling money under 24 & 25 Vict. c. s. 68, is not proved by showing merely that the prisoner embezzled a check, without evidence that he has converted the check into money. *Reg. v. Keena*, 1 L. R. C. C. 113; s. c., 37 L. J. M. C. 43; 17 L. T. 515; 16 W. R. 375; 11 Cox, C. C., 123.

2. *United States v. Adams*, 2 Dak. 305; s. c., 5 Cr. L. Mag. 448; 2 Cr. L. Mag. 823; 9 N. W. Rep. 718; *State v. Mims*, 26 Minn. 198; s. c., 3 Cr. L. Mag. 260.

3. *Hollingsworth v. State*, 111 Ind. 289; s. c., 9 Cr. L. Mag. 973; 12 N. E. Rep. 490; *State v. Mims*, 26 Minn. 191; s. c., 3 Cr. L. Mag. 260.

In Prosecution of County Treasurer.—On the trial of an indictment against defendant for the embezzlement of public moneys received by him as county treasurer, his refusal to pay over the moneys shown so to have been received, on the demand of claiming to be his successor in office, on the sole grounds that no such moneys were in his possession or under his control, may be shown as evidence upon the question of embezzlement, without proof that the party making the demand was rightfully entitled to the office. *State v. Mims*, 191; s. c., 3 Cr. L. Mag. 260.

4. *United States v. Adams*, 2 Dak. 305; s. c., 5 Cr. L. Mag. 448; 2 Cr. L. Mag. 823.

order "to buy stocks on margin," assumes the contract himself, instead of making it with a third person, is illegal¹ and not admissible in a prosecution against the broker for the embezzlement of the money deposited with him for the purchase.²

m. Of Value.—The value of property stolen or embezzled must be proved in order to disclose whether the offence be a felony or a misdemeanor;³ but the prosecution need not prove that the exact amount, as laid in the information, was embezzled;⁴ for proof that a part of the amount charged was embezzled is sufficient to sustain the indictment or information.⁵

n. Of Defendant's Financial Condition.—Evidence of the pecuniary condition of a defendant charged with embezzlement, immediately prior to the time and during the time the offence is alleged to have been committed, is competent.⁶

o. Competency.—Relevancy.—The general rules as to competency and relevancy are applicable in prosecutions under indictments for embezzlement.⁷

1. See *Farnsworth v. Hemmer*, 83 Mass. (1 Allen) 494; *Com. v. Cooper*, 130 Mass. 285.

2. *Com. v. Cooper*, 130 Mass. 285.

3. *Gerard v. State*, 10 Tex. App. 690; s. c., 3 Cr. L. Mag. 424. See *United States v. Nott*, 1 McL. C. C. 499; *Harris v. State*, 21 Tex. App. 478; *State v. Mook*, 40 Ohio St. 588; s. c., 5 Cr. L. Mag. 616; 11 Week. L. Bull. (Sup.) 157.

Where an indictment charged the embezzlement of numerous articles of property, and alleged an aggregate value thereof, it was competent for the State to prove the embezzlement of any one or more of the articles of property charged, and the value of the same, although the value of each article of property was not separately stated in the indictment. *State v. Mook*, 40 Ohio, 588; s. c., 5 Cr. L. Mag. 616; 11 Week. L. Bull. (Sup.) 157.

The indictment having been read to the jury as a pleading in the case, became a record in the case, of which the court was authorized to take judicial notice, and which sufficed to inform the jury that the alleged aggregate value of the goods embezzled exceeded twenty dollars, and to admit evidence that the articles were of the value charged, and amounted in the aggregate to a sum exceeding twenty dollars. *Harris v. State*, 21 Tex. App. 478.

Bank-Notes.—Some evidence is necessary of the genuineness and value of bank-notes said to have been stolen out of a letter. *United States v. Nott*, 1 McL. C. C. 499.

4. *People v. Gray*, 23 Cal. 125; s. c., 4 West Coast Rep. 69; 6 Cr. L. Mag. 289.

5. *People v. Gray*, 23 Cal. 125; s. c., 4 West Coast Rep. 69; 6 Cr. L. Mag. 289.

See *Gerard v. State*, 10 Tex. App. 690; s. c., 3 Cr. L. Mag. 424.

Evidence as to Value of Goods embezzled.

—Testimony of a witness that goods embezzled "were about the value alleged [in the indictment], amounting to more than twenty dollars," is sufficient legal proof of the value of the goods embezzled, although the indictment was not formally read in evidence to the jury, but only as part of the pleadings in the case. As a pleading, it is part of the record of which the court will take judicial notice on appeal. *Harris v. State*, 21 Tex. App. 478; s. c., 9 Cr. L. Mag. 398, 2 S. W. Rep. 830.

Evidence must support Indictment—

Variance Fatal.—But where the indictment alleges the embezzlement of "one hundred and fifty-five dollars, then and there of the value of one hundred and fifty-five dollars, current money of the United States of America," it was incumbent on the State, in order to warrant a conviction for a felony, to prove that the embezzled property was, as alleged in the indictment, current money of the United States of America, and of value, at least, to the extent of twenty dollars. *Gerard v. State*, 10 Tex. App. 690; s. c., 3 Cr. L. Mag. 424.

6. *United States v. Camp* (Idaho), 8 Cr. L. Mag. 355; 7 Cr. L. Mag. 796; 10 Pac. Rep. 226; 10 West Coast Rep. 127.

7. See this subject discussed in 4 Am. & Eng. Encycl. of L. 842, 846 *et seq.*

In Embezzlement of Mortgage Deed.—No exception lies to the admission of evidence to prove that the defendant, in an indictment for embezzling a deed of mortgage which was executed by him, and which, after its delivery, but before it had been recorded, was intrusted to him by a

p. Sufficiency. — The amount of proof required to establish the offence of embezzlement is similar in kind and quantity to that required to establish any other offence of a like grade. The commission of the offence must be clearly established, and the act brought within the statute.¹

person with whom it had been deposited, for the purpose of being carried to the mortgagee, has executed and put upon record a deed of the premises since the mortgage came into his possession, although it was not introduced until after the evidence had been put in. *Com. v. Concanon*, 87 Mass. (5 Allen) 502.

False Entries in Bank-Books — Knowledge of Directors — Intent. — In a prosecution for embezzlement, the accused offered to show that other officers of the bank were in complicity with him, and that he made the false entries in the books with their knowledge and approval, for the purpose of deceiving the bank department at Albany. *Held*, that the evidence was properly rejected. *Humphrey v. People*, 18 Hun (N. Y.), 393; s. c., 1 Cr. L. Mag. 262.

In Embezzlement of State Moneys. — On the trial of an indictment against defendant for an embezzlement of State moneys received by him as a county treasurer, under the provisions of Gen. Stat. ch. 38, proof of the execution of the bond, required by sect. 39 of that chapter, is not essential to maintain the charge. *State v. Mims*, 26 Minn. 183; s. c., 3 Cr. L. Mag. 259.

In Embezzlement by Post-office Official.

— The power to fix the salary and allowance for a post-office is in the postal department; and, on an indictment for embezzlement, evidence that amounts in excess of such allowances were expended by the postmaster for the expenses of the office, is not competent; nor can the postmaster shield himself from criminal liability for unlawful use of the money by the claim that, as to such extra expenditures, his accounts are "unsettled." *United States v. Adams*, 2 Dak. 305; s. c., 2 Cr. L. Mag. 823; 9 N. W. Rep. 718.

1. See *Com. v. O'Malley*, 97 Mass. 584; *Com. v. Shepard*, 83 Mass. (1 Allen) 575; *Perry v. State*, 22 Tex. App. 19; *Golden v. State*, 22 Tex. App. 1; *Leonard v. State*, 7 Tex. App. 417; s. c., 1 Cr. L. Mag. 528; *United States v. Crow*, 1 Bond, C. C., 51; *Reg. v. King*, 12 Cox, C. C., 73; s. c., 24 L. T. 670; *Reg. v. Moah*, 7 Cox, C. C., 60; s. c., *Dears. C. C.* 626; 25 L. J. M. C. 66; 2 Jur. N. S. 213; *Reg. v. Wolstenholme*, 11 Cox, C. C., 313; *Rex v. Joiner*, 7 C. & P. 33; *Rex v. Grove*, 7 C. & P. 635; s. c., 1 M. C. C. 447; *Reg. v. Aston*, 2 Cox, C. C., 234; s. c., 2 C. & K. 413.

In Prosecution of Officer of Bank. — An indictment under Mass. Stat. 1846, ch. 171,

sect. 1, against an officer of a bank for fraudulently taking and secreting particular and designated moneys with intent to convert the same to his own use, is not supported by proof that he received the moneys in question as a deposit in the bank, from a depositor, and entered the same in the name of the depositor in an account-book kept for that purpose, and that he afterwards fraudulently erased the entry, altered the footing of the column so as to make it appear that no such sum had been received, and entered the amount so deposited upon the account of the depositor in the ledger as having been received two months before the time of its actual receipt, if there is also evidence from which it may reasonably be inferred that the erasure, alteration, and false entry were not made until several days after the receipt of the money, and the making of the original and true entry thereof, during which time there is no proof of any fraudulent intent on his part respecting it, or that it was not put, kept, and used with other funds of the bank. *Com. v. Shepard*, 83 Mass. (1 Allen) 575.

Against Secretary of a Company. — To support a charge of embezzlement against the secretary of a company, whose duty it was to receive moneys and pay wages, etc., out of the moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money. *Reg. v. Wolstenholme*, 11 Cox, C. C., 313.

In Stealing Letters from Mails. — What evidence is necessary and sufficient to warrant a conviction for stealing letters from the United-States mail, explained in a charge to a jury, with reference to the facts of a particular case. *United States v. Crow*, 1 Bond, C. C., 51.

Against Banking Clerk. — It was the duty of a banking clerk to receive money, and to pay it either into a box or a till, of each of which he kept the key, and to make entries of his receipts in a book, the balance of each evening being the first item with which he debited himself in the book the next morning. On the morning of the day in question, he had thus debited himself with £1,762; and, on being called on in the evening by his employer to produce his money, he threw himself on his employer's mercy, and said he was about £900 short. Upon an indictment for embezzling, *held*, that this was evidence upon which the jury might convict, although no

Thus it suffices to prove a qualified ownership in the alleged owner of the property appropriated by the defendant, and that such owner had the right to the possession and control of it.¹

3. *Witnesses. — Experts. — Credibility.* — The rules of law relating to witnesses, experts, credibility, and admissibility are applicable to trials for embezzlement.²

evidence was given of the persons from whom the money was received, or of the coin of which it consisted. *Rex v. Grove*, 7 C. & P. 635; s. c., 1 M. C. C. 447.

Against Receiver of Taxes. — Upon the trial of an indictment under 2 & 3 Will. 4, c. 4, s. 1, charging that A., being intrusted by virtue of his employment in the public service with the receipt and custody of certain money, the property of the Government, did fraudulently and feloniously apply the same to his own use, it was proved that A., being a receiver of taxes, had kept in his own hands a balance very much exceeding that which he was allowed to retain; and, upon being asked whether he was prepared to pay over that balance or any part of it, he replied that he was not. He was then reminded that there was a balance of excise duties alone of about £300 standing against him from the previous Monday, which was a receipt-day at a particular place in his district. He then produced £255, and said that that was all he had in the world, and that the rest he had spent in an unfortunate speculation. *Held*, that there was evidence of the receipt of a particular sum of £300 by virtue of his employment, and of a misapplication by him of a part of it, and that therefore the conviction was right, even if evidence of a general deficiency on a balance of accounts would not alone have supported such an indictment. *Reg. v. Moah*, 7 Cox, C. C., 60; s. c., *Dears. C. C.* 626; 25 L. J. M. C. 66; 2 Jur. N. S. 213.

Failure to pay over Money. — A conductor of a tramway car was charged with embezzling 3s. It was proved that on a certain journey there were fifteen threepenny fares and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare, and to receive money from each, but what sum did not appear. He made out a way-bill for the journey, debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way-bills for each journey to a clerk, and to hand him all the money received during each day on the following morning. The prisoner's money should have been £3. 1s. 9d. according to his way-bill for the day, but he paid in only £3. or 8d. *Held*, that there was sufficient evidence of the receipt of 7s. 11d., the total amount of fares of the particular journey, and of the embezzlement of 3s.

part thereof. *Reg. v. King*, 12 Cox, C. C., 73; s. c., 24 L. T. 670.

Upon an indictment for embezzling 6s., it was proved that the prisoner was a drayman in the employment of the prosecutors, who were brewers, and that his duty was to sell porter at a certain fixed price only; viz., 9s. 6d. per dozen. He sold some at 6s., but did not receive the money for some time. In the interval the customer had informed the prosecutors of the transaction, and they told him to pay the money when the prisoner came for it. The prisoner accordingly received it, and did not account for it. *Held*, that the evidence was sufficient to support the indictment. *Reg. v. Aston*, 2 Cox, C. C., 234; s. c., 2 C. & K. 413.

What Insufficient Evidence. — A charge of embezzlement is not sustained by proof that the accused asked a girl to lend him a small sum of money, that she thereupon handed him a larger amount to count in her presence, and that he refused to return her any, and fled with the whole; such a conversion, *animo furandi*, would be larceny. *Com. v. O'Malley*, 97 Mass. 584.

It is not enough to prove that a clerk has received a sum of money, and not entered it in his book, unless there is also evidence that he was denied the receipt of it, or the like. *Rex v. Jones*, 7 C. & P. 833.

1. *Leonard v. State*, 7 Tex. App. 417, s. c., 1 Cr. L. Mag. 528.

2. Where the evidence of the defendant's embezzlement was circumstantial, and his mother testified to an improbable story to account for large sums of money found deposited in banks in her name, *held*, that her testimony might be rejected by the court, as against common experience and observation. *New York, etc., Ferry Co. v. Moore*, 102 N. Y. 667.

Upon the trial of a county treasurer for embezzlement, evidence of expert accountants, who have examined the books and papers of the office, as to the totals of the amounts received and paid out by him, as shown by such books and records, is admissible. *Hollingsworth v. State*, 111 Ind. 289; s. c., 9 Cr. L. Mag. 973; 12 N. E. Rep. 490.

Upon a charge against a postmaster of abstracting a letter from the mails, all the postmasters and clerks through whose hands the letter would pass in the regular course of business should be examined as

4. *Variance*. — A variance in the evidence is fatal in a prosecution for embezzlement.¹

5. *Verdict*. — *a. In General*. — One of the counts for embezzlement being good, the verdict means that the defendant is guilty of the offence as charged therein.² And upon an indictment containing various counts for embezzlement of different grades, and others for larceny, a verdict "guilty of embezzlement" is equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution.³

But on an indictment for embezzlement the jury cannot find the accused guilty of a breach of trust.⁴

b. Conviction of, under an Indictment for Theft. — Embezzlement being a purely statutory crime, — a sort of statutory theft, —

witnesses. And this is especially necessary when the accused proves a good character. *United States v. Whitaker*, 6 McL. C. C. 342.

1. See *Washington v. State*, 72 Ala. 272; s. c., 6 Cr. L. Mag. 289; 4 Cr. L. Mag. 611; 2 Ala. L. J. 63; *Carter v. State*, 53 Ga. 326; *State v. Hinckley*, 38 Me. 21; *Com. v. Merrifield*, 45 Mass. (4 Metc.) 468; *Rex v. White*, 4 C. & P. 46.

Thus an indictment which charges a larceny or embezzlement of the printed sheets of a certain publication is not supported by evidence that those sheets were delivered to the defendant by the owner to be bound, and that the defendant, after he had folded, stitched, bound, and trimmed them, embezzled and fraudulently converted them to his own use. In such case, the indictment should charge a larceny or embezzlement of books. *Com. v. Merrifield*, 45 Mass. (4 Metc.) 468.

Variance as to Owner of Property. — Where the indictment alleges that the defendant embezzled property which came to his possession as the agent of S., while the proof shows that the property was placed in his possession by one T., who was the bailee of S., to be delivered to S., the variance is fatal, unless it is shown that S. ratified or recognized the appointment. *Washington v. State*, 72 Ala. 272; s. c., 6 Cr. L. Mag. 289; 4 Cr. L. Mag. 611; 2 Ala. L. J. 63.

An indictment for embezzlement and larceny charged the money, funds, and securities embezzled and stolen, as the goods and personal property of A., B., and C., partners under the name of A., B., & Co. The proof showed that before the alleged offence the firm was composed of A., B., C., and D., doing business under the same name, the latter being a special partner, and that the articles of partnership were a matter of record; but that before the alleged offence, D. retired from the firm, although the dissolution of the firm of the four was not made a matter of record, and notice given,

as required by law. *Held*, that there was no variance, as, after D. retired, the property in fact belonged only to A., B., and C. *Ker v. People*, 110 Ill. 629.

Variance as to Person delivering. — An indictment, stating that B. was possessed of the property and delivered it to H., who embezzled it, is supported by proof that B. delivered it to an agent of H., who delivered it to B. *State v. Hinckley*, 38 Me. 21.

Variance as to Object of Delivery. — An allegation in an indictment that A. placed valuable securities in the hands of B., "with an order in writing to invest the proceeds in the Government funds," is not supported by proof of an order in writing, directing B. to invest the proceeds in the Government funds, in case of any unexpected accident happening to A. *Rex v. White*, 4 C. & P. 46.

Where an indictment charges that the defendant was intrusted by the owner with certain melons, "for the purpose of applying the same to the sole use and benefit of the said owner," a verdict of guilty is not sustained by proof that the melons were delivered to the defendant for the purpose of selling the same and bringing the money to the owner, less what he charged for his services. *Carter v. State*, 53 Ga. 326.

2. *Guenther v. The People*, 24 N. Y. 100.

3. *Guenther v. The People*, 24 N. Y. 100.

In 1876, defendant Myers was indicted under sect. 35, art. 2, ch. 42, Wag. Stat., for embezzling certain United-States bonds, charged to have been received by him as agent of one Zumbro, and was convicted at February term, 1878, of Newton Circuit Court, to which venue had been awarded. It appears from the record that only eleven jurors were present when the verdict of the jury was received by the court. *Held*, this was a fatal defect, and the judgment must be reversed. *State v. Myers*, 68 Mo. 266; s. c., 7 Cent. L. J. 499. See *State v. Mansfield*, 41 Mo. 470.

4. *State v. Reonnals*, 14 La. An. 276.

EMBEZZLEMENT—EMBLEMENS—EMBRACERY.

there cannot be a conviction of embezzlement under a common-law indictment for larceny.¹

6. *The Punishment.*—The offence of embezzlement being purely statutory, there is no punishment for its commission other than that provided for in the statute creating the offence. Under most, if not all, the statutes, the punishment is inflicted without regard to the amount of money taken or the value of the property converted.²

But it would seem that the court has no power to sentence the prisoner to pay a fine, and “stand committed,” until the fine imposed is paid.³

EMBLEMENS.—See CROPS; LANDLORD AND TENANT.

EMBRACERY.—1. *Definition.*—Embracery is a species of maintenance,⁴ and consists in an attempt by either party to a suit, or by a stranger, to corrupt or influence or instruct a juror or jury,⁵ to incline him or them to favor one side rather than the other by gifts or promises, threats or persuasions, words or letters, except by opening or enforcing the evidence by arguments at the trial, whether the jurors give a verdict or not, and whether the verdict given be true or false.⁶ It is an offence at common law as well as

1. *Texas Rule.*—In Texas, however, there is an exception to this rule, for their Revised Code of Criminal Procedure, article 714 authorizes a conviction for embezzlement under an indictment for theft. But a retroactive operation cannot be allowed to this new provision; and, therefore, in a trial for theft alleged to have been committed before the Revised Codes took effect, it was *held* error to instruct the jury to convict for embezzlement if they found that the possession of the converted property was lawfully acquired by the accused. *Simco v. State*, 8 Tex. App. 406; s. c., 2 Cr. L. Mag. 113. See *Whitworth v. State*, 11 Tex. App. 414; s. c., 4 Cr. L. Mag. 119; *Huntsman v. State*, 12 Tex. App. 619; s. c., 4 Cr. L. Mag. 284.

The Texas court has *held* that this article is not violative of the constitutional guaranty that a party “shall have the right to demand the nature and cause of the accusation against him.” *Whitworth v. State*, 11 Tex. App. 414; s. c., 4 Cr. L. Mag. 119.

Verdict.—The court say in *Whitworth v. State*, 11 Tex. App. 414; 4 Cr. L. Mag. 119, that the Revised Code of Procedure, art. 714, not only re-enacts the provision of the original code, which made the offence of theft to include all unlawful acquisition of personal property punishable by the Penal Code, but so enlarges the offence of theft as to include within it the offence of swindling and embezzlement. Therefore, under an ordinary indictment for theft, a conviction may be had for embezzlement,

provided the offence was committed since the Revised Codes took effect.

2. See *People v. Leehey* (Cal.), 1 Cr. L. Mag. 124; 4 Pac. Coast L. J. 75.

3. *Mims v. State*, 26 Minn. 494; s. c., 3 Cr. L. J. 260.

4. *Harris, Cr. L.* 95; *Roscoe's Cr. Ev.* 721; 1 *Russ. on Cr.* (5th ed.) 360.

5. *Solicitations by Juror.*—In *State v. Sales*, 2 Nev. 268, the defendant, while acting as a juror in a civil action, approached one of the attorneys in the case, and offered to secure and return a verdict for the defendant in consideration of the payment of the sum of a hundred dollars. There was no charge that he was corruptly influenced, or that he attempted in any way to corruptly influence his fellows; and the court *held* that the facts set forth did not constitute an offence. It is intimated, however, that, if properly indicted, the defendant might have been punished for soliciting and inciting another to commit the crime of embracery if it could be shown that he did so. The court say, “If the defendant solicited the attorney to employ money to corruptly influence the jury, he is indictable for inciting or soliciting another to commit the crime of embracery.”

6. *Grannis v. Branden*, 5 Day (Conn.), 260, 274; s. c., 5 Am. Dec. 143; *State v. Sales*, 2 Nev. 268; *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503; *Anon. Dy.* 48 a, pl. 19; *Hussey v. Cooke*, Hob. 294; *Herbert v. Shaw*, 11 Mod. 111, 118; 1 *v. F.*, Noy. 102; *Snell v. Timbrill*, 1 Str. 643; 1 *Hawk. P. C.* ch. 85,

under the statute,¹ and is punishable by fine and imprisonment.²

The bare giving of money to another to be distributed among jurors is an offence of the nature of embracery, whether any of it be afterwards actually distributed or not;³ and so also is the giving of money to a juror after verdict without any preceding contract, however it has been said to be otherwise of the payment of a juror's travelling expenses.⁴

An attempt to influence or corrupt a jury or juror is a consummated act of embracery, although the attempt is frustrated, and the object thwarted.⁵

Analogous to the offence of embracery is that of persuading, or endeavoring to persuade, a witness not to attend and give evidence, and is an offence punishable with fine and imprisonment. It is not material that the attempt was unsuccessful.⁶

sect. 1; Co. Litt. 157 b, 369, 369 a; 4 Bl. Com. 140.

Bribery.—Embracery is a special kind of bribery. Harris, Cr. L. 95.

Who may be guilty of the Offence.—The offence of embracery may be committed by a party to an action or a stranger. *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503. And a juror himself may be guilty of the offence by corruptly endeavoring to bring over his fellows to his side. Harris, Cr. L. 95; 1 Russ. on Cr. (5th ed.) 360. Or a witness may be guilty of the crime. A witness has no right to deliver a paper to a jury. *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503.

It is said that the law will not suffer a mere stranger so much as to labor a juror to appear and act according to his conscience, but that it seems clear that a person who may justify any other act of maintenance—see 1 Russ. on Cr. (5th ed.) 352 *et seq.*—may safely labor a juror to appear and give a verdict according to his conscience, but that no other person is justified in intermeddling so far. 1 Russ. on Cr. (5th ed.) 360.

Hawkins says, that, "The law so abhors all corruptions of this kind that it prohibits every thing which has the least tendency to it, what spacious pretence soever it may be covered with; and, therefore, it will not suffer a mere stranger so much as to labor a juror to appear and act according to his conscience." Hawk. P. C. (Curw. ed.) 466, sec. 2.

1. *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503; 1 Hawk. P. C. 85; Co. Litt. 369; 4 Bl. Com. 140.

Attempt to commit.—It was *held* in the case of *State v. Sales*, 2 Nev. 268, that an attempt to commit embracery is not a crime at common law. See 1 Russ. on Cr. (5th ed.) 360; 2 Bish. Cr. L. (7th ed.) § 386 *et seq.*

2. *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503; 1 Hawk. P. C. ch. 85, sect. 1; Harris, Cr. L. 95; Roscoe's Cr. Ev. 721; 1 Russ. on Cr. (5th ed.) 361.

3. 1 Russ. on Cr. 360.

4. Hawk. P. C. 85, sect. 3; Roscoe's Cr. Ev. 721.

Compensation to Juror.—The compensation of the jury in criminal as well as in civil cases is now regulated by statute in this country; and, as Bishop says, "consequently there is no room for suffering any other compensation to be given by the parties." 2 Bish. Cr. L. (7th ed.) sect. 386.

5. *State v. Sales*, 2 Nev. 268; 2 Bish. Cr. L. (7th ed.) sect. 389; 2 Bish. Cr. Proc. (3d ed.) sect. 347.

6. *Rex v. Lawley*, 2 Str. 904; 1 Russ. on Cr. (5th ed.) 361; Hawk. P. C. b. 1, c. 21, s. 15; Roscoe's Cr. Ev. 721.

What constitutes Embracery.—**Requisites of Indictment.**—An allegation that C. B. unlawfully furnished money to one A. R., for the use of P. E., to absent himself from the circuit court of the county at a certain term to which he, P. E., had been summoned as a witness against said C. B. in a trial on an indictment against C. B. then pending in said court, whereby the said C. B. attempted to obstruct and impede the administration of justice, the court *held* fatally defective in not alleging that A. R. paid, or offered to pay, said money to the witness P. E. to induce him to absent himself as such witness at said time from the circuit court; that without this, the act done by the defendant is not of such a nature as to constitute an attempt to commit the offence mentioned in the indictment, and, therefore, on motion of the defendant, the court ought to have quashed this indictment. *State v. Baller*, 26 W. Va. 90; s. c., 7 Cr. L. Mag. 796; s. c., 53 Am. Rep. 66.

EMIGRANT—EMIGRATION—EMINENT DOMAIN.

EMIGRANT.—An emigrant is one who quits his country for any lawful reason, with a design to settle elsewhere, and takes his family and property with him. (Vattel, b. 1, c. 19, s. 224.¹)

EMIGRATION.²—See EXPATRIATION.

EMINENT DOMAIN.³

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1. It seems that a representation made to a physician in the course of negotiations with him looking forward to his employment as the ship's physician, that the ship "will carry emigrant laborers not over forty," is satisfied if no more than forty laboring men are taken, although with their wives and children that number is exceeded. *Richards v. Hayward*, 2 Man. & G. 574.

2. Emigration is frequently used as synonymous with expatriation; but a distinction is sometimes made in their use,

emigration being used to signify a simple removal for the purpose of residence from one country to another; while expatriation signifies, in addition to a removal, a renunciation of allegiance. Argument of Counsel in *McIlvaine v. Cox's Lessee*, 2 Cranch. (U. S.) 302; 2 Kent, Com. 44.

3. In the preparation of this title the cases and notes on the subject in the American and English Railroad Cases and the American and English Corporation Cases have largely been made use of.

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I. Definition.—Eminent Domain is that sovereign power vested in the people, by which they can, for any public purpose, take possession of the property of any individual upon just compensation paid to him.¹

1. *Warren v. First Division St. Paul & P. R. R. Co.*, 18 Minn. 384; *Bonaparte v. Camden & Amboy R. R. Co.*, *Baldw. C. C.* 205; *DeVaraigne v. Fox*, 2 *Blatchf. C. C.* 95; 1 *Bouv. Law Dict.* (15th ed.) 588.

The Theory of Eminent Domain finds its earliest authoritative expression in the great work of Grotius. He says, "We have elsewhere said that the property of subjects is under the eminent dominion of the State, so that the State, or he who acts for it, may use or even alienate or destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be observed that when this is done the State is bound to make good the loss to those who lose their property, and to this public purpose those who have suffered the loss must, if needs be, contribute." *Whewell's trs.*, book iii., c. 20, § 7; cf. iii., c. 19, and *id.*, c. 14, § 7, 8.

Eminent domain, as contemplated by Grotius, is evidently to be exercised for the benefit of the State alone, for the compensation is treated as a charge on the general revenue. The State being thus at once actor and beneficiary in the exercise of this power, it follows that its duty to make compensation is moral rather than legal, for the immunity sovereign from the suit by the

subject is generally admitted. 3 *Law Quarterly Review*, 316.

Nature of Power.—The power to take private property for public uses belongs to every independent government. It is an incident of sovereignty, and requires no constitutional recognition. *Beckman v. The Saratoga & S. R. R. Co.*, 3 *Paige Ch. (N. Y.)* 45; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 *Wend. (N. Y.)* 13; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 *N. Y.* 100; *Wier v. The St. Paul, S., & T. F. R. R. Co.*, 18 *Minn.* 155; *Baring v. Erdman*, 14 *Haz. Pa. Reg.* 129; *United States v. Jones*, 109 *U. S.* 513; *bk. 27 L. ed.* 1015; *Bonaparte v. Camden & Amboy R. R. Co.*, *Baldw. C. C.* 205; *Jones v. Walker*, 2 *Paine, C. C.* 688; *s. c.*, 8 *Op. Att. Gen.* 333.

Manner of Exercise.—There is nothing, then, in the term "eminent domain" which implies any restriction as to the manner in which this power of the sovereign to take private property for public uses may be exercised. If there are any restrictions as to the manner of its exercise, they must be found, then, in the constitution; for nothing of less authority than the organic and fundamental law, which lays out the very frame of government, could impose on them. But the constitution contains no such restrictions, except as to the matter of compensation, which is not here important. There is no reason, then, why the legislature, representing the state, may not enact laws by which the eminent domain

II. Nature of the Right. — 1. In Whom vested. — The power of eminent domain is vested in the several States of the Union,¹ and

may be exercised by a private corporation. *Beckman v. S. & S. R. R. Co.*, 3 Paige Ch. (N. Y.), 45; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. (N. Y.) 13; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. 100; *Boston W. P. Co. v. Boston & W. R. R. Co.*, 40 Mass. (23 Pick.) 360.

The supreme court of Minnesota say, in the case of *Wier v. St. Paul, S., & T. F. R. R. Co.*, 18 Minn. 155, 163, that "there is no reason why the Legislature may not, by a general law, authorize the formation of private corporations for the construction of railroads. Nor is there any greater reason why the Legislature may not, by a general law, provide that any such corporation may for itself select a route upon which to build a railroad, and, having selected it, may proceed to take and obtain land needed for its purposes by an exercise of the power of eminent domain. These propositions follow inevitably from the propositions before established, to wit: that the state possesses the eminent domain, and that the manner of its exercise is, except as to compensation, unrestrained. It is no objection to this conclusion to say that the Legislature cannot do this, because it cannot delegate to another the authority delegated to itself. Its authority is to legislate, to pass laws; and the passage of the general laws spoken of, by virtue of which private corporations are authorized to exercise the eminent domain, is in no sense a delegation of this authority. From the foregoing conclusion it follows that the question as to the manner in which the eminent domain shall be exercised addresses itself to the Legislature as a question of propriety, fitness, expediency, rather than as a question of power."

Authority of the State. — The right of eminent domain, which is possessed by the State as a necessary attribute of sovereignty, is the right to resume the possession of private property for public use. There is nothing in the term which implies any restriction as to the manner in which this power of the sovereign to take private property for public uses may be exercised. If there are any restrictions as to the manner of its exercise they must be found in the Constitution, for nothing of less authority than the organic and fundamental law which lays out the very frame of government could impose them. *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40; s. c., 42 Am. Dec. 716; *Weir v. St. Paul, S., & T. F. R. R. Co.*, 18 Minn. 155.

The Right of Taking Property for Public Use is exercised by a State, subject to no

power vested in the Federal Government. The proprietary right of the United States can in no respect restrict or modify the exercise of this sovereign power by a State. *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507; bk. 12 L. ed. 535; *United States v. Railroad Bridge Co.*, 6 McL. C. C. 517; s. c., 3 Liv. L. Mag. 568; 10 L. Rep. N. S. 630; *Backus v. Lebanon*, 11 N. H. 19; s. c., 35 Am. Dec. 466; *Armington v. Barnet*, 15 Vt. 745; s. c., 40 Am. Dec. 705. See also *Alabama & F. R. R. Co. v. Kenney*, 39 Ala. 311; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 59; *Baltimore & H. de G. T. Co. v. Union R. Co. of Baltimore*, 35 Md. 231; *Northern R. R. Co. v. Concord & C. R. R. Co.*, 27 N. H. 194; *Crosby v. Hanover*, 36 N. H. 420; *Ash v. Cummings*, 50 N. H. 613; *Adden v. Railroad*, 55 N. H. 415. *In re N. Y. C. & H. R. R. Co. v. M. G. L. Co.*, 63 N. Y. 334; *State v. S. P. R. R. Co.*, 24 Tex. 127.

In a Proceeding to condemn Property for Public Use there is nothing in the nature of a contract between the owner and a State, or the corporation which the State authorizes to take the property. If just compensation be made to the owner, his property can then be taken without his consent. *Garrison v. N. Y. City*, 88 U. S. (21 Wall.) 196; bk. 22 L. ed. 612; *Richmond, F., & P. R. R. Co. v. Louisa R. R. Co.*, 54 U. S. (13 How.) 71; bk. 14 L. ed. 55; *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507; bk. 12 L. ed. 535.

Individual Property is exclusive as against individuals, but not as against society. Individual rights must yield to social ones. *Patten v. Northern Cent. R. R. Co.*, 33 Pa. St. 436; s. c., 75 Am. Dec. 612.

The Constitution protects property against arbitrary seizure or divestiture, not against seizure or divestiture by legal process, and on compensation made. But a law cannot authorize the taking of private property for any other public use. *Bonaparte v. Camden & Amboy R. R. Co.*, Baldw. C. C. 205.

2. *Central B. U. P. R. R. Co. v. Atchison, T., & S. F. R. R. Co.*, 28 Kan. 453; s. c., 10 Am. & Eng. R. R. Cas. 528; *Nichols v. Somerset & K. R. R. Co.*, 43 Me. 356; *Eastern R. R. Co. v. Boston & M. R. R. Co.*, 111 Mass. 125; s. c., 15 Am. Rep. 13; *Trombley v. Humphrey*, 23 Mich. 471; s. c., 9 Am. Rep. 94; *Leisse v. St. Louis, etc., R. R. Co.*, 2 Mo. App. 105; *People v. Smith*, 21 N. Y. 595; *Commonwealth v. Erie R. R. Co.*, 62 Pa. St. 286; s. c., 1 Am. Rep. 399; *Alexandria & F. R. R. Co. v. Alexandria & W. R. R. Co.*,

the Legislature cannot by any statute divest the State of its power.¹ By virtue of the delegation to the Federal Government,

75 Va. 780; s. c., 40 Am. Rep. 743; 10 Am. & Eng. R. R. Cas. 23; *DeVaigne v. Fox*, 2 Blatchf. C. C. 95; *Grand Rapids, N., & L. S. R. R. Co. v. Grand Rapids & I. R. R. Co.*, 35 Mich. 265; *Chicago, etc., R. R. Co. v. Town of Lake*, 71 Ill. 333; *New York, etc., R. R. Co.*, 36 Conn. 196; *City of Bridgeport v. New York, etc., R. R. Co.*, 36 Conn. 255; s. c., 4 Am. Rep. 63; *Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234; s. c., 21 Am. Rep. 643. *In re Kerr*, 42 Barb. (N. Y.) 119; *Backus v. Lebanon*, 11 N. H. 19. But to authorize the taking of land already actually devoted to a public use, there must be an express statutory authority. *In re Boston & A. R. R. Co.*, 53 N. Y. 574. Thus, in *Central City Horse R. Co. v. Fort Clark Horse R. Co.*, 81 Ill. 523, it was held that a part of the line of one railroad could not be taken by a competing road acting under an ordinance of a city council.

The Power of the State to take Private Property for the Public Use reaches every description of property within its jurisdiction, even when acquired by grant from the State. It is an inherent element of sovereignty; and from the necessity of the case, and the highest considerations of public welfare, it must continue unimpaired in the State. It is impliedly reserved in every grant. It cannot be abridged so as to bind future legislation. The franchise of a corporation is not exempt. As an incorporeal hereditament, it may be taken, in whole or in part, and, with the other property of the corporation, devoted to other or similar public uses. The purposes of government would be so far defeated, if any single owner, corporation, or individual could in this respect control its action. It belongs exclusively to the Legislature to determine whether the public benefit to be secured is sufficient to warrant the taking; and this is not a judicial question. The necessity may be left to the adjudication of designated officers or tribunals; but when not so delegated it may be declared by the Legislature itself. The right itself may be delegated to corporate bodies, public or private; and when the enjoyment of two public rights would to some extent interfere, it is, in the language of Chief Justice Shaw, "for the Legislature to determine which shall yield, and to what extent, and whether wholly or in part only, to the other; and such question will ordinarily be determined by the Legislature according to their conviction of the greater preponderance of public necessity and convenience." *Commonwealth v. Essex Co.*, 79 Mass. (13 Gray) 239, 247; *Boston Water Power Co. v. Boston &*

Worcester R. R. Co., 40 Mass. (23 Pick.) 360; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 68 Mass. (2 Gray) 1; *Central Bridge Co. v. Lowell*, 70 Mass. (4 Gray) 474; *Hingham & Quincy Bridge Co. v. County of Norfolk*, 88 Mass. (6 Allen) 353, 360; *Haverhill Bridge v. County Commissioners*, 103 Mass. 120; s. c., 4 Am. Rep. 518. See also *New York, Housatonic, & Northern R. R. Co. v. Boston, Hartford, & Erie R. R. Co.*, 36 Conn. 196; *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590; *People v. Smith*, 21 N. Y. 595, 598; *Eastern R. R. Co. v. Boston & M. R.*, 111 Mass. 125; s. c., 15 Am. Rep. 13.

1. *Hyde Park v. Oakwoods Cemetery Association*, 119 Ill. 141; s. c., 14 Am. & Eng. Corp. Cas. 417.

The Legislature cannot divest the State of its Power of Eminent Domain.—In the case of the Village of Hyde Park v. Oak Woods Cemetery, *supra*, the court say, "It is claimed that the acts of the Legislature creating the cemetery association, when accepted, and the purchase of the lands under said acts, and the dedication of the same to public use, constituted a contract between the State and the corporators of the association within the provision of section 10 of article 1 of the constitution of the United States, which prohibits legislation impairing the obligation of contracts. If this position was correct, it is plain that any future legislation authorizing the taking of the lands could not be sustained, as the Legislature has no authority to enact a law impairing the obligation of a contract. But the rule invoked has no application to a case of this character. The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the State, and does not fall within the inhibition of the Constitution of the United States. Cooley, in his work on "Constitutional Limitations" (5th ed., 281, 525), in the discussion of this question, says that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void (see *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40, 454; *Matter of Kerr*, 42 Barb. 119; *West River Bridge Co. v. Dix*, 16 Vt. 446; s. c., 47 U. S. (6 How.) 507; bk. 12 L. ed. 535), and that provision of the Constitution of the United States which forbids the State violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper author-

of certain of the sovereign powers vested in a State, the Federal Government has the right to condemn lands for any purpose necessary to the due exercise of the power so delegated;¹ and the exercise of the power so delegated cannot be curtailed, nor the manner prescribed by the State wherein the property is situated.² It has been held that the right of eminent domain in a State exists only for its own purposes, and that therefore a statute

ity. See also *Railroad Co. v. Railroad Co.*, 97 Ill. 506; *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 531; bk. 12 L. ed. 535. There are cases where the State might bind itself, and where it would be powerless, under the provisions of the Constitution cited, to pass future laws releasing itself from assumed obligations; but this is not one of them. The State had no power to divest itself of the right of eminent domain by any act it might pass which would prevent the exercise of that right in the future, when, in the opinion of the Legislature, a case arose wherein the public interest demanded the exercise of the power. But, while we hold that the State cannot divest itself of the power of eminent domain, it by no means follows that the village of Hyde Park has the right to condemn the lands in question. The necessity or propriety of exercising the right of eminent domain is a political question, one which belongs exclusively with the Legislature to determine. *Chicago, R. I., & P. R. v. Town of Lake*, 71 Ill. 333. It is a question with which the courts have no concern, as it is not judicial."

1. *Dickey v. Maysville W. P. & L. Turnpike Co.*, 7 Dana (Ky.), 113; *Trombley v. Humphrey*, 23 Mich. 471; *Darlington v. United States*, 82 Pa. St. 382; s. c., 22 Am. Rep. 766; *Kohl v. United States*, 91 U. S. (1 Otto) 367; bk. 23 L. ed. 449; *New Orleans v. United States*, 35 U. S. (10 Pet.) 723; bk. 9 L. ed. 597; *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 429; bk. 4 L. ed. 579; *United States v. Inlotts*, 2 Am. L. Rec. 315, 513, 577; *United States v. Oregon R. R. & N. Co.*, 16 Fed. Rep. 524; s. c., 14 Am. & Eng. R. R. Cas. 23; *Decker v. Baltimore & N. Y. R. R. Co.*, 1 Interstate Com. Rep. 434; *Stockton v. Baltimore & N. Y. R. R. Co.*, 1 Interstate Com. Rep. 411.

Exercise of Eminent Domain by Federal Government.—It is said in the case of *United States v. The Oregon R. & Nav. R. Co.*, *supra*, that "the government of the United States has the right of eminent domain, and may exercise it within a State whenever necessary to the exercise of any of the powers conferred upon it by the Constitution; and no question is made but that the construction of this canal and locks is an exercise of such power. In the

exercise of this right it is not restrained by any constitutional limitation, except that it is bound to make or provide a just compensation to the owner for the property taken. *Kohl v. United States*, 91 U. S. (1 Otto) 367; bk. 23 L. ed. 449; *Cooley, Con. Lim. 526*; Fifth Amendment to the Constitution."

In the earlier cases it was intimated that a proper method of proceeding in such cases was that the State should appropriate the property, and donate it to the general government. In a Massachusetts case the State statute was entitled, "An Act giving the consent of the Commonwealth to the United States for the purchase of additional land in the city of Boston, for the sub-treasury and post-office site." *Darlington v. United States*, 82 Pa. St. 382; *Burt. v. Merchant's Ins. Co.*, 106 Mass. 356; and in *Gilmer v. Lime Point*, 18 Cal. 229; it is made a query whether the federal government can take and appropriate land within a State for "forts," etc., without the aid or sanction of the State. See also *Beddall v. Bryan*, 14 Md. 444. In *Trombley v. Humphrey*, 23 Mich. 471, *Cooley, J.*, delivers an able and interesting opinion, which was subsequently adopted by the United States Supreme Court in *Kohl v. United States*, 91 U. S. (1 Otto) 367; bk. 25 L. ed. 449. According to these decisions, the proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own proper uses, and not for those of another. Beyond that there exists no necessity, which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired. *Field, J.*, dissented, however, from this decision. See, also, *Darlington v. United States*, 82 Pa. St. 382; *Jones v. United States*, 48 Wis. 385.

2. *Great Falls Manuf. Co. v. United States*, 16 Ct. of Cl. 160. See also *Grant v. United States*, 1 Ct. of Cl. 41.

authorizing the condemnation of lands to be turned over to the United States, for a purpose connected with the Federal Government, is unconstitutional and void.¹ On the formation of any Territory into a State, the right of eminent domain immediately passes from the Federal Government to the newly formed State.²

2. *Conditions of Exercise.* — Although the power of eminent domain is a sovereign power vested in a State, it cannot be exercised unconditionally. It can only be exercised where the property taken is taken for public use,³ and when the property

1. *People v. Humphrey*, 23 Mich. 471; s. c., 9 Am. Rep. 94; *Darlington v. United States*, 82 Pa. St. 382; s. c., 22 Am. Rep. 766; *Jones v. United States*, 48 Wis. 385. Compare *Burt v. Merchants Ins. Co.*, 106 Mass. 356; s. c., 8 Am. Rep. 339.

Exercise of Power by State for Federal Purposes. — However, a different doctrine is held in some of the States. Thus, in *Burt v. Merchants Ins. Co.*, 106 Mass. 356; s. c., 8 Am. Rep. 339, the Supreme Court of Massachusetts held that a State Legislature may delegate the right of eminent domain to an agent of the United States for the purpose of obtaining land in such State as a site for a post-office. The Supreme Court of Maryland, in the case of *Reddall v. Bryan*, 14 Md. 444, held, that under the right of eminent domain the Legislature of that State might authorize a taking of water to supply the City of Washington. And in the case of *Gilmer v. Lime Point*, 18 Cal. 229, an Act of the Legislature of California authorized the agents of the United States to take certain land for fortifications; and if the owners were unknown, or were incapable of conveying, or refused to convey, the agent of the United States might apply for an appraisalment by a jury, and upon tender or payment of the amount of the verdict and costs, the sheriff of the county might convey the land. The validity of the statute was contested, the case was elaborately discussed, and the court held that it was a valid exercise of the power of eminent domain.

2. *Swan v. Williams*, 2 Mich. 427; *Warren v. First Div. St. Paul & P. R. R.*, 18 Minn. 384; *Weber v. Harbor Commrs.*, 85 U. S. (18 Wall.) 57; bk. 21 L. ed. 798; *Doe v. Beebe*, 54 U. S. (13 How.) 25; bk. 14 L. ed. 35; *Goodtitle v. Kibbe*, 50 U. S. (9 How.) 471; bk. 13 L. ed. 220; *Pollard v. Hagan*, 44 U. S. (3 How.) 212; bk. 11 L. ed. 565; *United States v. Railroad Bridge Co.*, 6 McL. C. C. 517; s. c., 3 Liv. L. Mag. 568; 10 L. Rep. N. S. 630.

3. *Chicago & W. Ind. R. R. Co. v. Dunbar*, 100 Ill. 110; s. c., 5 Am. & Eng. R. R. Cas. 253; *Boston & L. R. R. v. Salem & L. R. R. Co.*, 68 Mass. (2 Gray) 1; *Grand Rapids N. & L. S. R. R. Co. v. Van Driele*, 24 Mich. 409; *Leisse v. St. Louis, etc.*,

R. R. Co., 2 Mo. App. 105; *Petition of Mt. Washington R. R. Co.*, 35 N. H. 134; *Matter of Hamilton Ave.*, 14 Barb. (N. Y.) 405; *Matter of Flatbush Ave.*, 1 Barb. (N. Y.) 286; *Varick v. Smith*, 5 Paige Ch. (N. Y.) 137; s. c., 28 Am. Dec. 417; *Edgewood R. R. Co. App.*, 79 Pa. St. 257; *Baltimore & Ohio R. R. Co. v. P. W. & K. R. R. Co.*, 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444; *Smith v. Gould*, 61 Wis. 31; s. c., 2 Am. & Eng. Corp. Cas. 424; *Secombe v. Milwaukee & St. P. R. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23 L. ed. 67.

Transferring Property of one Citizen to another. — In the case of *Varrick v. Smith*, 5 Paige Ch. (N. Y.) 137; s. c., 28 Am. Dec. 417, Chancellor Walworth says, "I had occasion in another case to say that the right of eminent domain did not imply a right, in the sovereign power of the state, to take the property of one citizen and transfer it to another, where the public interest would be in no way promoted by such a transfer; even if a full compensation for such property was awarded the owner thereof. In this opinion I am fully sustained by the decision of the supreme court, in the recent case as to the extension of Albany Street in the city of New York, in the *Matter of Albany St.*, 11 Wend. (N. Y.) 149; s. c., 25 Am. Dec. 618. The principles upon which forced sales of private property were compelled by the civil law, for the public good, were certainly as extended as any government can ever claim consistently with the private rights of its citizens. And it is not pretended that, even under the arbitrary government of the Roman emperors, it was lawful or justifiable for the sovereign to take the property of one citizen and give it to another where the public interest was not concerned in such transfer. 1 Domat. Civ. L., b. 1, tit. 2, sect. 13. A recent English writer, who admits the general right of the sovereign power to control or dispose of private property, paying a just compensation therefor, and to regulate and control the enjoyment of things before existing in common, considers a causeless or corrupt limitation of pre-existing rights as an abuse of the power. Thomas, Univ. Jurisp. 171. Perhaps in England, where the power of Par-

condemned is necessary to enable the public use to be carried into effect.¹ It is also a condition, that compensation must be made to the owner.² It is generally held that payment of the

liament is said to be omnipotent, so far as the exercise of mere human power is concerned, there may be no remedy for such an abuse of power, where it is by a concurrent act of the three estates of the realm; but in a State which is governed by a written Constitution, like ours, if the Legislature should so far forget its duty and the natural rights of an individual as to take his private property and transfer it to another, where there was no foundation for a pretence that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of eminent domain was an infringement of the spirit of the Constitution, and, therefore, not within the general powers delegated by the people to the Legislature.

"But, while I deny to the legislative power the right thus to take private property for the mere purpose of transferring it to another, I admit that the two branches of the Legislature, subject only to the qualified veto of the executive, are the sole judges as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the Constitution; and also as to the expediency of exercising the right of eminent domain for the purpose of making public improvements, either for the benefit of the inhabitants of the State generally, or of any particular section thereof."

1. *Horton v. Grand Haven*, 24 Mich. 465; *People v. Salem*, 20 Mich. 452; s. c., 4 Am. Rep. 400. *In re New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; s. c., 7 Am. Rep. 385; *Giesy v. Cincinnati, W., & Z. R. R. Co.*, 4 Ohio St. 308; *DeVraigne v. Fox*, 2 Blatchf. C. C. 95.

2. *Colton v. Rossi*, 9 Cal. 595; *Evansville & C. R. R. Co. v. Dick*, 9 Ind. 433; *Stewart v. Supervisors of Polk Co.*, 30 Iowa, 9; s. c., 1 Am. Rep. 238; *Hanson v. Vernon*, 27 Iowa, 28; s. c., 1 Am. Rep. 215; *Perkins v. Maine Cent. R. R. Co.*, 72 Me. 95; s. c., 6 Am. & Eng. R. R. Cas. 608; *Nichols v. Somerset & K. R. R.*, 43 Me. 356; *Cushman v. Smith*, 34 Me. 247; *Boston & L. R. R. Co. v. Salem & L. R. R. Co.*, 68 Mass. (2 Gray) 1; *Hursh v. First Div. St. Paul & P. R. R. Co.*, 17 Minn. 439; *Ash v. Cummings*, 50 N. H. 591; *Petition of Mt. Washington R. R. Co.*, 35 N. H. 134; *Doughty v. Somerville & E. R. R. Co.*, 7 N. J. Eq. (3 Halst.) 51; s. c. 51 Am. Dec. 267; *Blodgett v. Utica & Black R. R. Co.*, 64 Barb. (N. Y.) 580; *Craig v. Rochester C. & B. R. R. Co.*, 39 Barb. (N. Y.) 494; *University v. N. C. R. R. Co.*, 76 N. C. 103; s. c., 22 Am. Rep. 671; *Palai-*

rets App., 67 Pa. St. 479; s. c., 5 Am. Rep. 450; *East Tennessee & Va. R. R. Co. v. Love*, 3 Head (Tenn.), 63; *Gulf Colorado & S. F. R. R. Co. v. Fuller*, 63 Tex. 467; s. c., 22 Am. & Eng. R. R. Cas. 154; *Bohlman v. Green Bay & L. P. R. R. Co.*, 30 Wis. 105; *Shepardson v. Milwaukee & B. R. R. Co.*, 6 Wis. 605; *United States v. Jones*, 109 U. S. 513; bk. 27 L. ed. 1015; *Secombe v. Milwaukee & St. P. R. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23 L. ed. 67; *United States v. Russell*, 80 U. S. (13 Wall.) 623; bk. 20 L. ed. 474; *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. (13 Wall.) 166; bk. 20 L. ed. 557; *Withers v. Buckley*, 61 U. S. (20 How.) 84; bk. 15 L. ed. 816; *Barron v. Baltimore*, 32 U. S. (7 Pet.) 243; bk. 8 L. ed. 672; *Vanhorn v. Dorrance*, 2 U. S. (2 Dall.) 314; bk. 1 L. ed. 395; *New Orleans Water Works v. St. Tammany W. W. Co.*, 4 Woods, C. C., 134.

Legislature Sole Judge.—The necessity, utility, expediency, and extent of the exercise of the power of eminent domain in a particular case where the use is in fact public, are to be determined exclusively by the Legislature. *Napa, etc., R. R. Co. v. Napa County*, 30 Cal. 437; *Stockton, etc., R. R. Co. v. City of Stockton*, 41 Cal. 147; *Parksham v. Justices*, 9 Ga. 341; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Challis v. Atchison*, 16 Kan. 117; *New Central Coal Co. v. George's Creek Coal and Iron Co.*, 37 Md. 537; *Hingham, etc., Corporation v. County of Norfolk*, 88 Mass. (6 Allen) 353; *Talbot v. Hudson*, 82 Mass. (16 Gray) 417; *Haverhill Bridge Proprietors v. County Commissioners*, 103 Mass. 120; s. c., 9 Am. Rep. 518; *County Court of St. Louis Co. v. Griswold*, 58 Mo. 175; *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234. *In re Dansville Cemetery Assoc.*, 66 N. Y. 569; s. c., 23 Am. Rep. 86; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Smedley v. Irwin*, 51 Pa. St. 445; *Memphis Freight Co. v. Mayor of Memphis*, 4 Cold. (Tenn.) 419; *Anderson v. Tuberville*, 6 Cold. (Tenn.) 150; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95; *Varick v. Smith*, 5 Paige Ch. (N. Y.) 137; s. c., 28 Am. Dec. 417; *Aldridge v. Tusculumbia R. R. Co.*, 2 Stew. & P. (Ala.) 199; s. c., 23 Am. Dec. 307; *Scudder v. Trenton, Delaware Falls Co.*, 1 N. J. Eq. (1 Saxt.) 694; s. c., 23 Am. Dec. 756; *In re Wellington*, 33 Mass. (16 Pick.) 87; s. c., 26 Am. Dec. 631; *Heyward v. Mayor of N. Y.*, 7 N. Y. 325; *Dingley v. Boston*, 100 Mass. 558. *In re Dansville Cemetery B. Assoc.*, 66 N. Y. 572; s. c.,

compensation or provision made therefor¹ is a condition precedent to the right to enter upon and take possession of the property taken.²

III. Delegation of Power. — 1. *Generally.* — The manner in which the right of eminent domain shall be exercised rests within the discretion of the Legislature; it may be, and in point of fact generally is, effected by a delegation of its power to an agent. That agent may be a corporate body, carrying on a work of public utility, though for the purposes of private gain;³ and it is no objection that the corporation is chartered under the laws of another state.⁴ The power delegated to acquire lands for a purpose specifying the authorization in general terms will be construed to authorize the acquisition of every thing necessary to carry out the public use contemplated.⁵ Where the use is public, the Legislature is the sole judge of the necessity for the improvement or work for which the property is appropriated.⁶ But where any act seems to confer an authority on another to take property, but the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the Legislature to delegate the power of eminent domain, but simply to confer a right to do the act, and exercise the power given on first obtaining the consent of those affected.⁷

23 Am. Rep. 86; *Coster v. Tidewater Co.*, 18 N. J. Eq. (3 C. E. Gr.) 67; *Sadler v. Langham*, 34 Ala. 327. However, it is different where the power to determine the questions in particular instances has been delegated by statute to the courts or to other tribunals. *Powers's Appeal*, 29 Mich. 504; *Milwaukee, etc., R. R. Co. v. Fairbault*, 23 Minn. 167; *In re New York Cent. R. R. Co.*, 66 N. Y. 407; *Rensselaer v. Davis*, 43 N. Y. 137. There is another conception of the general rule laid down, and that is found in those cases where the power to make such determination has been transferred to the courts by the State Constitution. *Lecoul v. Police Jury*, 20 La. An. 308.

The Provision of the Federal Constitution declaring that private property shall not be taken without just compensation, is intended solely as a limitation on the exercise of the power by the Government of the United States, and is not applicable to the Legislature of the States. *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Withers v. Buckley*, 61 U. S. (20 How.) 84; bk. 15 L. ed. 816; *Barron v. Baltimore*, 32 U. S. (7 Pet.) 243; bk. 8 L. ed. 672.

1. *Stirling's Appeal* (Pa.), 2 Cent. Rep 51.

2. See *post*, VII., 3, a, and authorities there cited.

3. *Swan v. Williams*, 2 Mich. 427; *War-*

ren v. First Division St. Paul & P. R. R. Co., 18 Minn. 384; *Weir v. St. Paul S. & T. F. R. R. Co.*, 18 Minn. 155; *Leisse v. St. Louis, etc., R. R. Co.*, 2 Mo. App. 105; *Ash v. Cummings*, 50 N. H. 591; *Tinsman v. Belvidere Del. R. R. Co.*, 26 N. J. L. (2 Dutch.) 148; s. c., 69 Am. Dec. 565; *Matter Bloomfield, etc., Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.) 9; s. c., 31 Am. Dec. 313; *Alexandria & F. R. R. v. Alexandria & W. R. R. Co.*, 75 Va. 780; s. c., 10 Am. & Eng. R. R. Cas. 23; *Secombe v. Milwaukee & St. P. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23 L. ed. 67.

4. *Gray v. St. Louis & S. F. R. R. Co.*, 81 Mo. 126; *Matter of Townsend*, 39 N. Y. 171; *Morris C. & B. Co. v. Townsend*, 24 Barb. (N. Y.) 658. Compare *Holbert v. St. Louis, K. C., & N. R. R. Co.*, 45 Iowa. 23.

5. *Peavey v. Calais R. R. Co.*, 30 Me. 498; s. c., 1 Am. Ry. Cas. 147; *In re Boston & A. R. R. Co.*, 53 N. Y. 574; *In re New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; s. c., 7 Am. Rep. 385; *New York Cent. & H. R. R. Co. v. Metropolitan Gas Light Co.*, 5 Hun (N. Y.), 201; s. c., 63 N. Y. 326.

6. *Matter of Fowler*, 53 N. Y. 60. See "Legislature Sole Judge," *ante*, 508, note 2.

7. *Boston & L. R. R. Co. v. Salem & L. R. R. Co.*, 68 Mass. (2 Gray) 1. And see

2. *To Municipal Corporations.*—The authority to condemn property for public uses is often delegated to municipal corporations, for purposes connected with the city government. It is under this right that cities are authorized to lay out and appropriate lands for public parks, streets, and highways. Closely akin to the right of the municipality to open streets is the power to authorize the use of the streets for railroad tracks. This power, when it exists in the municipality, is derived from the Legislature by express grants. No right to authorize such use of the city streets by the railroad company or to regulate the same is inherent in the municipality.¹

3. *To Railroad Companies.*—The instances of the delegation of the power of eminent domain of most frequent occurrence are to be found in the case of railroad companies, coupled to the general powers conferred by their charters. There is usually an authority granted to appropriate lands so far as required for the construction of their tracks. By virtue of this general power they will be deemed entitled to enter upon and appropriate lands for all purposes reasonably necessary to the carrying on of their business. They may therefore take ground for passenger stations and approaches thereto, for engine-houses, for warehouses, intended to receive and store goods which have been, or are about to be, transported,² for cattle-yards for stock transported on the rail-

Matter of Hamilton Ave., 14 Barb. (N. Y.) 405; Matter of Flatbush Ave., 1 Barb. (N. Y.) 286.

1. Polack v. Trustees of San Francisco Orphan Asylum, 48 Cal. 490; Southern P. R. R. Co. v. Reed, 41 Cal. 256; Geiger v. Filor, 8 Fla. 325; Savannah & T. R. R. Co. v. Savannah, 45 Ga. 602; Wiggins Ferry Co. v. East St. Louis R. R. Co., 107 Ill. 450; s. c., 20 Am. & Eng. R. R. Cas. 9; Chicago, R. I., & P. R. R. Co. v. Joliet, 79 Ill. 25; Murphy v. Chicago, 29 Ill. 279; Moses v. Pittsburgh, Ft. W., & C. R. R. Co., 21 Ill. 516; Indianapolis & C. R. R. Co. v. State, 37 Ind. 489; Siatten v. Des Moines V. R. R. Co., 29 Iowa, 148; s. c., 4 Am. Rep. 205; Cosby v. Owensboro & R. R. Co., 10 Bush (Ky.) 288; Wolfe v. Covington & L. R. R. Co., 15 B. Mon. (Ky.) 404; Hoyle v. New Orleans R. R. Co., 23 La. An. 335; Knight v. Carrollton R. R. Co., 9 La. An. 284; New Orleans & C. R. R. Co. v. Municipality, 1 La. An. 128; Mathews v. Kelsey, 58 Me. 56; s. c., 4 Am. Rep. 248; Springfield v. Connecticut R. R. Co., 58 Mass. (4 Cush.) 63; State v. Hoboken, 35 N. J. L. (6 Vr.) 205; Paterson & P. H. R. v. Paterson, 24 N. J. Eq. (9 C. E. Gr.) 158; Jersey City & H. H. R. R. v. Jersey C. & B. R. R. Co., 21 N. J. Eq. (6 C. E. Gr.) 550; Morris & E. R. R. Co. v. Newark, 10 N. J. Eq. (2 Stockt.) 352; Carpenter v. Oswego & S. R. R., 24 N. Y. 655; Portland

v. Multnomah Co., 6 Oreg. 62; Black v. Phil. & R. R. R. Co., 58 Pa. St. 249; Mercer v. Pittsburgh, Ft. W., & C. R. R. Co., 36 Pa. St. 99; Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. St. 339; s. c., 67 Am. Dec. 471; O'Connor v. Pittsburgh, 18 Pa. St. 187; Green v. Reading, 9 Watts (Pa.), 382; Henry v. Pittsburgh & A. Bridge Co., 8 Watts & S. (Pa.) 85; *In re Philadelphia & T. R. R.*, 6 Whart. (Pa.) 25; Tennessee & A. R. R. Co. v. Adams, 3 Head (Tenn.), 596; Richmond, F., & P. R. R. v. City of Richmond, 96 U. S. (6 Otto) 521; bk. 24 L. ed. 734; Barney v. Keokuk, 94 U. S. (4 Otto) 324; bk. 24 L. ed. 224; s. c., 4 Dill. C. C. 593; People's R. R. v. Memphis R. R., 77 U. S. (10 Wall.) 38; bk. 19 L. ed. 844; Pacific R. R. Co. v. Leavenworth, 1 Dill. C. C. 393. Compare City of Quincy v. Chicago, B., & Q. R. R., 92 Ill. 21; Chicago & N. W. R. R. v. Elgin, 91 Ill. 251; Lexington & O. R. R. Co. v. Applegate, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; Louisville & F. R. R. Co. v. Brown, 17 B. Mon. (Ky.) 763.

2. Graham v. Connorsville & N. C. J. R. R. Co., 36 Ind. 463; s. c., 10 Am. Rep. 56; Protzman v. Indiana & C. R. R. Co., 9 Ind. 467; s. c., 68 Am. Dec. 650; Reed v. Louisville Bridge Co., 8 Bush (Ky.), 69; Hamilton v. Annapolis & E. R. R. Co., 1 Md. 553; Mansfield, C. & L. M. R. R. Co. v. Clark, 23 Mich. 519; *In re New*

road,¹ for shops to repair cars and engines used on the road,² for turn-outs and side-tracks, incidental to the road's business,³ for springs to supply water-tanks,⁴ for a dumping-place to deposit waste earth,⁵ for the accommodation of additional tracks on a whole line of railway,⁶ and for the purpose of obtaining sufficient space on the side of the road to erect a telegraph wire.⁷ But for purposes not directly connected with the business of the company no such power is reasonably to be inferred. Hence a railroad company has been held not to derive from the general terms of its charter power to build a lateral railroad,⁸ nor to take lands for speculation, nor to prevent competition, nor to aid collateral enterprises remotely connected with the road, nor to facilitate business not reasonably to be expected,⁹ nor for dwellings of workmen employed by the road,¹⁰ nor for shops to manufacture cars,¹¹ nor for the purpose of obtaining gravel to construct the road,¹² nor for a wharf,¹³ nor for a temporary right of way during the building of the main track.¹⁴ Reference is in every case had to what are the legitimate requirements of the company in carrying on its legitimate business.¹⁵

A power delegated to a railroad company is not lost through the leasing of the road for a term of years; and the right of its exercise does not vest in the lessee, but remains in the lessor.¹⁶

York Cent. & H. R. R. Co., 77 N. Y. 248; Weir v. St. Paul, S. & T. F. R. R. Co., 18 Minn. 155; Hannibal & St. J. R. R. Co. v. Muder, 49 Mo. 165; New York & H. R. R. Co. v. Kip, 46 N. Y. 546; s. c., 7 Am. Rep. 385; 67 N. Y. 227; Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137; Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 308; Cumberland Valley R. R. Co. v. McLanahan, 59 Pa. St. 23; South Carolina R. R. Co. v. Blake, 9 Rich. (S. C.), 228; Nashville & C. R. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348.

1. *In re* New York Cent. & H. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326.

2. Southern Pac. R. R. v. Raymond, 53 Cal. 223; Low v. Galena & C. U. R. R. Co., 18 Ill. 324; Chicago, B., & Q. R. R. Co. v. Wilson, 17 Ill. 123; Hannibal & St. J. R. R. Co. v. Muder, 49 Mo. 165; Virginia & T. R. R. Co. v. Elliott, 5 Nev. 358; State v. Mansfield, 23 N. J. L. (3 Zab.) 510.

3. Protzman v. Indianapolis & C. R. R. Co., 9 Ind. 467; s. c., 68 Am. Dec. 650; Toledo & W. R. R. Co. v. Daniels, 16 Ohio St. 390; Cleveland & P. R. R. Co. v. Speer, 56 Pa. St. 325; Philadelphia, W. & B. R. R. Co. v. Williams, 54 Pa. St. 103.

4. Strohecker v. Alabama & C. R. R. Co., 42 Ga. 509.

5. Lodge v. Philadelphia, W., & B. R. R. Co., 8 Phila. (Pa.) 345.

6. *In re* New York Cent. R. R. Co., 67 Barb. (N. Y.) 426.

7. Prather v. Jeffersonville, M. & I. R. R. Co., 52 Ind. 16.

8. Baltimore & H. Turnp. Co. v. Union R. R. Co., 35 Md. 224.

9. Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137.

10. State v. Mansfield, 23 N. J. L. (3 Zab.) 510; Nashville & C. R. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; Eldridge v. Smith, 34 Vt. 484.

11. New York & H. R. R. Co. v. Kip, 46 N. Y. 546; s. c., 7 Am. Rep. 385; Eldridge v. Smith, 34 Vt. 484; Vermont & Can. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2.

12. New York & C. R. R. Co. v. Gunnison, 1 Hun (N. Y.), 496.

13. Iron R. R. Co. v. Ironton, 19 Ohio St. 299.

14. Currier v. Marietta & C. R. R. Co., 11 Ohio St. 228; Gray v. Liverpool & Bury R., 9 Beav. 391.

15. Chicago, B. & Q. R. R. Co. v. Wilson, 17 Ill. 123; Prather v. Jeffersonville, M. & I. R. R. Co., 52 Ind. 16; Beck v. United N. J. R. R. Co., 39 N. J. L. (10 Vr.) 45; *In re* New York Cent. Ry. Co., 67 Barb. (N. Y.) 426; Toledo & W. R. R. Co. v. Daniels, 16 Ohio St. 390; Philadelphia, W. & B. R. R. Co. v. Williams, 54 Pa. St. 103; Lodge v. Philadelphia, W. & B. R. R. Co., 8 Phila. (Pa.) 345; South Carolina R. R. Co. v. Blake, 9 Rich. (S. C.) 228. See also Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137.

16. Mayor of W. v. Norwich & W. R. R. Co., 109 Mass. 103; Dietrichs v. L. & N. W.

But the power may be exercised by trustees, under a mortgage, who have entered into possession.¹ A consolidation, which constitutes the consolidated company the successor to the rights and powers of the companies consolidated, vests in the consolidated company the power to institute proceedings for the condemnation of lands.² A sale of a railway and the franchises of the company, under a general act authorizing the purchase and sale of railways, will entitle the purchaser to exercise the power of eminent domain.³ The right to question the existence of a corporate body being vested in the State alone, a *de facto* railroad corporation may, in the absence of any such proceeding, exercise the right of eminent domain, notwithstanding any objection raised by the land-owner.⁴

4. *To Other Corporate Bodies.*—Delegations of the right to exercise the power of eminent domain are often made to other corporate bodies than municipalities and railroads. Such delegations are, as a general rule, governed by the principles applicable to the case of grants to railroad companies. The power given is usually construed to be sufficiently wide to authorize the appropriation of any property required by the corporation to carry out the object in view. Thus a grant of power to a corporation to construct a road and bridges between given *termini*, the natural and convenient route of which would pass several navigable streams, authorizes the corporation to construct bridges over such streams in a manner that will not destroy the navigation.⁵ It has been held that a grant of power to condemn a dock for a ferry slip is not a breach of the constitutional provision in force in many States, prohibiting the Legislature from passing a private or local bill, "granting to any private corporation, association, or individual, any exclusive privileges, immunity, or franchise whatever."⁶ The principle that the charter of a corporation is a contract which the Legislature cannot impair against the company's assent does not preclude the Legislature from taking other franchises and property for public use upon making compensation; their powers and privileges, including every thing which constitutes other franchises, are held and engaged in the same manner and by the like tenure as all other property and rights under the constitution and laws of the States.⁷ It is essential to

R. R. Co., 13 Neb. 361. *In re* Petition of New York, Lack. & W. R. R. Co., 99 N. Y. 12; s. c., 23 Am. & Eng. R. R. Cas. 44; *Kip v. New York & H. R. R.*, 67 N. Y. 227; s. c., 15 Am. Ry. Rep. 98; 6 Hun (N. Y.), 24.

1. *Williams v. Orleans, M. & T. R. R. Co.*, 60 Miss. 689; s. c., 20 Am. & Eng. R. R. Cas. 378.

2. *North Carolina & R. R. R. Co. v. Carolina Cent. R. R.*, 83 N. C. 489.

3. *Chicago, St. Paul, & O. R. R. Co. v. Lundstrom*, 16 Neb. 254; s. c., 21 Am. & Eng. R. R. Cas. 528.

4. *McAuley v. Columbus, C. & I. C. R. R. Co.*, 83 Ill. 348; *Reisner v. Strong*, 24 Kan. 410; s. c., 10 Am. & Eng. R. R. Cas. 335.

5. *Attorney General v. Stevens*, 1 N. J. Eq. (Saxt.) 369; s. c., 22 Am. Dec. 526.

6. *In re Union Ferry Co.*, 98 N. Y. 139; s. c., 13 Am. & Eng. Corp. Cas. 383.

7. *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40, 454; *Noll v. Dubuque, B. & M. R. R. Co.*, 32 Iowa, 66; *Central B. Co. v. City of Lowell*, 70 Mass. (4 Gray) 474; *Boston & L. R. R.*

a judgment of condemnation that the corporation exercising the right prove its corporate existence, that it was fully organized by the election of directors.¹

5. *To Individuals.*—There are no adjudicated cases holding that the right of eminent domain can be delegated to individuals or private persons, although there is a line of decisions which may be thought to favor such a doctrine,² and it is believed that there can be no such delegation; however, if individuals can in any instance exercise the power of eminent domain, it will be under the same conditions and with the same limitations imposed upon corporations.³

6. *Method of Delegation.*—The right of eminent domain may be delegated either by a general act applicable to all corporations or individuals engaged in undertakings of a specified public nature, or by special charter granted to a single corporation. In some cases the Legislature has passed both a general act and a special charter. It has been held that when the provisions of the general statute are inconsistent with the provisions of the special charter of a company, incorporated before its passage, the company may acquire a title in a manner prescribed by the charter.⁴ But it has also been held that a company with a special charter may condemn lands, under the general law.⁵

7. *Conditions Precedent.*—In some cases a condition precedent is attached to the right to exercise the power of eminent domain. Thus where a general statute requires that the Legislature shall approve of the route and *termini* of the roads to be constructed, the company cannot proceed to condemn lands until it has obtained such legislative approval.⁶ And where it is so provided, the railroad corporation must make and file its survey before taking land.⁷

Co. v. Salem & L. R. R. Co., 68 Mass. (2 Gray) 1, 35 Springfield v. Connecticut R. R. Co., 58 Mass. (4 Cush.) 63; Crosby v. Hanover, 36 N. H. 404; Backus v. Lebanon, 11 N. H. 19; s. c., 35 Am. Dec. 466; Peirce v. Somersworth, 10 N. H. 370; Barber v. Andover, 8 N. H. 398; Piscataqua Br. Co. v. New Hampshire Br., 7 N. H. 35; *In re Union Ferry Co.*, 98 N. Y. 139; s. c., 13 Am. & Eng. Corp. Cas. 383; Newcastle & R. R. v. Peru & I. R., 3 Ind. 464; Red River Bridge Co. v. Mayor, &c., of Clarksville, 1 Sneed (Tenn.), 176; s. c., 60 Am. Dec. 143; White River Turnpike Co. v. Vermont Cent. R. R. Co., 21 Vt. 590; James River & K. Co. v. Thompson, 3 Gratt. (Va.) 270; Tuckahoe Canal Co. v. Tuckahoe & James R. R., 11 Leigh (Va.), 42; s. c., 36 Am. Dec. 374; Richmond F. & P. R. R. Co. v. Louisa R. R. Co., 54 U. S. (13 How.) 71; bk. 14, L. ed. 55; West R. Bridge Co. v. Dix, 47 U. S. (6 How.) 507; bk. 12, L. ed. 535; Bonaparte v. Camden & Amboy R. R. Co., 1 Bald. C. C. 205.

1. Powers v. Hazelton & L. R. R. Co., 33 Ohio St. 429.

2. See Crittenden v. Wilson, 5 Cow. (N. Y.) 165; s. c., 15 Am. Dec. 462; Young v. Buckingham, 5 Ohio, 485.

3. See Reisner v. Strong, 24 Kan. 410; s. c., 10 Am. & Eng. R. R. Cas. 335; Brown v. Beatty, 34 Miss. 127; s. c., 69 Am. Dec. 389.

4. Clarkson v. Hudson R. R. Co., 12 N. Y. 304; Visscher v. Hudson R. R. Co., 15 Barb. (N. Y.) 37. Compare McCrea v. Port Royal R. R. Co., 3 S. C. N. S. 381; Wisconsin Cent. R. R. Co. v. Cornell University, 52 Wis. 537; s. c., 10 Am. & Eng. R. R. Cas. 108.

5. Central Branch U. P. R. R. Co. v. Atchison T. & S. F. R. R. Co., 26 Kan. 669; s. c., 5 Am. & Eng. R. R. Cas. 389; 28 Kan. 453; 10 Am. & Eng. R. R. Cas. 528.

6. Gilliwat v. Mississippi & A. R. R. Co., 13 Ill. 1.

7. Morris Canal, etc., Co., v. Central R. R. Co., 16 N. J. Eq. (1 C. E. Gr.) 419.

It is in some cases also made a condition that the power shall not be exercised until the parties have attempted and failed to agree upon the price.¹ Under the latter condition it is a sufficient fulfilment that the agent holding the delegated authority offered, and the owner refused, a reasonable price for the property sought to be condemned. The selection of the lands being intrusted to the Secretary of War, it would seem that any offer which the Secretary, in the exercise of his judgment, may have made, is to be construed a reasonable one.² It would also seem that the attempted purchase need not have been made previous to the application for an appointment of commissioners for the appraisal of the compensation; but it is enough if the judge to whom the application is made is satisfied at the time of the appointment that the parties are unable to agree as to the price.³

8. *Construction of Grant.*—Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common rights, are not to be extended by an implication, but are to be strictly construed.⁴ Yet they are not to be construed so strictly as to defeat the evident purposes of the Legislature.⁵ Such statutes are to be construed most strongly against the grantee of the power.⁶ But except in a proceeding instituted at the instance of the attorney on behalf of

1. *Lincoln v. Colusa Co.*, 28 Cal. 663; *Gilmer v. Lime Point*, 19 Cal. 47; *Hall v. People*, 57 Ill. 307; *Terre Haute & I. R. R. Co. v. Scott*, 74 Ind. 29; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; s. c., 8 Am. Rep. 339; *Powers v. Hazelton & L. Ry. Co.*, 33 Ohio St. 429; *Oregon Cascades R. R. Co. v. Oregon Steam Navigation Co.*, 3 Oreg. 178; *In re Philadelphia, W. & B. R. R. Co.*, 7 Phila. (Pa.) 461; *Bigelow v. Mississippi Cent. & T. R. R. R.*, 2 Head (Tenn.), 624.

2. *United States v. Oregon R. & Nav. Co.*, 16 Fed. Rep. 524; s. c., 14 Am. & Eng. R. R. Cas. 23.

3. *Coster v. New Jersey R. R. Co.*, 23 N. J. L. (3 Zab.) 227.

4. *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123; *Southern Pac. R. R. Co. v. Wilson*, 49 Cal. 396; s. c., 8 Am. Ry. Rep. 37; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *State v. Jersey City*, 25 N. J. L. (1 Dutch.) 309; *Doughty v. Somerville & E. R. R. Co.*, 21 N. J. L. (1 Zab.) 442; s. c., 51 Am. Dec. 267; *New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; s. c., 7 Am. Rep. 385; *Adams v. Saratoga & W. R. R. Co.*, 10 N. Y. 328; *In re New York & B. R. R. Co.*, 62 Barb. (N. Y.) 85; *Doughty v. Hope*, 3 Den. (N. Y.) 249; *Platt v. Pennsylvania Co.*, 43 Ohio, 228; s. c., 22 Am. & Eng. R. R. Cas. 130; *Moorhead v. Little M. Railroad*, 17 Ohio, 340, 350; *Kemper v. Cincinnati, C.,*

& W. Turnpike Co., 11 Ohio, 392; *Cleveland & M. R. R. Co. v. Furnace Co.*, 37 Ohio St. 321, 329; *Bowersox v. Watson*, 20 Ohio St. 496, 588; *Toledo & W. R. R. Co. v. Daniels*, 16 Ohio St. 390, 396; *Currier v. Marietta, etc., R. R. Co.*, 11 Ohio St. 228; *Kramer v. Cleveland & P. R. R.*, 5 Ohio St. 140, 147; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *Oregonian R. Co. v. Hill*, 9 Oreg. 377; *Pittsburgh & L. E. R. R. Co. v. Bruce*, 102 Pa. St. 23; *Lance's Appeal*, 55 Pa. St. 16; *Zack v. Pennsylvania R. R. Co.*, 25 Pa. St. 394; *Alexandria & F. R. Co. v. Alexandria & W. R. R. Co.*, 75 Va. 780; s. c., 10 Am. & Eng. R. R. Cas. 23; *Walker v. London & B. R. Co.*, 3 Ad. & El. N. S. 744; s. c., 43 Eng. C. L. 954; *Gray v. Liverpool & B. R. Co.*, 9 Beav. 391; s. c., 10 Jur. 364; 4 Eng. Ry. & C. Cas. 235; *Mayor of Liverpool v. Chorley W. W. Co.*, 21 Eng. L. & Eq. 620; s. c., 2 DeG. M. & G. 852; *Webb v. Manchester & Leeds Ry. Co.*, 4 Mylne & C. 116; s. c., 1 Eng. R. R. & C. Cas. 576.

5. *New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; s. c., 7 Am. Rep. 385; *In re New York & B. R. R. Co.*, 62 Barb. (N. Y.) 85.

6. *New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; s. c., 7 Am. Rep. 385; *Mayor of Alleghany v. Ohio & P. R. R. Co.*, 26 Pa. St. 355; *Walker v. London & B. R. Co.*, 3 Ad. & El. N. S. 744; s. c., 43 Eng. C. L. 954.

the State, any one seeking to restrain the violation of such a delegation of power is bound to show that he has a private interest in the matter.¹

9. *When Delegated Power exhausted.*—In the case of railroads the law does not require a railroad company to acquire by condemnation all the lands necessary for the construction and operation of its road at the same time. It may increase its facilities as the business of the country may require.² In some States provision is made by statute for the subsequent exercise of the power.³ While individuals may resist the condemnation of their lands for a right of way, after the expiration of the time given by the charter of the company for the completion of the road, they cannot interfere to prevent the company extending its road, after the expiration, over a right of way acquired before the expiration. The State alone can proceed to arrest the work on that ground.⁴

1. *Mayor of Liverpool v. Chorley W. W. Co.*, 2 DeG. M. & G. 552; 21 Eng. L. & Eq. 620; s. c., *Lee v. Milner*, 2 Younge & C. 611; s. c., 2 Mees. & W. 824; Mur. & H. 275.

2. *Fisher v. Chicago & S. R. R. Co.*, 104 Ill. 323; s. c., 10 Am. & Eng. R. R. Cas. 14; *Chicago, B. & Q. R. R. Co. v. Wilson*, 17 Ill. 123; *Peck v. Louisville N. A. & C. R. R. Co.*, 101 Ind. 366; s. c., 22 Am. & Eng. R. R. Cas. 193; *Prather v. Jeffersonville M. & I. R. R.*, 52 Ind. 16; *Central B. U. P. R. R. Co. v. Atchison, T. & S. F. R. R. Co.*, 26 Kan. 669; s. c., 5 Am. & Eng. R. R. Cas. 389; *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553; *Mississippi & T. R. R. Co. v. Devaney*, 42 Miss. 555; s. c., 2 Am. Rep. 608; *Atlantic & Pac. R. R. Co. v. St. Louis*, 66 Mo. 228; *Deitrichs v. Lincoln & N. R. R. Co.*, 13 Neb. 361; *Virginia & T. R. R. Co. v. Lovejoy*, 8 Nev. 100; *Beck v. United N. J. R. R. & C. Cos.*, 39 N. J. L. (10 Vr.) 45; *Childs v. Central R. R. Co.*, 33 N. J. L. (4 Vr.) 323; *Selden v. Delaware & H. C. Co.*, 29 N. Y. 634; *In re New York Central, etc.*, R. R. Co., 67 Barb. (N. Y.) 426; *Johnson v. Utica W. W. Co.*, 67 Barb. (N. Y.) 415; *Toledo & W. R. R. Co. v. Daniels*, 16 Ohio St. 390; *Farnham v. Delaware & H. C. Co.*, 61 Pa. St. 265; *Philadelphia W. & B. R. R. Co. v. Williams*, 54 Pa. St. 103; *In re South Carolina R. R. Co. v. Blake*, 9 Rich. (S. C.) 228. *Ex parte South Carolina R. R. Co.*, 2 Rich. (S. C.) 434; *Webb v. Manchester & Leeds R. Co.*, 4 Mylne & C. 116; s. c., 1 Eng. R. R. & C. Cas. 576; *Simpson v. Lancaster & C. R. Co.*, 4 Eng. Ry. Cas. 625; *Williams v. South Wales R. Co.*, 13 Jur. 443; s. c., 3 DeG. & S. 354; *Stamps v. Birmingham W. & S. V. Ry.*, 17 L. J. Eq. N. S. 431; s. c., 7 Hare, 251.

Exhaustion of Power by Single Users.—It has, however, been held in the following

cases that the power to take lands is limited by the expiration of the time as fixed by the charter, or is exhausted after the first use. *New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co.*, 36 Conn. 196; *Illinois Cent. R. R. Co. v. Rucker*, 14 Ill. 353; *Atlantic & P. R. R. Co. v. St. Louis*, 66 Mo. 228; *Peavey v. Calais R. R. Co.*, 30 Me. 498; *Beck v. United N. J. R. R. Co.*, 39 N. J. L. (10 Vr.) 45; *Morris & E. R. R. Co. v. Central R. R. Co.*, 31 N. J. L. (2 Vr.) 205; *In re Brooklyn W. & N. R. R. Co.*, 72 N. Y. 245; *Mason v. Brooklyn & N. R. R. Co.*, 35 Barb. (N. Y.) 373; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. (N. Y.) 358; *Hudson & Del. Canal Co. v. New York & E. R. R. Co.*, 9 Paige Ch. (N. Y.) 323; *Lodge v. Philadelphia W. & B. R. R. Co.*, 8 Phila. (Pa.) 345.

3. *Derby v. Framingham & L. R. R. Co.*, 119 Mass. 516; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137; *In re New York Cent. & H. R. R. Co.*, 4 Hun (N. Y.), 381. See also *Prather v. Jeffersonville M. & I. R. R. Co.*, 52 Ind. 16; *Childs v. Central R. R. Co.*, 33 N. J. L. (4 Vr.) 323; *Bentley v. Rotherham, etc.*, L. R. 4 Ch. Div. 588; *Rangeley v. Midland Ry. Co.*, L. R. 3 Ch. App. 306; *Ystalyfera Iron Co. v. Neath & B. Ry. Co.*, L. R. 17 Eq. 142; *Seymour v. London & S. W. Ry. Co.*, 5 Jur. N. S. 753; *Stamps v. Birmingham W. & S. V. Ry. Co.*, 17 L. J. Eq. 431; *Sadd v. Maldon W. & B. Ry. Co.*, 20 L. J. Ex. 102; *Reg. v. Lancashire & Y. Ry. Co.*, 20 L. J. Q. B. 507 n.; *Thicknesse v. Lancaster Canal Co.*, 4 Mees. & W. 472; *Salisbury v. Great Northern Ry. Co.*, 17 Q. B. 840; *Reg. v. York N. & B. Ry. Co.*, 16 Q. B. 886; *Reg. v. London & N. W. Ry. Co.*, 16 Q. B. 864; *Reg. v. Birmingham & O. Ry. Co.*, 15 Q. B. 647.

4. *Atlantic & P. R. R. v. City of St. Louis*, 66 Mo. 228.

IV. Public Uses. — 1. *General Requisites.* — If there be a direct public benefit, it is not necessary, in order to constitute a public use, that the improvement contemplated should directly benefit the people of the whole State. The benefit contemplated may be confined to a particular community.¹ And the Legislature is the sole and exclusive judge whether the exigency exists which calls on it to exercise or to delegate the power of eminent domain.² What is such public use as will justify the exercise of the power of eminent domain, is a question for the courts; but if the improvement be declared to be for a public use by the Legislature, the courts will hold the use to be public, unless it manifestly appears by the provisions in the act that they can have no tendency to advance and promote such public use.³

2. *Streets, Parks, and Highways.* — One of the commonest of public uses for which private property is taken is for the laying out of streets and roads;⁴ and land taken in cities for public parks and squares by authority of law, where the advantages are to the public for recreation, health, or business, is a public use.⁵

3. *Railroads, Depots, Branches, etc.* — A railway is in general such a public use as affords just ground for the taking of private property and appropriating it to that use;⁶ and land or property taken for the safety of the travelling public is likewise deemed to be taken by a railroad as a part of the public use to

1. *Ross v. Davis*, 97 Ind. 79; *O'Reiley v. Draining Co.*, 32 Ind. 169; *Riche v. Bar Harbor Co.*, 75 Me. 91; *Talbot v. Hudson*, 82 Mass. (16 Gray) 417; *DeCamp v. Hibernia R. R.*, 47 N. J. L. (18 Vr.) 43; *Matter of Bloomfield & R. Gas Light Co.*, 63 Barb. (N. Y.) 437; *Chesbrough v. Commissioners*, 37 Ohio St. 508.

2. *Chicago R. I. & P. R. R. Co. v. Town of Lake*, 71 Ill. 333; *Talbot v. Hudson*, 82 Mass. (16 Gray) 417; *Petition of Mt. Washington R. Co.*, 35 N. H. 134; *In re Brooklyn F. Co.*, 98 N. Y. 139; s. c., 13 Am. & Eng. Corp. Cas. 383; *Powers v. Hazelton & L. Co.*, 33 Ohio St. 429; *Baltimore & O. R. R. Co. v. Pittsburgh, W. & K. R. R.*, 17 W. Va. 812; *Smith v. Gould*, 61 Wis. 31; s. c., 2 Am. & Eng. Corp. Cas. 424; *United States v. Oregon Ry. & Nav. Co.*, 16 Fed. Rep. 524.

3. *Bankhead v. Brown*, 25 Iowa, 540; *Hazen v. Essex Co.*, 56 Mass. (12 Cush.) 475. See also *Challiss v. Atchison, T. & S. F. R. R.*, 16 Kan. 117; *County Court of St. Louis Co. v. Griswold*, 58 Mo. 175; *Giesy v. Cincinnati, W. & Z. Ry. Co.*, 4 Ohio St. 308; *Smith v. Gould*, 61 Wis. 31; s. c., 2 Am. & Eng. Corp. Cas. 424.

4. *Dorgan v. Boston*, 94 Mass. (12 Allen) 223; *Plant v. Long Island R. R. Co.*, 10 Barb. (N. Y.) 26; *Seaman v. Hicks*, 8 Paige, Ch. (N. Y.) 655; *Watson v. South Kingstown*, 5 R. I. 562; *Patrick v. Commissioners*, 4 McC. (S. C.) 541; *United*

States v. Railroad Bridge, 6 McL. C. C. 517; s. c., 3 Liv. L. Mag. 568; 10 L. Rep. N. S. 630.

5. *Matter of Commissioners of Cent. Park*, 63 Barb. (N. Y.) 282. See also *County of St. Louis v. Griswold*, 58 Mo. 175.

6. *Aldridge v. Tusculum C. & D. R. R. Co.*, 2 Stew. & P. (Ala.) 199; s. c., 23 Am. Dec. 307; 4 Stew. & P. (Ala.) 421; *San Francisco A. & S. R. R. Co. v. Caldwell*, 31 Cal. 367; *Bradley v. New York & N. H. R. R. Co.*, 21 Conn. 294; *Whiteman v. Wilmington & S. R. R. Co.*, 2 Harr. (Del.) 514; s. c., 33 Am. Dec. 411; *Swan v. Williams*, 2 Mich. 427; *Weir v. St. Paul, S. & T. R. R. Co.*, 18 Minn. 155; *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. 100; *Secomb v. Milwaukee & St. P. Ry. Co.*, 49 How. (N. Y.) 75; *Beekman v. Saratoga & S. R. R. Co.*, 3 Paige Ch. (N. Y.) 45; s. c., 22 Am. Dec. 679; *Bloodgood v. Mohawk & H. R. R. Co.*, 14 Wend. (N. Y.) 52; s. c., 18 Wend. (N. Y.) 9; 31 Am. Dec. 313; *Louisville, C. & C. R. R. Co. v. Chappell, Rice (S. C.) L.* 383; *Buffalo B. B. & C. R. R. Co. v. Ferris*, 26 Tex. 588; *Secomb v. Milwaukee & St. P. R. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23, L. ed. 67; *Olcott v. Fond du Lac Co.*, 83 U. S. (16 Wall.) 678; bk. 21, L. ed. 382; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Baldw. C. C. 205; *Baltimore & O. R. R. Co. v. Van Ness*, 4 Cr. C. C. 595.

which it is devoted.¹ Depots, engine-houses, and repair-shops required for the purposes of enabling the company to properly conduct its business, are public uses for which property may be taken against the owner's consent.² But the manufacture of railroad cars is not so legitimately and necessarily connected with the management of the railroad that the company may condemn land therefor.³ The question whether a railroad company may be authorized to condemn land for side-tracks leading to private manufactories, established for the convenience thereof, does not appear to be definitely settled. Many cases support the right of the railroad company to do so,⁴ but, on the other hand, there are decisions holding that a railroad company cannot appropriate land for such purposes.⁵

4. *Telegraph and Telephone Lines.* — The transmission of intelligence by electricity is a business of public character to be exercised under public control, in the same manner as transportation of goods or passengers by railroads. It has accordingly been held that the construction of telegraph lines is a public use, for which the right of eminent domain may be exercised.⁶ It has been expressly held that telephones are within the meaning of the word "telegraph" as used in a statute, and within the scope of laws enacted for the regulation of telegraphic communication, even though such laws were passed before the telephone was invented.⁷

5. *Wharves, Canals, and Ferries.* — A canal is a public use if the public have a right of passage thereon, and though a reasonable stipulated and uniform toll may be exacted.⁸ Wharves are

1. *Reusch v. Chicago, B. & Q. R. R.*, 57 Iowa, 687; s. c., 15 Am. & Eng. R. R. Cas. 359.

2. *Hannibal & St. Joseph R. R. Co. v. Muder*, 49 Mo. 165.

3. *Eldridge v. Smith*, 34 Vt. 484.

4. *Sherman v. Buick*, 32 Cal. 241; *Brewer v. Bowman*, 9 Ga. 37; *Robinson v. Swope*, 12 Bush (Ky.) 21; *News Cent. Coal Co. v. George's Creek Coal Co.*, 37 Md. 537; *Pittsburgh v. Pennsylvania R. R. Co.*, 48 Pa. St. 359; *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. St. 325; *Pocopson v. Road*, 16 Pa. St. 15; *Getz's Cases*, 105 Pa. St. 547; s. c., 3 Am. & Eng. R. R. Cas. 186; *Harvey v. Thomas*, 10 Watts (Pa.), 63; s. c., 36 Am. Dec. 141.

5. *Bradley v. New York & N. H. R. R. Co.* 21 Conn. 305; *Young v. McKenzie*, 3 Ga. 31; *South Chicago R. R. Co. v. Dix*, 109 Ill. 237; s. c., 17 Am. & Eng. R. R. Cas. 157; *Buffalo & N. Y. R. R. v. Brainard*, 9 N. Y. 100; *Taylor v. Porter*, 4 Hill (N. Y.), 140; s. c., 40 Am. Dec. 274; *Keeves v. Treasurer of Wood Co.*, 8 Ohio St. 333.

6. *New Orleans, M. & T. R. R. Co. v. Southern & Atlantic Telegraph Co.*, 53 Ala. 211; *Pierce v. Drew*, 136 Mass. 75;

s. c., 49 Am. Rep. 7; 8 Am. & Eng. Corp. Cas. 83; *Turnpike Co. v. News Co.*, 43 N. J. L. (14 Vr.) 381.

7. *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32; *Attorney General v. Edison Tel. Co. of London*, L. R. 6 Q. B. Div. 244.

8. *Denslow v. New Haven & N. Co.*, 16 Conn. 98; *People v. Wells*, 12 Ill. 102; *Van Vlaricum v. State*, 7 Blackf. (Ind.) 209; *State v. Beackmo*, 6 Blackf. (Ind.) 488; *Harness v. Chesapeake & O. C. Co.*, 1 Md. Ch. 246; *Leopard v. Chesapeake & O. C. Co.*, 1 Gill (Md.), 223; *Chesapeake & O. Canal Co. v. Baltimore & O. Railroad Co.*, 4 Gill & J. (Md.) 1; *Van Schoick v. Delaware & R. C. Co.*, 20 N. J. L. (1 Spen.) 249; *Morris, etc., Co. v. Central R. R. Co.*, 16 N. J. Eq. (1 C. E. Gr.) 419; *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735; *Steel v. Inland, etc., Nav. Co.*, 2 Johns. (N. Y.) 283; *Jackson v. Daley*, 5 Wend. (N. Y.) 526; *Buckingham v. Smith*, 10 Ohio, 288; *Willyard v. Hamilton*, 7 Ohio (II. pt.) 111; s. c., 30 Am. Dec. 195; *Commonwealth v. Fisher*, 1 Pen. & W. (Pa.) 462; *Chesapeake & O. C. Co. v. Hoyer*, 2 Gratt. (Va.) 511; *Binney v. Chesapeake & O. C. Co.*, 33 U. S. (8 Pet.) 201; bk. 8 L. ed. 917; *Bonaparte v. Camden & Amboy R. R. Co.*, Baldw.

subservient to the public by facilitating the transfer of passengers and freight by land and water, and thus may be constructed for a public use.¹ But it has been held that the privilege of constructing a wharf in a public highway does not authorize the erection of a warehouse.² The right of ferries usually belongs to the riparian proprietor, but ferries in general are public uses, for the development of which the State may appropriate private property.³

6. *Water and Gas Works.* — Water-works for the supply of a town with water is a proper use for the exercise of the power of eminent domain;⁴ and it has been held that taking water for distribution and sale is *ipso facto* devoting it to a public use.⁵ The laying of gas-pipes is a "public use" for which private property may be appropriated by condemnation.⁶ The transportation and sale of natural gas for public consumption has been held to be a public use within the meaning of the Constitution.⁷

7. *Drains and Sewers.* — Ditches, drains, and sewers come within the principle allowing private property to be taken for public use, where the public health, convenience, or welfare demands it;⁸ but the work must not be undertaken solely for the advantage of the land-owners or residents of the neighborhood, but for the good of the public generally.⁹

8. *Mills.* — It is within the power of the Legislature to declare the existence of public exigency for the establishment of a mill, for which the right of eminent domain may be properly exercised.¹⁰

C. C. 205; Chesapeake & O. Can. Co. v. Key, 3 Cr. C. C. 599; Farnham v. Blackstone C. Corp., 1 Sumn. C. C. 46.

1. Jeffersonville v. Louisville & J. Ferry Co., 27 Ind. 100; Bingham v. Doane, 9 Ohio, 165.

2. Bingham v. Doane, 9 Ohio, 165.

3. Jacksonville v. Louisville & J. F. Co., 27 Ind. 100; Day v. Stetson, 8 Me. (8 Greenl.) 365; Pipkin v. Wynns, 2 Dev. (N. C.) L. 402; Bowman v. Wathen, 2 McL. C. C. 376.

4. Burden v. Stein, 25 Ala. 455; s. c., 24 Ala. 130; St. Helena W. Co. v. Forbes, 62 Cal. 182; s. c., 46 Am. Rep. 659; Kane v. Baltimore, 15 Md. 240; Reddall v. Bryan, 14 Md. 444; s. c., 74 Am. Dec. 550; Graff v. Mayor, etc., of Baltimore, 10 Md. 544; Ipswich Mills v. County Commissioners, 108 Mass. 363; Wayland v. County Commissioners, 70 Mass. (4 Gray) 500; Thorn v. Sweeney, 12 Nev. 251; *In re Rochester Water Commissioners*, 66 N. Y. 413; Mayor, etc., of New York v. Bailey, 2 Den. (N. Y.) 433; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526; Fleming's Appeal, 65 Pa. St. 444.

5. McCrary v. Beaudry, 67 Cal. 120; s. c., 7 Pac. Rep. 264.

6. *In re Bloomfield & R. Nat. Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437. See also *St. Louis v. St. Louis Gas Light*

Co., 70 Mo. 69; *In re Deering*, 93 N. Y. 361; *People of New York v. Bowen*, 30 Barb. (N. Y.) 24; s. c., 21 N. Y. 517; Williamsport W. Co. v. Lycoming Gas & W. Co., 95 Pa. St. 35; Providence Gas Co. v. Thurber, 2 R. I. 15; s. c., 55 Am. Dec. 621.

7. Johnston v. People's Natural Gas Co. (Pa.), 5 Cent. Rep. 564.

Natural Gas — Transportation of, for Consumption. — In *Johnston v. People's Natural Gas Co.*, *supra*, the court said, "Natural gas has become a public necessity; but as it cannot be used except it be piped to the manufacturers and residences of the people, it follows that as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public, and directly affect its welfare."

8. Paterson v. Baumer, 43 Iowa, 477; Norfleet v. Cromwell, 70 N. C. 634; s. c., 16 Am. Rep. 787; Zimmerman v. Canfield, 42 Ohio St. 463; s. c., 9 Am. & Eng. Corp. Cas. 382; Sessions v. Crunkilton, 20 Ohio St. 349.

9. Paterson v. Baumer, 43 Iowa, 477; Reeves v. Treasurer of Wood Co., 8 Ohio St. 333.

10. Lowell v. Boston, 111 Mass. 454, 464; s. c., 15 Am. Rep. 39.

The Massachusetts "Mill Acts." — In *Lowell v. Boston*, *supra*, the court say,

9. *Logging Booms*. — It has been uniformly held that the construction of dams and booms for the purpose of floating lumber down the rivers of the States having large lumber interests, is a valid exercise of the power of eminent domain.¹

10. *Irrigation*. — It has been held that the taking of a riparian owner's interest in the waters of a stream to supply "farming neighborhoods" with water for irrigation is a public use.²

with reference to the Massachusetts Mill Acts, "The Mill Acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court used *arguendo* has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the exercise of the right to eminent domain in their behalf as a public use. *Talbot v. Hudson*, 82 Mass. (16 Gray) 417, 426; *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 478; *Boston & Roxbury Mill Co. v. Newman*, 29 Mass. (12 Pick.) 467; s. c., 23 Am. Dec. 622. That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for public use, we do not question. . . . What the limits of legislative power in that direction are, whether there are any limits, except in the discretion of the sound Legislature, it is needless to inquire. We are satisfied that the Mill Acts are not founded upon that power, and do not authorize its exercise."

The court refer with approval to the *dictum* of Chief Justice Shaw in *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, in which he says, with reference to the Massachusetts Mill Acts, "The principle on which the law is founded is not, as has sometimes been supposed, the right of eminent domain, or the sovereign right of taking property for public use; it is not in any proper sense a taking of the property from an owner of the land flowed, nor is any compensation awarded by the public." It also approves of the *dictum* of the same judge in *Bates v. Weymouth Iron Co.*, 62 Mass. (8 Cush.) 548, 553, where he says, "It is a provision by law for regulating the rights of proprietors on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it."

In Maine the same considerations have supported a grant of the power of eminent domain. *Jordan v. Woodward*, 40 Me. 317.

In New Hampshire the taking of land for mill-dam purposes has been justified on the ground that statutes existed for the purpose when the Constitution was adopted, and it is reasonable to construe that instrument as promoting them. *Great Falls Man. Co. v. Farnald*, 47 N. H. 444. See also *Ash v. Cummings*, 50 N. H. 591.

In Other States. — In Tennessee, Indiana, Connecticut, Kansas, New Jersey, Minnesota, such statutes are sustained. *Olmstead v. Camp*, 33 Conn. 532; *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266; *Harding v. Funk*, 8 Kan. 315; *Venard v. Cross*, 8 Kan. 248; *Miller v. Troost*, 14 Minn. 365; *Scudder v. Trenton D. Falls Co.*, 1 N. J. Eq. (1 Saxt.) 694; s. c., 23 Am. Dec. 756; *Harding v. Goodlett*, 3 Verg. (Tenn.) 41; s. c., 24 Am. Dec. 546. In Wisconsin the public use has been sustained. *Pratt v. Brown*, 3 Wis. 603; *Thien v. Voegtlander*, 3 Wis. 461; *Newcomb v. Smith*, 1 Chand. (Wis.) 71. But the correctness of these decisions has since been doubted, and the court has declared that if the questions were new a different conclusion would doubtless be reached. *Fisher v. Horicon Iron Man. Co.*, 10 Wis. 351.

Condemnation for Mills — Not a taking for Public Use. — In Georgia, New York, Alabama, Vermont, and Michigan, it is held, that the taking of lands for mill-dams was not a taking for a public use. *Sadler v. Langham*, 34 Ala. 311; *Loughbridge v. Harris*, 42 Ga. 500; *Hay v. Cohoes Co.*, 3 Barb. (N. Y.) 47.

In Alabama it is assumed that if the mills were compelled to grind grain for toll, and required to serve the public impartially, the power of eminent domain might be delegated to take them. *Sadler v. Langham*, 34 Ala. 311.

1. *Lancaster v. Kennebec Co.*, 62 Me. 272; *Cotton v. Mississippi Boom Co.*, 22 Minn. 372; *Finney v. Somerville*, 80 Pa. St. 59; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; s. c., 41 Am. Rep. 12; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Patterson v. Miss. & R. R. Boom Co.*, 3 Dill. C. C. 465.

2. *Lux v. Haggin*, 69 Cal. 255, 300.

Appropriating Waters for Irrigation. — Colorado Doctrine. — Statutes authorizing the appropriation of waters for irrigation by private individuals, and also the con-

11. *Cemeteries.*—Lands may be condemned for the purpose of a public cemetery where the public in general have a right to obtain interment;¹ but lands cannot be condemned for the purposes of a private cemetery.² It has also been held that lands taken for the purposes of enlarging a public cemetery is devoting them to public use;³ and that a private cemetery may be condemned for use as a place of public burial.⁴

12. *Mining.*—Statutes authorizing companies of individuals to condemn lands for the encouragement of the mining industry have been enacted, and in some cases have been sustained as a constitutional exercise of the power of eminent domain.⁵ There are, however, decisions in which such an exercise of the power is held to be unconstitutional.⁶ There would seem to be no

denation of land for a right of way for flumes, exist in Colorado, and the courts have rendered decisions thereon without making any reference to the question whether the use authorized was public and the statutes constitutional. See *Golden C. Co. v. Bright*, 8 Colo. 144; *Coffin v. Left-hand Ditch Co.*, 6 Colo. 443; *Schilling v. Rominger*, 4 Colo. 100. But it must be kept in view, that in the cases in which the question arose, the waters appropriated were those of streams flowing through the public domain, and the appropriation was made by grantees of the United States. This right to appropriate does not exist by virtue of the right of eminent domain, but depends upon an implied contract or a license by the Federal Government that settlers upon the public lands may use for any useful purpose, whether public or private, connected with the lands upon which they have settled, the waters of streams flowing through the public lands. The right of way in favor of the individual appropriating to convey water over another's land already exists, and is inseparably connected with the enjoyment of the land which the United States confers on its grantees. *Davis v. Gale*, 32 Cal. 26; *Butte Canal & D. Co. v. Vaughn*, 11 Cal. 143; s. c., 70 Am. Dec. 769; *Maeris v. Bicknell*, 7 Cal. 261; s. c., 68 Am. Dec. 257; *Sims v. Smith*, 7 Cal. 148; s. c., 68 Am. Dec. 233; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Schilling v. Rominger*, 4 Colo. 100; *Yunker v. Nichols*, 1 Colo. 551; *Shoemaker v. Hatch*, 13 Nev. 261.

1. *Evergreen Cemetery Co. v. Beecher*, 53 Conn. 551; *Edwards v. Stonington Cemetery Co.*, 20 Conn. 466; *Balch v. County Commissioners*, 103 Mass. 106; *Edgecumbe v. Burlington*, 46 Vt. 218.

2. *Evergreen Cemetery Co. v. Beecher*, 53 Conn. 551; s. c., 14 Am. & Eng. Corp. Cas. 121.

What are Private Cemeteries. — In Matter of Deansville Cemetery Association,

66 N. Y. 569; s. c., 23 Am. Rep. 86, the court held that where the land is to be vested in trustees, with power to divide it into lots, and sell these lots to individual owners at prices to be fixed by private agreement, the lots or the right of the owners to descend as private property to the heirs of these owners, who are also to have power to sell, and by whom the trustees were to be elected, was devoting lands to the purposes of private burial, and not to any public use.

3. *Edwards v. Stonington Cemetery Association*, 20 Conn. 466.

4. *Balch v. County Commissioners*, 103 Mass. 106.

5. *Hand Gold Mining Co. v. Parker*, 59 Ga. 419; *New Cent. Coal Co. v. George's Creek Coal Co.*, 37 Md. 537; *Getz's Cases*, 105 Pa. 547; s. c., 3 Am. & Eng. R. R. Cas. 186.

Condemnation for Private Mines.—**Necessity.**—In one case lands sought to be condemned were the most eligible and convenient for the erection of expensive machinery and sinking shafts; no other lands could have been selected except at great distance and inaccessible to the railroad and wagon-roads, without which the business of a mining company could not be conducted. It was held that a necessity existed for the condemnation of the land for the protection and advancement of the mining interests of the country. *Overman Silver M. Co. v. Corcoran*, 15 Nev. 147.

6. **Taking Private Property for Private Industry.**—In *Consolidated Channel Co. v. Central Pac. R. R. Co.*, 51 Cal. 269, it was held that the Legislature cannot, in the exercise of the power of eminent domain, take private property for a purely private industry, such as to enable a person to build a flume on the land of another to carry off the tailings from his land, or to enable him to deposit the tailings on such land.

Condemnation for Benefit of Private Coal Co.—Where a coal company, in order to

doubt that a statute authorizing an establishment of public ways to mines is not unconstitutional, although such mines be private, for ways for the general use of the public are contemplated.¹

13. *Private Roads.* — Statutes providing for the opening of private roads or ways over highways to the premises of individuals over the property of others, by the process of condemnation, have been held unconstitutional as authorizing the condemnation of private property for the private use or accommodation of an individual.² On the other hand, it is held that such a road, though primarily for the benefit of an individual, is a public road in the sense that the public have the right to travel on it, and that therefore the right of eminent domain may properly be exercised in opening such a road without infringing on constitutional rights.³

14. *Right to change Use.* — Where land is condemned for a special purpose on the score of public utility, the sequestration is limited to that particular use.⁴ But the mode of using the prop-

secure convenient transportation for its coal, incorporated a railroad company, and the articles of incorporation declared the purposes of a new company to be, to transport freight and passengers, and upon this representation and in the belief that the land was required for public use, the court, by the usual judicial proceedings, authorized the corporation to take the land, and the railway, when constructed, was operated exclusively for the transportation of the coal, it was held that the proceedings in condemnation amounted to an imposition upon the court, and that it was competent for the State, on discovering the imposition of its authority, to interpose to correct the abuse. *People v. Pittsburgh R. R. Co.*, 53 Cal. 604.

In *Sholl v. German Coal Co.*, 118 Ill. 427; s. c., 59 Am. Rep. 379; 8 West. Rep. 94, it was held that a coal company cannot condemn lands for facilitating the transportation of coal from its works, the public having no interest in either the tramway or the works more than any other strictly private business.

1. *Phillips v. Watson*, 63 Iowa, 28.

2. *Sadler v. Langham*, 34 Ala. 311; *Crear v. Crossly*, 40 Ill. 175; *Nesbitt v. Trumbo*, 39 Ill. 110; *Stewart v. Hartman*, 46 Ind. 331; *Wild v. Deig*, 43 Ind. 455; s. c., 13 Am. Rep. 399; *Bankhead v. Brown*, 25 Iowa, 540; *Com. v. Sawin*, 19 Mass. (2 Pick.) 547; *Com. v. Cambridge*, 7 Mass. 158; *Dickey v. Tension*, 27 Mo. 373; *Powers v. Bergen*, 6 N. Y. 368; *Embury v. Conner*, 3 N. Y. 511; s. c., 53 Am. Dec. 525; *Baker v. Braman*, 6 Hill (N. Y.) 47; s. c., 40 Am. Dec. 387; *Taylor v. Porter*, 4 Hill (N. Y.), 140; s. c., 40 Am. Dec. 274; *Witham v. Osburn*, 4 Oreg. 318; s. c., 18 Am. Rep.

287; *Clark v. White*, 2 Swan (Tenn.), 540; *Osborn v. Hart*, 24 Wis. 89; s. c., 1 Am. Rep. 161; *Pell v. Boswell*, 8 Ont. (Can.) 680; s. c., 9 Am. & Eng. Corp. Cas. 358.

3. *Sherman v. Buick*, 32 Cal. 241; *Hickman Case*, 4 Harr. (Del.) 580; *Brewer v. Bowman*, 9 Ga. 37; *Kissinger v. Hansleman*, 33 Ind. 80; *Johnson v. Supervisor of Clayton Co.*, 61 Iowa, 89; *Robinson v. Swope*, 12 Bush (Ky.) 21; *Snyder v. Warford*, 11 Mo. 513; s. c., 49 Am. Dec. 94; *Proctor v. Andover*, 42 N. H. 348; *Metcalf v. Bingham*, 3 N. H. 459; *Allen v. Stevens*, 29 N. J. L. 65 (5 Dutch.) 509; *Perrine v. Farr*, 22 N. J. L. (2 Zab.) 356; *Ferris v. Bramble*, 5 Ohio St. 109; *Shaver v. Starrett*, 4 Ohio St. 494; *Pocopson Road*, 16 Pa. St. 15; *Harvey v. Thomas*, 10 Watts (Pa.), 65; s. c., 36 Am. Dec. 141; *Bell v. Prouty*, 43 Vt. 279; *Whittingham v. Bowen*, 22 Vt. 317.

4. *Imlay v. Union Branch R. R. Co.*, 26 Conn. 255; s. c., 68 Am. Dec. 392; *Warren v. Lyons*, 22 Iowa, 357; *Louisville v. Louisville Rolling Mill*, 3 Bush (Ky.), 416; *Price v. Thompson*, 48 Mo. 363; *Rutherford v. Taylor*, 38 Mo. 315; *Williams v. Natural Bridge Plank R. Co.*, 21 Mo. 583; *Belcher, etc., Co. v. St. Louis, etc., Co.*, 82 Mo. 121; s. c., 5 Am. & Eng. Corp. Cas. 417; *State v. Laverock*, 34 N. J. L. (5 Vr.) 202; *Pres. Soc. v. Auburn R. R. Co.*, 3 Hill (N. Y.), 567; *Trenor v. Jackson*, 46 How. (N. Y.) Pr. 389; *Board of Education v. Edson*, 18 Ohio St. 225; *Barney v. Keokuk*, 94 U. S. (4 Otto) 324; bk. 24 L. ed. 224; *Barclay v. Howell's Lessee*, 31 U. S. (6 Pet.) 498; bk. 8 L. ed. 477; *Galloway v. Mayor, etc., of London*, L. R. 1 H. L. 34; s. c., 35 L. J. Ch. N. S. 477; 12 Jur. N. S. 747; 14 L. T. N. S. 865.

erty may change from time to time, as the wants of commerce or the public may require.¹ And the Legislature have the power by an express enactment to authorize the property condemned to be devoted to another kind of public use, so long as the property continues to be devoted to public use.²

V. What may be Appropriated.—1. *In General.*—The right to appropriate "property" includes not only the tangible thing owned, but every right and incident which accompanies ownership.³ In the case of land, it includes any right or easement;⁴ and it has been held that it even includes the right of action for injuries to land.⁵ The power to appropriate may be exercised where the corporation or individual to whom it is directed is already in possession of the property under a limited title. Thus a railroad may acquire title to lands to which it already holds an unexercised lease,⁶ or under a license from the proprietor.⁷ So, too, the right may be exercised where the property has been entered upon without any legal right.⁸ The particular property to be condemned may be pointed out by the Legislature; and, where this is done, the courts have no right to review its action.⁹

2. *Nature and Quality of Interest.*—The Legislature are the exclusive judges of the degree and quality of property to be taken from the individual and dedicated to the public use.¹⁰ It may exercise or delegate the power of taking lands in fee whenever it may please to do so; and, as a rule, the acts granting such power contain express clauses to that effect.¹¹

Use of the words "fee simple" is not essential to a grant of the right to take an entire interest;¹² but it does not necessarily

1. Illinois, etc., *Canal Co. v. St. Louis*, 2 Dill. C. C. 82.

2. *Lexington & O. R. R. Co. v. Applegate*, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; *People v. Kerr*, 27 N. Y. 188; *Malone v. City of Toledo*, 28 Ohio St. 643; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 452; *Street Railway v. Cummins*, 14 Ohio St. 533; *Chagrin Falls & C. P. R. Co. v. Cane*, 2 Ohio St. 419.

3. *Dunlap v. Toledo, A. A. & G. T. R. R. Co.*, 50 Mich. 470; s. c., 10 Am. & Eng. R. R. Cas. 185; *Gulf, Colorado, & St. Fé Ry. Co. v. Fuller*, 63 Tex. 467.

4. *Nichols v. Somerset & Kennebec Ry. Co.*, 43 Me. 356; *Cushman v. Smith*, 34 Me. 247; *Arnold v. Hudson River Ry. Co.*, 55 N. Y. 661; *People v. Haines*, 49 N. Y. 587; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; *Troy & B. R. R. Co. v. Turnpike Co.*, 16 Barb. (N. Y.) 100.

5. *Morris C. & B. Co. v. Townsend*, 24 Barb. (N. Y.) 658. See also *Erwin v. United States*, 97 U. S. (7 Otto) 392; bk. 24, L. ed. 1065.

6. *In re New York & H. R. R. Co.*, 11 Abb. (N. Y.) Pr. N. S. 91.

7. See *infra*, "Damages, Waiver of;" "Damages, Protection of the Right."

8. See *infra*, "Procedure;" "Commencement of proceeding."

9. *In re Brooklyn U. Ferry Co.*, 98 N. Y. 139; *Baltimore & Ohio R. R. Co. v. Pittsburgh, W., & Ky. R. R. Co.*, 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95.

10. *De Varaigne v. Fox*, 2 Blatchf. C. C. 95.

11. *State v. Evans*, 3 Ill. (2 Scam.) 208; *Nelson v. Fleming*, 56 Ind. 310; *Dingley v. Boston*, 100 Mass. 544; *Cotton v. Mississippi & R. R. Boom Co.*, 22 Minn. 372; *Wyoming Coal Co. v. Price*, 81 Pa. St. 156; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95; *Chesapeake & O. Canal v. Union Bank*, 4 Cr. C. C. 75.

12. *New Orleans Pac. Ry. v. Gay*, 31 La. An. 430; *Holt v. Somerville*, 127 Mass. 408; *Gardner v. Brookline*, 127 Mass. 358; *Dingley v. Boston*, 100 Mass. 544; *Washington Cemetery v. Prospect P. & C. I. Ry. Co.*, 68 N. Y. 591; *Watson v. New York C. R. R. Co.*, 47 N. Y. 157; *Brooklyn P. C. v. Armstrong*, 45 N. Y. 234; *Rexford v. Knight*, 11 N. Y. 308; *Malone v.*

follow that a grant in fee simple will give any thing more than a base and determinable fee, limited to the purposes of the grant, and expiring when the property ceases to be used for those purposes.¹ Where the grant is of a right to take land "for the purposes of a railroad," this conveys an easement only.² A "right of way" in legal meaning is a mere easement in the lands of others.³

A provision in the charter that a company shall, on taking land, be "seised and possessed" thereof, does not of itself confer the power to acquire a fee.⁴

3. *Private Property.* — *a. Land and Appurtenances.* — Not only an absolute fee in or right of way over land may be taken, but also any easement or right connected with it. Thus it has been held that the power of eminent domain may be exercised over a right of reversion;⁵ the right to use water-power;⁶ an easement over the land of another,⁷ and the lien of a mortgage;⁸ a riparian right to use running water;⁹ a right in land subject to the easement of a public highway;¹⁰ a contested claim to unliquidated damages;¹¹ the right of a commoner in a common;¹² a bridge belonging to a private individual;¹³ and unimproved lands.¹⁴

b. Materials for Construction. — Authority may be given to a person or corporation engaged in the construction of a public improvement to enter upon adjoining lands and take therefrom materials required for the construction.¹⁵ Where land is condemned for a right of way for a railroad, by some statutes authority is given to excavate earth, gravel, and trees, from the land

Toledo, 34 Ohio St. 541; s. c., 28 Ohio St. 643.

1. *People v. White*, 11 Barb. (N. Y.) 26; *Hooker v. Utica & M. Turnpike R. Co.*, 12 Wend. (N. Y.) 371; *Malone v. Toledo*, 28 Ohio St. 643; s. c., 34 Ohio St. 541.

2. *Beach v. Miller*, 51 Ill. 206; *Barlow v. McKinley*, 24 Iowa, 69; *New Orleans Pac. Ry. v. Gay*, 32 La. An. 471; *Proprietors of Locks & Canals v. Nashua & L. R. R. Co.*, 104 Mass. 1; s. c., 6 Am. Rep. 181; *Kellogg v. Malin*, 50 Mo. 496; s. c., 11 Am. Rep. 426; *Blake v. Rich*, 34 N. H. 282; *Taylor v. New York & L. B. R. R.*, 38 N. J. L. (9 Vr.) 28; *State v. Brown*, 27 N. J. L. (3 Dutch.) 13; *Heard v. Brooklyn*, 60 N. Y. 242; *Western P. R. R. v. Johnston*, 59 Pa. St. 290; *Troy & B. R. R. v. Potter*, 42 Vt. 265; s. c., 1 Am. Rep. 325; *Quimby v. Vermont C. R. R. Co.*, 23 Vt. 387.

3. *Williams v. Western Union Ry. Co.*, 50 Wis. 71.

4. *Quimby v. Vermont C. R. R. Co.*, 23 Vt. 387.

5. *Heard v. Brooklyn*, 60 N. Y. 242.

6. *Bank of Auburn v. Roberts*, 44 N. Y. 192.

7. *Arnold v. Hudson R. R. R. Co.*, 55

N. Y. 661; *People v. Haines*, 49 N. Y. 587.

8. *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

9. *Harding v. Stamford Water Co.*, 41 Conn. 87; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 161; s. c., 7 Am. Dec. 526; *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497; bk. 19 L. ed. 498.

10. *Williams v. New York Cent. R. R. Co.*, 16 N. Y. 97; s. c., 69 Am. Dec. 651.

11. *Erwin v. United States*, 97 U. S. (7 Otto) 392; bk. 24 L. ed. 1065.

12. *Bell v. Ohio & P. R. R. Co.*, 1 Grant Cas. (Pa.) 105.

13. *Haverhill Bridge Proprietors v. Commissioners*, 103 Mass. 120; s. c., 4 Am. Rep. 518.

14. *Wallace v. Karlenowefski*, 19 Barb. (N. Y.) 118.

15. *Parsons v. Howe*, 41 Me. 218; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; s. c., 11 Am. Dec. 484; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; s. c., 37 Am. Dec. 277; *Wheelock v. Young*, 4 Wend. (N. Y.) 647; *Bliss v. Hosmer*, 15 Ohio, 44; *Vermont Cent. R. R. Co. v. Baxter*, 22 Vt. 365. Compare, *In re New York C. Ry. Co. v. Gunnison*, 3 T. & C. (N. Y.) 632; s. c., 1 Hun (N. Y.), 496.

so taken, and to remove trees growing thereon, for the purpose of aiding in the construction of the road. It has been held that the use of such materials is not limited to the land from which they are taken, that they may be employed on any part of the track.¹ The right to remove timber is not confined simply to that actually growing upon the track. Any timber that interferes with the safe and convenient running of cars may be removed.² It has been held that the right to trees, herbage, and minerals not essential to the use of the railroad remains vested in the land-owner.³

c. Mines and Minerals. — Where a public road is established over land, the owner parts with the use only, and, while it is used as a highway, he is entitled to the native minerals which may be found buried in it.⁴

4. Public Property. — a. Public Lands. — It is within the authority of the States to appropriate the property of the United States; and this may be done under a general State statute authorizing the condemnation of land for railroad purposes.⁵ But where

1. *Preston v. Dubuque & P. R. R. Co.*, 11 Iowa, 15; *Henry v. Dubuque & P. R. R. Co.*, 2 Iowa, 288; *Taylor v. New York & L. B. R. R. Co.*, 38 N. J. L. (9 Vr.) 28.

2. *Preston v. Dubuque & P. R. R. Co.*, 11 Iowa, 15.

3. *Blake v. Rich*, 34 N. H. 282; *Barclay v. Howell's Lessee*, 31 U. S. (6 Pet.) 498; bk. 8 L. ed. 477. Compare *Brainard v. Clapp*, 64 Mass. (10 Cush.) 6; s. c., 57 Am. Dec. 74.

4. *Barclay v. Howell's Lessee*, 31 U. S. (6 Pet.) 498; bk. 8 L. ed. 477.

Minerals in Lands condemned — In England a railway company may purchase lands compulsorily, if it is necessary and proper for the support of the track. *Errington v. Metropolitan D. Ry. Co.*, L. R. 19 Ch. Div. 559; s. c., 6 Am. & Eng. R. R. Cas. 562. See also *Jenkins v. Central Ontario R. R. Co.*, 4 Ont. Ch. Div. 593; s. c., 17 Am. & Eng. R. R. Cas. 116. By the English statutes, where land is condemned for a canal or a railway, the owner of the minerals beneath it is required to give notice of his intention to work them before actually doing so; upon receiving such notice, the railway or canal company can, if it so desires, have the value of the minerals assessed, and, upon payment thereof, the owner must allow them to remain. *Great Western Ry. Co. v. Smith*, L. R. 2 Ch. Div. 235; *Birmingham C. Co. v. Cartwright*, L. R. 11 Ch. Div. 421; *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. Cas. 19; *Barnsley Canal Co. v. Twibell*, 13 L. J. N. S. Eq. 434. But where the railway company has elected to take lands without the minerals thereunder, the land-owner may work the mines in the usual and proper manner (*Pountney v. Clayton*, L. R. 11 Q. B. Div. 820; s. c., 14 Am. & Eng. R. R. Cas. 476),

subject, however, to the right of the company to stop the working at any time that it fears danger to the land, by notice of its willingness to pay compensation for the minerals they desire left standing. *Dixon v. Caledonia & G. S. W. R. Co.*, L. R. 5 App. Cas. 820.

Distinction between Mines and Minerals — In *Davell v. Roper*, 24 L. J. Ch. 779, a distinction was drawn between mines and minerals in the following terms: "The best definition of a mineral is, that which was worked by means of a mine," as distinguished from a quarry. The distinction between quarrying and mining is: "that where you are working *sub dio*, after having removed the surface so as not to leave any roof, that is what is called quarrying. Mining is when you begin on the surface, and by sinking shafts you work under ground in a horizontal direction, making a channel as you proceed, and leaving a roof overhead." See also *Bell v. Wilson*, L. R. 1 Ch. App. 303; *Micklethwait v. Winter*, 20 L. J. Ex. 313; *Brown v. Chadwick*, 7 Ir. C. L. 101; *Listowel v. Givings*, 9 Ir. C. L. 223. But this definition of the "mineral" was authoritatively repudiated in a subsequent case where the substance in dispute was china clay, obtainable only by destroying the surface, and it was stated that the result of the authorities appeared to be that a reservation in a deed of "minerals" "includes every substance which can be got from underneath the surface of the earth, for the purpose of profit; unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." *Hext v. Gill*, L. R. 7 Ch. App. 699, 712.

5. *United States v. Railroad Bridge Co.*, 6 McL. C. C. 517; s. c., 3 Liv. L. Mag. 568;

the land is already devoted to a public use in connection with the Federal Government, the State has no power to authorize its condemnation.¹ It has been held that the State may grant its own lands to a corporation desiring to devote them to a public use, without making any provision for compensation.²

b. Public Institutions. — Lands vested in the State and devised to the use of a public institution, such as the education of the blind, will not be included in a grant of right of way over "all lands belonging to the State," although adjoining the road and convenient for its use.³ Where, however, the lands are not used or held for public purposes, and are not contiguous to the institution, they may be appropriated in the same manner as the lands of private persons.⁴

5. *Property already devoted to Public Use.* — *a. In General.* — Property already devoted to public use, although held by a municipal or other corporation, may be condemned under the power of eminent domain.⁵ And such land may, by express statutory authority, be afterwards devoted to another use.⁶

10 L. R. N. S. 630; Union Pac. R. R. Co. v. Burlington & M. R. R. Co., 1 McC. C. C. 452; s. c., 10 Rep. 357; Northern Pac. R. R. Co. v. St. Paul & M. R. R. Co., 1 McCr. C. C. 302; s. c., 3 Fed. Rep. 702.

By Revised Statutes of United States, sect. 2477, the right of way for the construction of "highways" over public lands not preserved for public uses, is granted. It has been held that a railroad is a "highway" within the meaning of this section. Flint & P. M. R. R. Co. v. Gordon, 41 Mich. 420.

1. United States v. Chicago, 48 U. S. (7 How.) 185; bk. 12 L. ed. 660; United States v. Railroad Bridge Co., 6 McL. C. C. 517; s. c., 3 Liv. L. Mag. 568; 10 L. R. N. S. 630; United States v. Ames, 1 Woodb. & M. C. C. 76.

2. Washington Cemetery v. Prospect Park & C. I. R. R. Co., 4 Abb. (N. Y.) N. C. 15; s. c., 68 N. Y. 591; Chagrin Falls & C. P. R. Co. v. Cane, 2 Ohio St. 420; Indiana Cent. R. R. Co. v. State, 3 Ind. 421.

In the last case it was held, that where a company is authorized by an act of the Legislature to construct a railroad between two designated points, it has a right to occupy in the construction of the road, any land between those points on the general route authorized, which may be necessary for the purpose. See also Pennsylvania R. R. Co. v. New York & L. B. R. R. Co., 23 N. J. Eq. (8 C. E. Gr.) 157; Davis v. East Tennessee & Ga. R. R. Co., 1 Sneed. (Tenn.) 94.

Grant to construct Road over Lands of State. — *Damages.* — In Com. v. Boston & M. R. R. Co., 47 Mass. (3 Cush.) 25, it was held, that a grant of authority to con-

struct a railroad over lands held by the Commonwealth for a particular purpose, would not be presumed to be a donation, but the Commonwealth might institute proceedings, and prosecute a claim for damages. See also Mayor of Atlanta v. Central R. R. & B. Co., 53 Ga. 120.

3. St. Louis, J. & C. R. R. Co. v. Trustees of Blind Asylum, 43 Ill. 303. Compare Indiana Cent. R. R. Co. v. State, 3 Ind. 421.

4. State v. St. Paul, M. & M. R. R. Co., 30 Minn. 311; s. c., 22 Am. & Eng. R. R. Cas. 94.

5. Evergreen Cemetery Association v. City of N. H., 43 Conn. 234; s. c., 21 Am. Rep. 643; New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; City of Jacksonville v. Jacksonville R. R. Co., 67 Ill. 540; Illinois & M. C. v. Chicago & R. I. R. R. Co., 14 Ill. 314; Baltimore & O. C. R. R. Co. v. North, 103 Ind. 486; s. c., 23 Am. & Eng. R. R. Cas. 36; Inhabitants of Springfield v. Connecticut R. R. Co., 58 Mass. (4 Cush.) 63; Prospect Park & C. I. R. R. Co. v. Williamson, 91 N. Y. 552; s. c., 14 Am. & Eng. R. R. Cas. 34; In re Prospect Park & C. I. R. R. Co., 67 N. Y. 371; s. c., 15 Am. Ry. Rep. 102; aff'm. 8 Hun (N. Y.), 30; In re New York & B. B. R. R. Co., 20 Hun (N. Y.), 201; Little Miami C. & Z. R. R. Co. v. Dayton, 23 Ohio St. 510.

6. Evergreen Cemetery v. City of N. H., 43 Conn. 234; s. c., 21 Am. Rep. 643; Cook v. City of Burlington, 30 Iowa, 94; s. c., 44 Am. Rep. 679; Springfield v. Inhabitants of Connecticut R. R. Co., 58 Mass. (4 Cush.) 63; Stevens v. Patterson & N. R. R. Co., 34 N. J. L. (5 Vr.) 532;

b. Streets and Highways. — The appropriation of a street for the purpose of laying a railroad-track is not a perversion from its original purpose so long as such use does not interfere with the use of it by the public as a highway for passage and repassage.¹ The right to authorize such an appropriation is vested in the Legislature.² Such power can be, and often is, delegated to the municipal authorities,³ but only by express legislative enactment.⁴ The right to construct a railroad in a public street must be conferred by express legislative grant,⁵ or by the consent or grant of the municipal authority to whom the power of control is delegated.⁶ Under a grant of authority to construct its track along a street, a

s. c., 3 Am. Rep. 269; *In re City of Buffalo*, 68 N. Y. 167; *In re Boston & A. R. R. Co.*, 53 N. Y. 574; *State v. Cincinnati Cent. R. R. Co.*, 37 Ohio St. 157, 176; *Hickok v. Hine*, 23 Ohio St. 523; s. c., 13 Am. Rep. 255; *Little Miami C. & Z. R. R. Co. v. Dayton*, 23 Ohio St. 510; *Alexandria & F. R. R. Co. v. Alexandria & W. R. R. Co.*, 75 Va. 780; s. c., 10 Am. & Eng. R. R. Cas. 23.

1. *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Lexington & O. R. R. v. Applegate*, 8 Dana (Ky.) 289; s. c., 33 Am. Dec. 497; *Porter v. North Missouri R. R. Co.*, 33 Mo. 128; *Chapman v. Albany & S. R. R. Co.*, 10 Barb. (N. Y.) 360; *Plant v. Long Island R. R. Co.*, 10 Barb. (N. Y.) 26.

2. *Perry v. New Orleans, M. & C. R. R. Co.*, 55 Ala. 413; s. c., 28 Am. Rep. 740; *Savannah & T. R. R. Co. v. Savannah*, 45 Ga. 602; *Chicago, R. I. & P. R. R. v. Joliet*, 79 Ill. 25; *Indianapolis & C. R. R. v. State*, 37 Ind. 489; *Council Bluffs v. Kansas C.*, St. J. & C. B. R. R. Co., 45 Iowa, 338; s. c., 24 Am. Rep. 773; *Ingram v. C. D. & M. R. R. Co.*, 38 Iowa, 669; *Clinton City v. Cedar R. & M. R. R. Co.*, 24 Iowa, 455; *Hughes v. Mississippi & M. R. R. Co.*, 12 Iowa, 261; *Tate v. Missouri, K. & T. R. R.*, 64 Mo. 149; *State v. Hoboken*, 35 N. J. L. (6 Vr.) 205; *Carpenter v. Oswego & S. R. R.*, 24 N. Y. 655; *Davis v. Mayor of N. Y.*, 14 N. Y. 506; s. c., 67 Am. Dec. 186; *Com. v. Erie & N. E. R. R. Co.*, 27 Pa. St. 339; s. c., 67 Am. Dec. 471; *Philadelphia v. Empire Passenger R. R. Co.*, 3 Brewst. (Pa.) 547; *Faust v. Passenger R. R. Co.*, 3 Phila. (Pa.) 164; *In re Philadelphia & T. R. R.*, 6 Whart. (Pa.) 25; *District of Columbia v. Baltimore & P. R. R. Co.*, 114 U. S. 453; bk. 29 L. ed. 216; s. c., 20 Am. & Eng. R. R. Cas. 38; *Jackson Co. Horse Ry. v. Interstate Rapid Transit Ry.*, 24 Fed. Rep. 306.

3. *Atchison St. R. R. Co. v. Missouri P. R. R. Co.*, 31 Kan. 660; s. c., 14 Am. & Eng. R. R. Cas. 439; *Covington St. R. R. Co. v. Covington*, 9 Bush (Ky.), 127; *Donaher v. State*, 16 Miss. (8 Smed. & M.)

649; *Milbau v. Sharp*, 27 N. Y. 611; s. c., 15 Barb. (N. Y.) 193; 17 Barb. (N. Y.) 435; 9 How. (N. Y.) Pr. 102; *Mercer v. Pittsburgh, Ft. W. & C. R. R. Co.*, 36 Pa. St. 99; *In re Philadelphia & T. R. R. Co.*, 6 Whart. (Pa.) 25.

4. *Perry v. New Orleans, M. & C. R. R. Co.*, 55 Ala. 413; s. c., 28 Am. Rep. 740; *Polack v. Trustees*, 48 Cal. 490; *State v. Hoboken*, 35 N. J. L. (6 Vr.) 205; *Davis v. Mayor of N. Y.*, 14 N. Y. 506; s. c., 67 Am. Dec. 186; *Lawrence R. R. v. William*, 35 Ohio St. 168; *East Portland v. Multnomah Co.*, 6 Oreg. 62.

5. *St. Louis, V. & T. H. R. R. Co. v. Haller*, 82 Ill. 208; *State v. Davenport & St. P. R. R.*, 47 Iowa, 507; *Hine v. Keokuk & D. M. R. R. Co.*, 42 Iowa, 636; *Chicago, N. & S. W. v. Newton*, 36 Iowa, 299; *Attorney General v. Morris & E. R. Co.*, 19 N. J. Eq. (4 C. E. Gr.) 386; *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150; s. c., 3 Am. & Eng. R. R. Cas. 507; *Cake v. Philadelphia & E. R. R. Co.*, 87 Pa. St. 307; *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. St. 325; *Com. v. Erie & N. E. R. R. Co.*, 27 Pa. St. 339; *Houston & Tex. Cent. R. R. Co. v. Odum*, 53 Tex. 343; s. c., 2 Am. & Eng. R. R. Cas. 503.

6. *Savannah, A. & G. R. R. v. Shiels*, 33 Ga. 601; *City of Quincy v. Chicago, B. & Q. R. R. Co.*, 92 Ill. 21; *Stetson v. Chicago & E. R. R. Co.*, 75 Ill. 74; *Indianapolis, B. & W. R. R. Co. v. Hartley*, 67 Ill. 439; *Cook v. Burlington*, 36 Iowa, 357; s. c., 6 Am. Rep. 649; *Lexington & O. R. R. Co. v. Applegate*, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; *Wolfe v. Covington & L. R. R. Co.*, 15 B. Mon. (Ky.) 404; *Wiggins F. Co. v. East St. Louis U. R. R. Co.*, 107 Ill. 450; s. c., 20 Am. & Eng. R. R. Cas. 9; *Harrison v. New Orleans P. R. R. Co.*, 34 La. An. 462; *Hovelman v. Kansas City Horse R. R. Co.*, 79 Mo. 632; s. c., 20 Am. & Eng. R. R. Cas. 17; *Paterson & P. H. R. R. Co. v. Paterson*, 24 N. J. Eq. (9 C. E. Gr.) 158; *Pacific R. R. Co. v. Leavenworth*, 1 Dill. C. C. 393; *Pembroke v. Canada C. R. R. Co.*, 3 Ont. (Can.) 503; s. c., 14 Am. & Eng. R. R. Cas. 117.

railroad company cannot monopolize a street to the exclusion of the public and private uses to which it is applied.¹ Where once authority to construct a railroad has been given by a municipality, the repeal of the ordinance granting such authority will not render the railroad a nuisance;² and it is not within the power of the Legislature to attach a condition to a grant already made by a municipality properly authorized to confer the right to use the city streets.³ As in the case of streets, the Legislature may authorize the building of a railroad on a public highway.⁴ The grant in a charter of a right to construct a railroad on a specified route gives the right without express words to appropriate public highways, which said route may intersect, but only where this is necessary for the route, as authorized.⁵

6. *Corporate Property and Franchises.*—*a. Power to authorize Appropriation.*—The property of a corporation is equally liable with the property of a private citizen to be taken for public uses on the payment of just compensation.⁶ But further than this the

1 *Tate v. Ohio & M. R. R. Co.*, 7 Ind. 479; *New Orleans & C. R. Co. v. Second Municipality of N. O.*, 1 La. An. 128; *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180; s. c., 34 Mo. 259; *Farrand v. Chicago & N. W. R. R. Co.*, 21 Wis. 435; *Janesville v. Milwaukee & M. R. R. Co.*, 7 Wis. 484.

2 *Ingram v. Chicago D. & M. R. R. Co.*, 38 Iowa, 669.

3 *Hovelman v. Kansas City Horse Ry. Co.*, 79 Mo. 632; s. c., 20 Am. & Eng. R. R. Cas. 17.

4 *Easton & A. R. R. Co. v. Inhabitants of Greenwich*, 25 N. J. Eq. (10 C. E. Gr.) 565; *In re Prospect Park & C. I. R. R. Co.*, 8 Hun (N. Y.), 30; *Danville H. & W. R. R. Co. v. Com.*, 73 Pa. St. 29.

Turnpike a Public Highway.—A turnpike has been held to be a public road or highway within the meaning of the statute authorizing a corporation in constructing a canal to occupy roads and highways. *Rodgers v. Bradshaw*, 20 Johns. (N. Y.) 735.

5 *Attorney General v. Morris & E. R. R. Co.*, 19 N. J. Eq. (4 C. E. Gr.) 386, 575.

6 *Alabama & F. R. R. Co. v. Kenney*, 39 Ala. 307; *New York H. & N. R. R. Co. v. Boston, H. & E. R. R. Co.*, 36 Conn. 196; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40; *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 141; s. c., 14 Am. & Eng. Corp. Cas. 417; *Lake Shore & M. S. R. R. Co. v. Chicago & W. I. R. R. Co.*, 97 Ill. 506; s. c., 2 Am. & Eng. R. R. Cas. 440; *Metropolitan City R. R. Co. v. Chicago W. D. R. Co.*, 87 Ill. 317; *Peoria P. & J. R. R. v. Peoria & S. R. R. Co.*, 66 Ill. 174; *Jeffersonville, M. & I. R. R. Co. v. Daugherty*, 40 Ind. 33; *Lafayette Plank Road Co. v. New Albany & S. R. R. Co.*, 13 Ind. 90; s. c., 74 Am. Dec. 246; *New*

castle & R. R. R. Co. v. Peru & I. R. R. Co., 3 Ind. 464; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289; s. c., 33 Am. Dec. 497; *Cushman v. Smith*, 34 Me. 247; *Trustees of Belfast Academy v. Salmond*, 11 Me. 109; *Baltimore & H. G. Turnpike Co. v. Union R. R. Co.*, 35 Md. 224; *Bel-lona Co.'s Case*, 3 Bland Ch. (Md.) 442; *Eastern R. Co. v. Boston & M. R. R. Co.*, 111 Mass. 125; s. c., 15 Am. Rep. 13; *Grand Junction R. v. Middlesex*, 80 Mass. (14 Gray) 553; *Backus v. Lebanon*, 11 N. H. 19; s. c., 35 Am. Dec. 466; *Peirce v. Somersworth*, 10 N. H. 369; *Barber v. Andover*, 8 N. H. 398; *Prop. of P. Bridge v. New Hampshire Bridge*, 7 N. H. 35; *State v. Hudson Tunnel R. Co.*, 38 N. J. L. (9 Vr.) 548; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552; s. c., 14 Am. & Eng. R. R. Cas. 34; *Miller v. New York & E. R. R. Co.*, 21 Barb. (N. Y.) 513; *Iron R. R. v. Ironton*, 19 Ohio St. 299; *Philadelphia & G. F. P. Ry. Co.'s Appeal*, 102 Pa. St. 123; s. c., 20 Am. & Eng. R. R. Cas. 1; *Com. v. Pennsylvania Canal Co.*, 66 Pa. St. 41; *Com. v. Pittsburgh & C. R. Co.*, 58 Pa. St. 26; *White Riv. Turnpike Co. v. Vermont C. R. R.*, 21 Vt. 590; *Alexandria & F. Ry. Co. v. Alexandria & W. R. R. Co.*, 75 Va. 780; s. c., 40 Am. Rep. 743; 10 Am. & Eng. R. R. Cas. 23; *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. R. Co.*, 11 Leigh (Va.), 42; s. c., 36 Am. Dec. 374; *Richmond F. & P. R. R. Co. v. Louisa R. R. Co.*, 54 U. S. (13 How.) 71; bk. 14, L. ed. 55; *West River Bridge v. Dix*, 47 U. S. (6 How.) 507; bk. 12, L. ed. 535; *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420; bk. 9, L. ed. 773; *Union P. R. Co. v. Burlington & M. R. R. Co.*, 1 McCr. C. C. 452; *United States v. Railroad Bridge Co.*, 6 McL. C. C. 517; s. c., 3 Liv. L. Mag. 568;

franchises of a corporation, even though originally granted to it for the public advantage, are equally liable to be interfered with, or even to be wholly abrogated, by virtue of the exercise of the power of eminent domain.¹ And even the fact that the franchises have been irrevocably or exclusively granted will not protect them from subsequent condemnation for what the Legislature may deem a more beneficial public use.² But a grant of the power to take property for any purpose will not, in the absence of express authority, be stretched so far as to allow the taking of corporate franchises, unless absolutely essential to the carrying-out of the purposes which the Legislature have contemplated.³

10 L. R. N. S. 630; *San Mateo v. Southern Pac. R. R. Co.*, 8 Sawy. C. C. 238; 13 Fed. Rep. 722.

1. *New York, H. & N. R. R. v. Boston, H. & E. R. R.*, 36 Conn. 196; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40; *Metropolitan City Ry. Co. v. Chicago W. D. Ry.*, 87 Ill. 317; *Lafayette Plank Road v. New Albany & S. R. R. Co.*, 13 Ind. 90; *Newcastle & R. R. Co. v. Peru & I. R. R.*, 3 Ind. 464; *State v. Noyes*, 47 Me. 189; *Baltimore & H. G. T. Co. v. Union Ry. Co.*, 35 Md. 224; *Chesapeake & O. Canal Co. v. Baltimore & O. R. R.*, 4 Gill. and J. (Md.) 5; *Eastern R. R. Co. v. Boston & M. R. R.*, 111 Mass. 125; s. c., 15 Am. Rep. 13; *Central Bridge Corp. v. Lowell*, 81 Mass. (15 Gray) 106; *Central Bridge Co. v. City of Lowell*, 70 Mass. (4 Gray) 474; *Boston & L. R. Co. v. Salem & L. R. R. Co.*, 68 Mass. (2 Gray) 1, 35; *Springfield v. Connecticut R. R. Co.*, 58 Mass. (4 Cush.) 63; *Boston Water Power Co. v. Boston & W. R. R. Co.*, 40 Mass. (23 Pick.) 360; *Forward v. Hampshire & H. Canal Co.*, 39 Mass. (22 Pick.) 462; *Crosby v. Hanover*, 36 N. H. 404; *Northern R. R. v. Concord & C. R. R.*, 27 N. H. 183; *Peirce v. Somersworth*, 10 N. H. 370; *Backus v. Lebanon*, 11 N. H. 20; s. c., 35 Am. Dec. 466; *Barber v. Andover*, 8 N. H. 398; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *State v. Canterbury*, 28 N. H. 195; *In re Rochester Water Commissioners*, 66 N. Y. 413; *In re New York C. & H. R. R. v. Metropolitan Gas Light Co.*, 63 N. Y. 326; *In re Kerr*, 42 Barb. (N. Y.) 119; *Newcastle & R. Ry. v. P. & J. Ry.*, 3 Ind. 464; *Lake Shore & M. S. R. R. v. Cincinnati S. & C. R. R. Co.*, 30 Ohio St. 604; *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150; s. c., 3 Am. & Eng. R. R. Cas. 507; *In re Towanda Bridge Co.*, 91 Pa. St. 216; *Com. v. Pittsburgh & C. R. R.*, 58 Pa. St. 26; *Red River Bridge v. Clarksville*, 1 Sneed. (Tenn.) 176; s. c., 60 Am. Dec. 143; *White River Turnpike Co. v. Vermont C. R. R.*, 21 Vt. 590; *Armington v. Barnet*, 15 Vt. 745; s. c., 40 Am. Dec. 705; *James River & K. Co. v. Thompson*, 3 Gratt. (Va.)

270; *Tuckahoe Canal Co. v. Tuckahoe & J. R. Ry.*, 11 Leigh (Va.) 42; s. c., 36 Am. Dec. 374; *Greenwood v. Union F. R. R. Co.*, 105 U. S. (15 Otto) 13; bk. 26, L. ed. 961; s. c., 9 Am. & Eng. R. R. Cas. 526; *Richmond F. & P. R. R. Co. v. Louisa R. R. Co.*, 54 U. S. (13 How.) 71; bk. 14, L. ed. 55; *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507; bk. 12, L. ed. 535; *Bonaparte v. Camden & A. R. R. Co.*, 1 Baldw. C. C. 205.

2. *Alabama & F. R. R. Co. v. Kenney*, 39 Ala. 307; *New Orleans M. & T. R. Co. v. Southern & A. Tel. Co.*, 53 Ala. 211; *Enfield/Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40; *Atlantic & G. R. R. v. Mann*, 43 Ga. 200; *St. Louis J. & C. R. R. v. Blind Institution*, 43 Ill. 303; *Newcastle & R. R. v. Peru & I. R. R.*, 3 Ind. 464; *Baltimore & H. G. Turnpike v. Union R. R.*, 35 Md. 224; *Lexington & O. R. R. v. Applegate*, 8 Dana (Ky.) 289; s. c., 33 Am. Dec. 497; *Housatonic R. R. Co. v. Lee & H. R. R. Co.*, 118 Mass. 391; *Troy v. Cheshire R. R. Co.*, 23 N. H. (3 Fost.) 83; *Backus v. Lebanon*, 11 N. H. 19; s. c., 35 Am. Dec. 466; *Piscataqua Bridge v. New Hampshire B. Co.*, 7 N. H. 35; *New Jersey S. R. R. Co. v. Long Branch Commissioners*, 39 N. J. L. (10 Vr.) 28; *State v. Easton & A. R. R.*, 36 N. J. L. (7 Vr.) 181; *State v. Montclair Ry.*, 35 N. J. L. (6 Vr.) 328; *Stevens v. Patterson & N. R. R. Co.*, 34 N. J. L. (5 Vr.) 532; s. c., 3 Am. Rep. 269; *Starr v. Camden & A. R. R. Co.*, 24 N. J. L. (4 Zab.) 592; *Raritan & D. B. R. R. Co. v. Delaware & R. C. Co.*, 18 N. J. Eq. (3 C. E. Gr.) 546; *Delaware R. Can. Co. v. Camden & A. R. R. Co.*, 16 N. J. Eq. (1 C. E. Gr.) 321; *In re Boston & A. R. R. Co.*, 53 N. Y. 574; *In re Kerr*, 42 Barb. (N. Y.) 119; *In re Towanda Bridge Co.*, 91 Pa. St. 216; s. c., 37 Leg. Int. 389; *Com. v. Pennsylvania Canal Co.*, 66 Pa. St. 41; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Tuckahoe Canal v. Tuckahoe & I. R. R.*, 11 Leigh (Va.) 42; s. c., 36 Am. Dec. 374; *Richmond F. & P. R. R. Co. v. Louisa R. R. Co.*, 54 U. S. (13 How.) 71; bk. 14, L. ed. 55.

3. *Bridgeport v. New York & N. H. R. R.*

b. Uses for which Corporate Property may be taken. — Where one corporation is duly authorized to condemn the property of another, it may be taken for a dissimilar use,¹ or even for any similar purpose, as in the case of one railroad company appropriating the property of another.² And a right of way may be taken by a railroad company chartered by a State, over the track of a company chartered by the Federal Government.³

c. Railroad Crossings. — Every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency demands it;⁴ and it has been held that it is not necessary that any express power should be given.⁵

Co., 36 Conn. 253; s. c., 4 Am. Rep. 63; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; State v. Noyes, 47 Me. 189; Worcester & N. R. R. Co. v. Railroad Commissioners, 118 Mass. 561; Commissioners v. Holyoke Water Power Co., 104 Mass. 446; s. c., 6 Am. Rep. 247; Boston & L. R. R. Co. v. Salem & L. R. R. Co., 68 Mass. (2 Gray) 1; West Boston Bridge Co. v. Middlesex, 37 Mass. (10 Pick.) 270; Milwaukee & St. P. R. R. v. Faribault, 23 Minn. 167; *In re* New York Cent. & H. R. R. Co., 77 N. Y. 248; Matter of City of Buffalo, 68 N. Y. 167; Matter of Ninth Ave. & Fifteenth Street, 45 N. Y. 729; Matter of Hamilton Ave., 14 Barb. (N. Y.) 405; Matter of Flatbush Ave., 1 Barb. (N. Y.) 286; New York City & N. R. Co. v. Central Union Tel. Co., 21 Hun (N. Y.), 261; Hickok v. Hine, 23 Ohio St. 523; s. c., 13 Am. Rep. 255; Hatch v. Cincinnati & I. R. R. Co., 18 Ohio St. 92; Parker v. Sunbury & E. R. R. Co., 19 Pa. St. 211; Rex v. Pease, 4 Barn. & Ad. 30; Attorney General v. Ely H. & S. Ry. Co., L. R. 4 Ch. App. 194; Pugh v. Golden Valley Ry. Co., L. R. 12 Ch. Div. 274; Reg. v. Wycombe R. R. Co., L. R. 2 Q. B. 310.

1. Illinois & M. C. v. Chicago & R. I. R. R. Co., 14 Ill. 314; Bellona Co.'s Case, 3 Bland Ch. (Md.) 442; *In re* New York L. & W. R. R. Co., 99 N. Y. 12; s. c., 23 Am. & Eng. R. R. Cas. 43; *In re* New York Cent. & H. R. R. Co. v. Metropolitan G. L. Co., 63 N. Y. 326; West R. B. Co. v. Dix, 47 U. S. (6 How.) 507; bk. 12 L. ed. 535.

2. City of Bridgeport v. New York & N. H. R. R. Co., 36 Conn. 256; s. c., 4 Am. Rep. 63; New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; Chicago, R. I. & P. R. R. Co. v. Town of Lake, 71 Ill. 333; Providence & W. R. R. Co. v. Norwich & W. R. R. Co., 138 Mass. 277; s. c., 22 Am. & Eng. R. R. Cas. 493; Easton R. R. Co. v. Boston & M. R. R. Co., 111 Mass. 125; s. c., 15 Am. Rep. 13; Lowell & L. R. R. v. Boston & L. R. R. Co., 73 Mass. (7 Gray) 27; Grand Rapids N. & L. S. R. R. Co. v. Grand Rapids & I. R. R.

Co., 35 Mich. 265; s. c., 24 Am. Rep. 545; Northern R. R. v. Concord & C. R. R., 27 N. H. (7 Fost.) 183; Kinsman St. R. R. Co. v. Broadway & N. S. R. R. Co., 36 Ohio St. 239; s. c., 5 Am. & Eng. R. R. Cas. 327; Baltimore & O. R. R. Co. v. Pittsburgh W. & K. R. R. Co., 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444; Denver & R. G. R. R. Co. v. Denver & S. P. R. R. Co., 17 Fed. Rep. 867; s. c., 14 Am. & Eng. R. R. Cas. 83. Compare Lake Shore & M. S. R. R. v. Chicago & W. I. R. R. Co., 96 Ill. 125; s. c., 2 Am. & Eng. R. R. Cas. 440, 445, where the court say, "To warrant the taking of property of one party, already appropriated to a public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use, and also that the change from the present use to the new shall be for the benefit of the public. Whether the new use be different from the present use, is a judicial question, which the courts may decide; but where the new use in its nature may be a public benefit, whether the change will be for the benefit of the public is a political question to be determined by a political department of the government, and generally, if not always, by the law-making power."

3. North Pac. R. R. Co. v. St. Paul, M. & M. Ry. Co., 1 McCr. C. C. 302; 3 Fed. Rep. 702; 1 Am. & Eng. R. R. Cas. 12.

4. Contra Costa R. R. Co. v. Moss, 23 Cal. 324; East St. Louis C. R. Co. v. E. St. Louis U. R. Co., 108 Ill. 265; s. c., 17 Am. & Eng. R. R. Cas. 163; Chicago & A. R. R. Co. v. Joliet, L. & A. R. R. Co., 105 Ill. 389; s. c., 44 Am. Rep. 799; 14 Am. & Eng. R. R. Cas. 62; Massachusetts C. R. R. v. Boston, C. & F. R. R., 121 Mass. 125; New York & H. R. R. Co. v. Forty-second St. R. R. Co., 50 Barb. (N. Y.) 285, 309; s. c., 26 How. (N. Y.) Pr. 68; 32 How. (N. Y.) Pr. 481; Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. Ry., 30 Ohio St. 604.

5. Morris & E. R. R. Co. v. Central R. R., 31 N. J. L. (2 Vr.) 205.

7. *Rights in Waters and Water-Courses.* — *a. Riparian Rights.* — (1) *Navigable Waters.* — There is no private property in lands under navigable waters. The Legislature may authorize such land to be taken for a public use, without providing for any compensation to a riparian owner.¹ The right to authorize such appropriation is vested in the State; but the Federal Government may, by virtue of the powers delegated by the several States to it, also exercise the right of eminent domain over such navigable waters;² and such right may be exercised without any consent or authority from the State on whose land, under navigable waters, the proposed structure is to rest, and without compensation to the State.³ The right of a riparian owner to lands bordering upon navigable waters, whether tide-waters, or streams and lakes where the tide does not ebb or flow, extends only to high-water mark.⁴ And the State may appropriate lands between low and high water mark for railroad tracks, wharves, or any other public purpose, without compensation to riparian owners.⁵ When a riparian owner makes an erection amounting to a purpresture, he is not entitled to damages for such erection on the taking of his land for public use.⁶

(2) *Non-navigable Waters.* — The owner of land is entitled to the use of a non-navigable stream of water which has been accustomed from time immemorial to flow through it, and cannot be appropriated or diverted for public use without his consent, or a just compensation.⁷

1: Davidson v. Boston & M. R. R. Co., 57 Mass. (3 Cush.) 91; Sugar Refining Co. v. Mayer, etc., Jersey City, 26 N. J. Eq. (11 C. E. Gr.) 247; Pennsylvania R. R. Co. v. New York & L. B. R. R. Co., 23 N. J. Eq. (8 C. E. Gr.) 157; Gould v. Hudson R. R. Co., 6 N. Y. 522; Champlain & St. L. Ry. v. Valentine, 19 Barb. (N. Y.) 484; Lansing v. Smith, 4 Wend. (N. Y.) 9; s. c., 21 Am. Dec. 89; Abraham v. Great N. Ry. Co., 16 Q. B. 586; s. c., 5 Eng. L. & Eq. 258; 20 L. J. N. S. (Q. B.) 322; 15 Jur. 855.

2. Mississippi R. Bridge Co. v. Loneragan, 91 Ill. 508; Talbot Co. v. Queen Anne's Co., 50 Md. 245; Wisconsin River Imp. Co. v. Manson, 43 Wis. 255; s. c., 28 Am. Rep. 542; Pound v. Turck, 95 U. S. (5 Otto) 459; bk. 24 L. ed. 525; South Carolina v. Georgia, 93 U. S. (3 Otto) 4; bk. 23 L. ed. 782; *In re* Clinton Bridge, 77 U. S. (10 Wall.) 454; bk. 19 L. ed. 969; Gilman v. Philadelphia, 70 U. S. (3 Wall.) 713; bk. 18 L. ed. 96; Pennsylvania v. Wheeling & B. Bridge Co., 59 U. S. (18 How.) 421; bk. 15 L. ed. 435; s. c., 54 U. S. (13 How.) 318; bk. 14 L. ed. 249; United States v. Milwaukee & St. P. R. R., 5 Biss. C. C. 410; Ormerod v. New York, W., & S. R. R. Co., 13 Fed. Rep. 370; s. c., 14 Rep. 424; Stockton v. Baltimore R. R. Co., 1 Interstate Commerce Rep. 411.

3. Stockton v. Baltimore R. R. Co., 1 Interstate Commerce Rep. 411.

4. Barney v. Keokuk, 94 U. S. (4 Otto) 324; bk. 24 L. ed. 224; aff'm. 4 Dill. C. C. 593.

5. Davidson v. Boston & M. R. R. Co., 57 Mass. (3 Cush.) 91; Getty v. Hudson R. R. Co., 21 Barb. (N. Y.) 628; Champlain St. L. R. R. v. Valentine, 19 Barb. (N. Y.) 484; Gould v. Hudson R. R. Co., 12 Barb. (N. Y.) 628; s. c., 6 N. Y. 526.

6. Brunswick v. Union D. S. Ry. & T. Co. (Minn.); 14 Am. & Eng. R. R. Cas. 233; Diedrich v. North Western U. R. R. Co., 47 Wis. 662.

7. St. Helena W. Co. v. Forbes, 62 Cal. 182; s. c., 45 Am. Dec. 659; Chicago, R. I., & P. R. R. v. Moffitt, 75 Ill. 524; Van Orsdol v. Burlington, C. R. & N. R. R., 56 Iowa, 470; Stodghill v. Chicago, B. & Q. R. R., 43 Iowa, 26; s. c., 22 Am. Rep. 211; Fowle v. New Haven & N. Co., 112 Mass. 334; s. c., 17 Am. Rep. 106; Estabrooks v. Peterborough & S. R. R. Co., 66 Mass. (12 Cush.) 224; Proprietors of Locks & C. v. Nashua & L. R. R. Corp., 64 Mass. (10 Cush.) 385; Van Hoozier v. Hannibal & St. J. R. R., 70 Mo. 145; Johnson v. Atlantic & St. L. R. R., 35 N. H. 569; s. c., 69 Am. Dec. 560; March v. Portsmouth & C. R. R., 19 N. H. 372; Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. (14 Vr.) 605;

(3) *Milldams and Water-Power Privileges.* — Where a person has acquired a right to maintain a dam, or to use a water-power, such right is property which may be taken for public uses.¹ But where the right to build and maintain a dam is held under the statute, which is, in fact, only a license which the State may revoke at any time, the owner of such milldam has no such interest as constitutes a right of property, but is simply a license.²

b. Surface Waters. — The right of land-owners in the case of surplus waters differs from the right which he holds in the case of waters flowing through water-courses.³ It would seem that there exists no natural servitude in favor of the owner of the superior or higher ground as to mere surface water, or such as flows or accumulates by rain or melting of snow, and that the proprietor of the inferior or lower estate may, if he chooses, lawfully obstruct or hinder the natural flow of such water thereon, and, in so doing, may turn the same back upon the lands of other proprietors, without liability for injuries resulting from such obstruction or diversion.⁴ But notwithstanding this fact land-owners have

Garwood v. New York C. & H. R. R. Co., 83 N. Y. 400; s. c., 38 Am. Rep. 452; 2 Am. & Eng. R. R. Cas. 490; Gardner v. Trustees of Newburgh, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526; Whitaker v. Delaware & H. C. Co., 87 Pa. St. 34; Spencer v. Hartford, P. & F. R. R., 10 R. I. 14; Waterman v. Connecticut & P. R. Ry., 30 Vt. 610; s. c., 73 Am. Dec. 326; Hatch v. Vermont C. R. R., 25 Vt. 49; Smith v. Gould, 61 Wis. 31; s. c., 2 Am. & Eng. Corp. Cas. 424; Lyon v. Green Bay & M. R. R., 42 Wis. 538; Young v. Chicago & N. W. R. R., 28 Wis. 171.

Diversion of Stream. — But a power conferred upon a railway company to divert the course of a river "in order to more conveniently carry the same over or under or by the side of the railway, as its officers may think proper, only authorizes such a diversion when the river presents an actual obstacle to the construction of the land, and not in the case where the diversion is merely for the purpose of saving expenses." Pugh v. Golden Valley R. R. Co., L. R. 15 Ch. Div. 330. See also Valley R. R. Co. v. Bohm, 34 Ohio St. 114; s. c., 21 Am. Ry. Rep. 30.

Right to Use of Water "Property." — In the case of St. Helena Co. v. Forbes, 62 Cal. 182; s. c., 45 Am. Dec. 659, the court say that the right of the riparian owner to the use of the water is "property," an "incident of property in the land inseparably annexed to the soil," "an incorporeal hereditament appertaining to the land," and falls within the term "property," used in a statute providing for the condemnation of "real property" for a public use.

A person accustomed to take water from

a public river and not claiming its use as an easement, a particular tenement has no right in the water which can be taken. Jubb v. Hull Dock Co., 9 Ad. & El. N. S. 443; Rex v. Bristol Dock Co., 12 East. 429; Reg. v. Hull Dock Co., 11 Jur. 15; s. c., 3 Eng. R. R. Cas. 795.

1. Galena & S. W. R. R. Co. v. Haslam, 73 Ill. 494; White v. South S. R. R. Co., 60 Mass. (6 Cush.) 412; Barclay R. R. & C. Co. v. Ingham, 36 Pa. St. 194.

2. Barclay R. R. & C. Co. v. Ingham, 36 Pa. St. 194; New York & E. R. R. Co. v. Young, 33 Pa. St. 175. See also Susquehanna C. Co. v. Wright, 9 Watts & S. (Pa.) 9; s. c., 42 Am. Dec. 315; Monongahela Nav. Co. v. Coons, 6 Watts & S. (Pa.) 101.

3. **A Water-Course** may be defined as a place where water flows in a certain direction through a regular channel with fixed bed and banks, the flow of which is defined though not necessarily continuous. Howard v. Ingersoll, 17 Ala. 780; Gillett v. Johnson, 30 Conn. 180; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Macomber v. Godfrey, 108 Mass. 219; s. c., 11 Am. Rep. 349; Starr v. Child, 20 Wend. (N. Y.) 149; Wagner v. Long Island R. R. Co., 2 Hun (N. Y.), 633; s. c., 5 T. & C. (N. Y.) 163; Reynolds v. McArthur, 27 U. S. (2 Pet.) 417; bk. 7 L. ed. 470; Rex v. Oxfordshire, 1 Barn. & Ad. 301.

4. Adams v. Walker, 34 Conn. 466; Gillett v. Johnson, 30 Conn. 180; Wadsworth v. Tillotson, 15 Conn. 366; s. c., 39 Am. Dec. 391; Cairo & V. R. R. Co. v. Houry, 77 Ind. 364; Cairo & V. R. R. Co. v. Stevens, 73 Ind. 278; Schlichter v. Phillipy, 67 Ind. 201; Taylor v. Fickas, 64 Ind. 168; s. c., 31 Am. Rep. 114; Atchison,

been held entitled to recover as for property injured, where the construction of a railroad lessens the value of adjoining property by reason of the detention, diversion, or accumulation of surface water.¹

c. Wharves. — Wharves, of which the owners have the right of wharfage, are property which may be taken for a public purpose.²

8. *Extent of Appropriation.* — *a. Necessity.* — Only property which is necessary for the undertaking can be appropriated for public use.³ But the necessity is not to be confined to the present

T. & S. F. R. R. Co. v. Hammer, 22 Kan. 763; Murphy v. Kelly, 68 Me. 521; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Greeley v. Maine C. R. R. Co., 53 Me. 200; Bangor v. Lansil, 51 Me. 521; Macomber v. Godfrey, 108 Mass. 219; s. c., 11 Am. Rep. 349; Emery v. Lowell, 104 Mass. 16; Bates v. Smith, 100 Mass. 181; Hawkesworth v. Thompson, 98 Mass. 77; Curtis v. Eastern R. R. Co., 96 Mass. (14 Allen) 55; Turner v. Inhabitants of Dartmouth, 95 Mass. (13 Allen) 291; Gannon v. Hargadon, 92 Mass. (10 Allen) 106; Dickinson v. Worcester, 89 Mass. (7 Allen) 19; Flagg v. Worcester, 79 Mass. (13 Gray) 601; Parks v. Newburyport, 76 Mass. (10 Gray) 28; Ashley v. Wolcott, 65 Mass. (11 Cush.) 192; Luther v. Winnisimmet Co., 63 Mass. (9 Cush.) 171; Munkers v. Kansas City, St. J. & C. B. R. R. Co., 72 Mo. 514; s. c., 60 Mo. 334; Hoshier v. Kansas City, St. J. & C. B. R. R. Co., 60 Mo. 329; McCormick v. Kansas City, St. J. & C. B. R. R. Co., 57 Mo. 433; s. c., 35 Am. Rep. 431; 70 Mo. 359; Imler v. City of Springfield, 55 Mo. 119; Swett v. Cutts, 50 N. H. 439; s. c., 9 Am. Rep. 276; Bowlsby v. Spear, 31 N. J. L. (2 Vr.) 351; Gould v. Booth, 66 N. Y. 62; Conhocton Stone R. Co. v. Buffalo, N. Y. & E. R. R. Co. 51 N. Y. 573; Curtiss v. Ayrault, 47 N. Y. 73; Cott v. Lewiston R. R. Co., 36 N. Y. 214, 217; Pixley v. Clark, 35 N. Y. 520, 532; Brown v. Bowen, 30 N. Y. 538; Goodale v. Tuttle, 29 N. Y. 459; Bellinger v. New York C. R. R. Co., 23 N. Y. 42; Waffle v. Porter, 61 Barb. (N. Y.) 130; Waffle v. New York C. R. R. 58 Barb. (N. Y.) 413; Trustees v. Youmans, 50 Barb. (N. Y.) 316; Ellis v. Duncan, 21 Barb. (N. Y.) 230; Sleight v. Kingston, 11 Hun (N. Y.), 594; Wagner v. Long Island R. R. Co., 2 Hun (N. Y.), 633; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526; Limerick & C. Turnpike Co.'s Appeal, 80 Pa. St. 425; Wakefield v. Newell, 12 R. I. 75, s. c., 34 Am. Rep. 598; Buffum v. Harris, 5 R. I. 253; Beard v. Murphy, 37 Vt. 104; Chatfield v. Wilson, 28 Vt. 49; Davis v. Fuller, 12 Vt. 178; s. c., 36 Am. Dec. 334; O'Connor v. Fond du Lac & P. Ry. Co., 52 Wis. 526; s. c., 38 Am. Rep. 753; Fryer

v. Warne, 29 Wis. 511; Hoyt v. Hudson, 27 Wis. 656; s. c., 9 Am. Rep. 473; Pettigrew v. Evansville, 25 Wis. 223; s. c., 3 Am. Rep. 50; Broadbent v. Ramsbotham, 11 Ex. 602; s. c., 34 Eng. L. & Eq. 553; 25 L. J. Ex. 115; Rawstron v. Taylor, 11 Ex. 369; s. c., 33 Eng. L. & Eq. 428; 25 L. J. Ex. 33. Compare Ogburn v. Connor, 46 Cal. 346; s. c., 13 Am. Rep. 213; Jacksonville, N. W. & S. E. R. R. Co. v. Cox, 91 Ill. 500; St. Louis V. & T. H. R. R. Co. v. Capps, 72 Ill. 188; Toledo, W. & W. R. R. Co. v. Morrison, 71 Ill. 616; Gormley v. Sanford, 52 Ill. 158; Gillham v. Madison Co. R. R. Co., 49 Ill. 484; Hooper v. Wilkinson, 15 La. An. 497; s. c., 77 Am. Dec. 194; Minor v. Wright, 16 La. An. 151; Shane v. Kansas City, St. J. & C. B. R. R. Co., 71 Mo. 237; s. c., 36 Am. Rep. 480; 5 Am. & Eng. R. R. Cas. 64; Porter v. Durham, 74 N. C. 767; Raleigh & A. A. L. R. R. Co. v. Wicker, 74 N. C. 220; Overton v. Sawyer, 1 Jones (N. C.), L. 308; Tootle v. Clifton, 22 Ohio St. 247; s. c., 10 Am. Rep. 732; Hurdman v. North Eastern R. R. Co., L. R. 3 C. P. Div. 168.

1. Morrison v. Bucksport & B. R. R. Co., 67 Me. 353; Walker v. Old Colony & N. R. R. Co., 103 Mass. 10; s. c., 4 Am. Rep. 509; Adams v. Hastings & D. R. R. Co., 18 Minn. 260; Eaton v. Boston C. & M. R. R. Co., 51 N. H. 504; s. c., 12 Am. Rep. 147; Oregon & C. R. R. Co. v. Barlow, 3 Ore. 311; Pfeigar v. Hastings & D. R. R., 28 Minn. 510; s. c., 5 Am. & Eng. R. R. Cas. 85; Hurdman v. North Eastern Ry. Co., L. R. 3 C. P. Div. 168; s. c., 30 Moak Eng. Rep. 81.

2. Fitchburg R. R. Co. v. Boston & M. R. R. Co., 57 Mass. (3 Cush.) 58; Murray v. Sharp, 1 Bosw. (N. Y.) 539; Davenport & N. W. R. R. Co. v. Renwick, 102 U. S. (12 Otto) 180; bk. 26, L. ed. 51; Van Dolson v. New York, 17 Fed. Rep. 817.

3. Smith v. Chicago & W. I. R. R. Co., 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384; Bowman v. Venice & C. R. R., 102 Ill. 459; Chicago & W. I. R. R. Co. v. Dunbar, 100 Ill. 110; s. c., 5 Am. & Eng. R. R. Cas. 253; Indianapolis, P. & C. Ry. Co. v. Rayl, 69 Ind. 424; Nelson v. Fleming, 56 Ind. 310; Protzman v. Indianapolis

needs of the undertaking, but may include reasonable provision for future development.¹ The corporation to whom the power is delegated to take lands necessary for a public purpose is, to some extent, the judge of what is required.² But such right is subject to the review and control of the court in the case of abuse.³

b. Statutory Limit. — In some cases the General Statute, authorizing the condemnation of land for railroad purposes, imposes a limit upon the width of the strip to be taken.⁴ With a provision authorizing the company to condemn a greater width, where necessary for excavation, embankment, or depositing waste earth,⁵ where the company claims that the statutory limit is not sufficient in view of excavations, etc., the burden of proof is upon the company to prove the necessity for taking a greater quantity.⁶ Where a company has obtained the condemnation of more land than it is authorized by law to acquire, the proceeding will be set aside in toto.⁷

c. Part of Tract. — A statute which authorizes the taking of a whole lot, where a part only is needed, is unconstitutional and void, in so far as it authorizes the taking of more than is necessary for use, without the owner's consent.⁸

& C. R. R., 9 Ind. 467; s. c., 68 Am. Dec. 650; *Preston v. Dubuque & P. R. R.*, 11 Iowa, 15; *New Orleans P. R. R. Co. v. Gay*, 32 La. An. 471; *Knight v. Carrollton R. R.*, 9 La. An. 284; *New Orleans & C. R. R. v. Second Municipality*, 1 La. An. 123; *Worcester v. Western R. R. Co.* 45 Mass. (4 Metc.) 564; *Grand Rapids N. & L. S. R. R. Co. v. Van Driele*, 24 Mich. 409; *Beck v. United New Jersey R. R. & C. Co.'s*, 39 N. J. L. (10 Vr.) 45; *In re New York C. & H. R. R. R. v. Metropolitan G. L. Co.*, 63 N. Y. 326; *In re New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; s. c., 7 Am. Rep. 385; *In re Rensselaer & S. R. R. v. Davis*, 43 N. Y. 157; *Toledo & W. R. R. v. Daniels*, 16 Ohio St. 390; *Cleveland & P. R. R. v. Speer*, 56 Pa. St. 325; *Lance's Appeal*, 55 Pa. St. 16; *Philadelphia, W. & B. R. R. v. Williams*, 54 Pa. St. 103; *Hill v. Western Vermont R. R.*, 32 Vt. 68; *Stacey v. Vermont C. R. R.*, 27 Vt. 39; *United States v. Harris*, 1 Sumn. C. C. 21; *Webb v. Manchester & L. R. R. Co.*, 4 Mylne & Cr. 116.

1. *Lodge v. Philadelphia, W. & B. R. R. Co.*, 8 Phila. (Pa.) 345.

2. *Hays v. Risher*, 32 Pa. St. 169; *Richards v. Scarborough P. M. Co.*, 23 L. J. Ch. N. S. 110; s. c., 23 Eng. L. & Eq. 343.

3. *Southern P. R. R. Co. v. Raymond*, 53 Cal. 223; *Smith v. Chicago & W. I. Co.*, 105 Ill. 511; *Tracy v. Elizabethtown L. & B. S. R. R. Co.*, 80 Ky. 259; s. c., 14 Am. & Eng. R. R. Cas. 407; *In re New York C. & H. R. R. R. Co. v. Metropolitan G. L. Co.*, 5 Hun (N. Y.), 201; s. c., 63 N. Y.

326; *Brown v. Peterson*, 40 Pa. St. 373; *Horne & R. L. R. R. Co.*, 37 Pa. St. 333.

4. *State v. Hudson Ter. R. R. Co.*, 46 N. J. L. (17 Vr.) 289; s. c., 20 Am. & Eng. R. R. Cas. 294.

5. *Johnson v. Chicago M. & St. P. R. R. Co.*, 58 Iowa, 537.

6. *Johnson v. Chicago, M. & St. P. R. R. Co.*, 58 Iowa, 537; *In re New York C. R. R. Co.*, 66 N. Y. 407; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137; *Wisconsin C. R. R. Co. v. Cornell University*, 52 Wis. 537.

7. *State v. Hudson Ter. R. R. Co.*, 46 N. J. L. (7 Vr.) 289; s. c., 20 Am. & Eng. R. R. Cas. 294.

8. *Embury v. Connor*, 3 N. Y. 511; s. c., 53 Am. Dec. 525; *Matter of Albany St.*, 11 Wend. (N. Y.) 149.

English Doctrine. — By the English statutes wherever a railroad corporation proposes taking the part of any dwelling-house, manufactory, etc., the owner can by serving the notice upon the company compel it to take the whole. Many questions arise as to what will be considered a part of said dwelling-house or manufactory: see *Reg. v. London & S. W. R. R. Co.*, 12 Ad. & El. N. S. 775; s. c., 64 Eng. C. L. 774; *Reg. v. London & G. Ry. Co.*, 3 Ad. & El. (N. S.) 166; s. c., 43 Eng. C. L. 681; *Fergusson v. London, B. & S. C. R. R. Co.*, 3 DeG. J. & S. 653; s. c., 68 Eng. Ch. 652; *Pulling v. London C. & D. Ry. Co.*, 33 Beav. 644; s. c., 10 Jur. N. S. 665; 10 L. T. 393, 740; 12 W. R. 770, 969; 3 DeG. J. & S. 661; *Rex v. Wycombe Ry. Co.*, 28 Beav. 104; *Cole v. West*

9. *Exemptions.* — It is within the discretion of the Legislature in conferring the power to appropriate property for any public use, to make such exemptions as it shall deem fit. In some States it has been provided that the improvement shall not take in dwelling-houses;¹ but the exemption must be asked in good faith. It will not be granted where the building has been put upon the line of a railway, and occupied wholly for the purpose of enabling the owner to claim the exemption.²

VI. What amounts to taking or injuriously affecting Property. —

1. *In General.* — To constitute a taking of property within the meaning of the constitutional provision requiring compensation to be made therefor, it is not necessary that there should have been any actual dissiezor of the owner: it is a "taking" to invade his property by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed upon it so as to effectually destroy or impair its usefulness.³ Any gross burden or additional expense placed upon property for the benefit of the public is within the constitutional inhibition, where it is

London & C. P. Ry. Co., 27 Beav. 242; s. c., 28 L. J. N. S. 767; 5 Jur. N. S. 1114; Reddin v. Metropolitan B. of W., 4 DeG. F. & J. 532; s. c., 31 L. J. Ch. 660; Stone v. Commercial Ry. Co., 9 Sim. 621; s. c., 1 Eng. Ry. Cas. 375.

1. Wells v. Somerset & K. R. R. Co., 47 Me. 345; State v. Troth, 34 N. J. L. (5 Vr.) 377; McConiha v. Guthrie, 21 W. Va. 134; s. c., 17 Am. & Eng. R. R. Cas. 1.

Exemption of Dwelling-Houses. — It has been held that the exemption of a dwelling-house would not include a garden and orchard or the curtilage. Wells v. Somerset & K. R. R. Co., 47 Me. 345. But a billiard-room attached to a hotel is within the exemption. State v. Troth, 36 N. J. L. (7 Vr.) 422.

Under the English Statutes the exemption is to be construed liberally in favor of the owner of the property. Reddin v. Metropolitan B. of W., 31 L. J. Ch. 660. The word "house" includes court-yard, office, out-houses (whether finished or not), garden, and all that is necessary to the enjoyment of the house, if within the same ambit or circuit, whether attached to the main building or not, and though purchased subsequently to the erection of the main building. McConiha v. Guthrie, 21 W. Va. 134; s. c., 17 Am. & Eng. R. R. Cas. 1; Cole v. West London & C. P. R. R. Co., 27 Beav. 242; Reg. v. Wycombe R. R. Co., 59 L. J. Ch. 462; s. c., L. R. 2 Q. B. 310; Marston v. London, C. & D. R. R. Co., 37 L. J. Ch. 483; Alexander v. West End & C. P. R. R. Co., 31 L. J. Ch. 500; Governors, etc., v. Charing Cross, R. R. Co., 30 L. J. Ch. 395; Dakin v. London, etc., R. R.

Co., 26 L. J. Ch. 734; Grosvenor v. Hampstead, J. R. R. Co., 26 L. J. Ch. 731.

2. Morris v. Schallsville B. R. R. Co., 4 Bush (Ky.) 448; Carris v. Commissioners of W., 2 Hill (N. Y.) 443.

3. Dodson v. Cincinnati, 34 Ohio St. 276; East Pennsylvania Ry. Co. v. Schollenberger, 54 Pa. St. 144; Pumpelly v. Green Bay Co., 80 U. S. (13 Wall.) 166; bk. 21 L. ed. 557.

A Mining Company engaged in Mining in the Sierra Nevada Mountains, in the course of its operations, washed away a large amount of debris, which was carried into the head waters of the Yuba River, whence it was carried on by the ordinary current and by floods into the lower portion of that stream, and into the Feather and Sacramento Rivers. The quantity of debris was so great that it filled the natural channel of the Yuba above the level of the banks and surrounding country, and buried with sand and gravel the farms of the riparian owners, on either side of the Yuba River, over a space two miles wide and twelve miles long. It was held, that a statute of the State of California expressly authorizing the acts which resulted in the damage, would be in conflict with the Fourteenth Amendment of the United States Constitution, — the Yuba, Feather, and Sacramento Rivers having been navigable, — and also in conflict with similar provisions of the State Constitution, and that such legislation would either deprive the riparian owners of their property without due process of law, or take or damage their property for alleged public use without compensation. Woodruff v. North Broomfield Gravel Mining Co., 81 Fed. Rep. 753.

not imposed as a tax applicable to the property of all the citizens of the State.¹ But where the right taken is held by a mere licensee, and is subject to defeasance by the State at any time, there is no taking within the meaning of the Constitution.²

2. *Entry for Permanent Occupation.*—Entry upon land with the intention of permanently occupying, is a taking. There must, however, be an intention to permanently occupy the land: mere temporary user is not sufficient.³

1. *Requiring weighing Coal at Mines*—**A "Taking of Private Property for Public Use."**—An Illinois Act provided for the weighing of coal at the mines. It required the owners and operators of mines to provide scales, and weigh all coal taken out, and to make such weight the basis of wages paid to miners. It also provided that a record of all coal weighed at the mines should be kept, such record to be open to public inspection. A penalty of fine and imprisonment was prescribed to be enforced against any owner or operator failing to comply with the provisions of the Act. It was *held* that the requirement that a record be kept for public information is a taking of property for public uses, and invalid unless compensation be made therefor. *Millett v. People*, 117 Ill. 294; s. c., 57 Am. Rep. 869; 15 Am. & Eng. Corp. Cas. 1.

Fishway in Dam.—A railway company to which the absolute sale of a State dam on a navigable river was made, held a charter from the State, in which there was no power of change or revocation reserved. Subsequently the Legislature passed an Act requiring every individual or corporation, having or maintaining any dam on the river, to construct or maintain a sluice, or other device, for the free passage of fish. The railroad company assigned its interest in the dam to a canal company formed after the passage of the Fish Act. On an indictment against the canal company for a failure to comply with the Act, it was *held*, that the power to cause the changes to be made in the dam was within the right of eminent domain; but that the Act was unconstitutional in so far as it imposed the burden of expenses of the changes upon the canal company, because it authorized the "taking of private property for public use without compensation." *Com. v. Pennsylvania Canal Co.*, 66 Pa. St. 41; s. c., 5 Am. Rep. 329.

2. *Rights of Lessees.*—Pursuant to authority conferred by law, the board of public works of a State leased the surplus water of her canals, but reserved the right to resume the use of it, when it should be needed for the purpose of navigation. A statute was subsequently passed whereby one of the canals within certain limits was

granted to, and appropriated by, a city for a highway. *Held*, that the lessee was not thereby deprived of his property without due process of law, as the State, so far from assuming an obligation to maintain the canals to supply water-power, had the right, of which every lessee was bound to take notice, to discontinue them, whenever the Legislature deemed expedient. *Fox v. Cincinnati*, 104 U. S. (14 Otto) 783; bk. 26 L. ed. 928.

3. *Mere Selection of Land and Institution of Proceedings to ascertain Value is not a Taking*, so that a payment or securing of compensation must precede the same. *United States v. Oregon Ry. & Nav. Co.*, 9 Sawy. C. C. 61; 16 Fed. Rep. 524; s. c., 14 Am. & Eng. R. R. Cas. 23. *Compare Marion & M. V. R. R. Co. v. Ward*, 9 Ind. 123, where it was *held* that the right of the owner to obtain an easement of damages is perfected by the location of the road without any other act of appropriation on the part of the company.

A corporation having under the Act of Parliament right to take land for certain public works, gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land for the purpose of surveys, etc.; and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons and rails and other implements on the land, and there left them, but did not commence the work, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the wagons, etc., to remain on the land, and from taking possession of the land until they had complied with the provisions of the Land Clauses consolidation Act. *Held*, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the Act, and that the bill was improperly filed. *Standish v. Mayor, etc., of Liverpool*, 1 Drew, 1; s. c., 15 Eng. L. & Eq. 255.

3. *Seizure for Military Purposes.* — Where the government takes the use of property for the purpose of facilitating military operations, it is under an implied contract to compensate the owner.¹

4. *Interruption of Use.* — It is not necessary that property should be taken in a literal sense to entitle the owner to compensation: a serious interruption to the common and necessary use of property may amount to a taking within the meaning of the constitutional provision, and entitle the owner to compensation.²

5. *Injuriously affecting Property.* — *a. Incidental Injuries.* — To entitle the owner to recover, the injury to his property must be of a special direct nature, affecting the owner only, and not differing, only in degree, from those suffered by the rest of the community.³ It must also, in the absence of the statute authorizing the payment of damages for other injuries, be an injury for which, if committed without the authority of the sovereign power, would

When Land "taken." — But it has been held that land is not "taken for public use," in the sense of the word "taken" as used in the Constitution, until the last act is done which is required to transfer the title or subject it to servitude. *Fox v. Western P. R. R. Co.*, 31 Cal. 538.

1. *United States v. Russell*, 80 U. S. (13 Wall.) 623; bk. 20 L. ed. 474.

The Owner of a Hay-Press offered to sell it to a Quartermaster, and the officer subsequently put the machine to use in the government service. It was held that it must be considered as property taken for public use, and that the owner might recover its reasonable value, and could not be required to take back the machine and accept compensation for its use. *Peck v. United States*, 14 Ct. of Cl. 84.

Destruction under Public Necessity. — **Public "taking."** — In *Gilbert v. United States*, 1 Ct. of Cl. 28, it was laid down that in respect to the obligation to make compensation, there is no difference between the taking of private property to be used for public purposes, and the taking of it to be destroyed under a public necessity, e. g., where buildings and stores belonging to an individual are necessarily burned by army officers in carrying on hostilities in time of war.

2. *Pumpelly v. Green Bay Co.*, 80 U. S. (13 Wall.) 166; bk. 20 L. ed. 557; *Crocker v. New York*, 15 Rep. 135.

Interference with an Easement. — In *Eagle v. Charing Cross Ry. Co.*, L. R. 2 C. P. 638, it was held that an interference of an easement, in that case a diminution of light in plaintiff's premises, caused by the erection of a railway and the works connected therewith, was a taking within the meaning of the Lands Clauses Consolidation Act.

3. *City of Pekin v. Winkel*, 77 Ill. 57;

Stone v. Fairbury, P. & N. W. R. R. Co., 68 Ill. 396; *City of Pekin v. Brereton*, 67 Ill. 479; s. c., 16 Am. Rep. 629; *Wesson v. Washburn Iron Co.* 95 Mass. (13 Allen) 95; *Blood v. Nashua & L. R. R. Corp.*, 68 Mass. (2 Gray) 140; s. c., 61 Am. Dec. 444; *Hoffman v. Hoffman*, 26 N. J. L. (2 Dutch.) 174; *Baron v. Mayor of Baltimore*, 2 Am. Jur. 103; *Beckett v. Midland Ry. Co.*, L. R. 3 C. P. 82; s. c., 17 L. T. N. S. 499; 37 L. J. C. P. 11; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 3 Ex. 306; s. c., L. R. 5 Ex. 231; 5 H. L. Cas. Eng. & Ir. App. 418; *Reg. v. Metropolitan Board of Works*, L. R. 4 Q. B. 358; *Chamberlain v. West End of London & C. P. Ry. Co.*, 2 Best & S. 605; s. c., 110 Eng. C. L. 605; *Wood v. Stourbridge Ry. Co.*, 16 C. B. N. S. 236; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. 243, 256.

English Cases under "Land Clauses Consolidation Act" in Point. — In *Delaplane v. Chicago & N. W. R. Co.*, 42 Wis. 214, it was insisted, in argument, that a leading case arising under the Lands Clauses Consolidation Act was not authority for the construction of the Constitution of Wisconsin, for the reason that the Act allows damages when lands are "injuriously affected." To this the Supreme Court replied, "But the test applied to determine the proper meaning of the words 'injuriously affected' as giving a right to compensation was, whether the act done in carrying out the works in question was an act which would have given a right of action if the works had not been authorized by an Act of Parliament. In other words, if the act affecting the land had been done by an individual he would be liable for the damages. This remark shows that the decisions made under that Act are in point."

have given a right of action against the corporation or individual.¹ Compensation can be claimed for any personal inconvenience or injury not connected with real property.²

b. Premises not taken. — Owners of property adjoining a railroad are not usually entitled to damages for injury done to their property by the usual and necessary operation of the railroad. All damage done in this way is considered consequential, and is *damnum absque injuria*.³ In some of the States, however, consequential damages are provided for by the constitution or by the statute. In such cases the owner of the property injured, though not taken, is entitled to compensation.⁴

c. By granting Rival Franchises. — A franchise granted by the Legislature which is not exclusive in its terms may be injured or affected by another franchise, granted by the Legislature, without

1. *Eaton v. Boston, C. & M. R. R. Co.*, 51 N. H. 519; s. c., 12 Am. Rep. 147; *McCarthy v. Metropolitan Board of Works*, L. R. 8 C. P. 209; s. c., L. R. 7 H. L. Cas. 243; *Beckett v. Midland Ry. Co.*, L. R. 3 C. P. 82; s. c., 17 L. T. N. S. 499; 37 L. J. C. P. 11; *Hall v. Mayor of Bristol*, L. R. 2 C. P. 322; *Hammersmith & C. Ry. Co. v. Brand*, L. R. 4 H. L. Cas. Eng. & Ir. App. 171; *Rickett v. Metropolitan Ry. Co.*, 5 Best & S. 156; s. c., 34 L. J. Q. B. 257; L. R. 2 H. L. Cas. 187; *Chamberlain v. West End of London & C. P. Ry. Co.*, 2 Best & S. 605; s. c., 110 Eng. C. L. 605; *Cameron v. Charing Cross Ry. Co.*, 16 C. B. N. S. 430; s. c., 111 Eng. C. L. 430; *In re Penny & S. E. Ry. Co.*, 7 El. & Bl. 660; s. c., 90 Eng. C. L. 660; *Glover v. North Staffordshire Ry.*, 16 Ad. & El. N. S. 923; s. c., 71 Eng. C. L. 923; *Caledonian Ry. Co. v. Ogilvy*, MacQueen's Sc. App. 229.

"Act injuriously affecting." — What amounts to. — In *McCarthy v. Metropolitan Board of Works*, L. R. 8 C. P. 209, Bramwell, C. B., said, "The act therefore injuriously affecting must be that which would be wrongful but for the statute, but I agree that it need not be that for which an action would lie: it is enough that it would be indictable, or might be prevented by injunction."

2. *Beckett v. Midland Ry. Co.*, L. R. 3 C. P. 82; s. c., 17 L. T. N. S. 499; 37 L. J. C. P. 11; 16 W. R. 221; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. Eng. & Ir. App. 256; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 291; *Bird v. Great Eastern R. R. Co.*, 34 L. J. C. P. 366; *Ricketts v. Metropolitan Ry. Co.*, 34 L. J. Q. B. 257.

3. *Colorado C. R. R. Co. v. Mollandin*, 4 Colo. 154; *Hyde Park v. Dunham*, 85 Ill. 569; *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ill. 588; *Stetson v. Chicago & E.*

R. R. Co., 75 Ill. 74; *Page v. Chicago, M., & St. P. R. R. Co.*, 70 Ill. 324; *Nichols v. Somerset & K. R. R. Co.*, 43 Me. 356; *Whittier v. Portland & K. R. R. Co.*, 38 Me. 26; *Rogers v. Kennebec & P. R. R. Co.*, 35 Me. 319; *Rochette v. Chicago, M., & St. P. R. R. Co.*, 32 Minn. 201; *Shaubut v. St. Paul & S. C. R. R. Co.*, 21 Minn. 502, s. c., 17 Am. & Eng. R. R. Cas. 192; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545; s. c., 58 N. H. 108; *Eaton v. Boston, C., & M. R. R. Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147; *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. (2 Stockt.) 352; *Selden v. Delaware & H. C. Co.*, 29 N. Y. 634; *Bellinger v. New York C. R. R. Co.*, 23 N. Y. 42; *Arnold v. Hudson R. R. R. Co.*, 49 Barb. (N. Y.) 108; *Struthers v. Dunkirk, W. & P. R. R. Co.*, 87 Pa. St. 282; *Hornstein v. Atlantic & G. W. R. R. Co.*, 51 Pa. St. 87, *Case of Philadelphia & T. R. R. Co.*, 6 Whart. (Pa.) 25; *Richardson v. Vermont C. R. R. Co.*, 25 Vt. 465; s. c., 60 Am. Dec. 283; *Alexander v. City of Milwaukee*, 16 Wis. 247.

4. *Chicago & W. I. Ry. v. Ayres*, 106 Ill. 511; *Chicago v. Union B. Assoc.*, 102 Ill. 379; *Rigney v. Chicago*, 102 Ill. 64; *Pittsburg, Ft. W., & C. R. R. v. Reich*, 101 Ill. 157; *Chicago, M. & St. P. R. v. Hall*, 90 Ill. 42; *Brown v. Providence, W. & B. R. R. Co.*, 71 Mass. (5 Gray) 35; *Dodge v. Essex*, 44 Mass. (3 Metc.) 380; *Republican Valley R. Co. v. Fellers*, 16 Neb. 169; s. c., 20 Am. & Eng. R. R. Cas. 256; *Gottschalk v. Chicago, B., & Q. R. R.*, 14 Neb. 550; *Dearborn v. Boston, C., & M. R. R. Co.*, 24 N. H. 179; *Clark v. Boston, C. & M. R. R. Co.*, 24 N. H. 114; *Watson v. Pittsburg & C. R. R. Co.*, 37 Pa. St. 469; *Schuylkill Navigation Co. v. Thoburn*, 7 Serg. & R. (Pa.) 411; *Smith v. Gould*, 61 Wis. 31; s. c., 5 Am. & Eng. Corp. Cas. 472.

any compensation being made.¹ But where the grant has been exclusive in its terms compensation must be made.²

d. Injuries to Business.—In some cases it has been held that loss of profits, business, and good-will are not grounds for the recovery of damages.³ But damages therefor have been allowed, where the business was in some way connected with the land upon which it was carried on.⁴ And in a number of cases it has been held that evidence is admissible to show the effect of the construction of the railroad upon the business, as an aid in the assessment of damages.⁵

e. Smoke and Dust.—Where the construction of a public improvement has, by loading the atmosphere with smoke, gases, ashes, cinders, or other foreign substances, the effect of impairing the natural easement which every land-owner has in the passage of pure air, this is considered to be an injury affecting his property, for which he can recover compensation.⁶

1. *Dyer v. Tuscaloosa B. Co.*, 2 Port. (Ala.) 296; s. c., 25 Am. Dec. 655; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 454; s. c., 44 Am. Dec. 954; *Troy & B. R. R. Co. v. North Turnpike Co.*, 16 Barb. (N. Y.) 100; *Matter of Hamilton Ave.*, 14 Barb. (N. Y.) 405; *Mohawk B. Co. v. Utica & S. R. R. Co.*, 6 Paige Ch. (N. Y.) 554; *Red River Bridge Co. v. Mayor, etc., of Clarksville*, 1 Sneed (Tenn.), 176; s. c., 60 Am. Dec. 143; *White River Turnpike v. Vermont C. R. R. Co.*, 21 Vt. 590; *Charles River Bridge Co. v. Warren Bridge Co.*, 24 Mass. (7 Pick.) 344; *Hopkins v. Great Northern Ry. Co.*, L. R. 2 Q. B. Div. 224; s. c., 20 Moak's Eng. Rep. 295.

2. *Piscataqua B. Co. v. New Hampshire B. Co.*, 7 N. H. 35; *Mason v. Harper's Ferry B. Co.*, 17 W. Va. 396; *Reg. v. Cambrian R. R. Co.*, L. R. 6 Q. B. 422.

3. *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; *Cobb v. Boston*, 109 Mass. 438; *Edmands v. Boston*, 108 Mass. 535; *Whitman v. Boston & M. R. R.*, 85 Mass. (3 Allen) 133; *Eaton v. Boston, C., & M. R. R.*, 51 N. H. 504; s. c., 12 Am. Rep. 147; *In re Mount Washington Road*, 35 N. H. 134; *Union V. & J. R. R. v. Akin*, 53 Barb. (N. Y.) 457; *Canandaigua & N. F. R. R. v. Payne*, 16 Barb. (N. Y.) 273; *Eddings v. Seabrook*, 12 Rich. (S. C.) L. 504; *Rickett v. Metropolitan Ry. Co.*, 5 Best & S. 149; s. c., 117 Eng. C. L. 149; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. E. & I. App. 256; *Reg. v. Metropolitan Board of Works*, L. R. 4 Q. B. 358; *Queen v. Vaughan*, L. R. 4 Q. B. 190.

4. *South Carolina R. R. Co. v. Steiner*, 44 Ga. 559; *Chamberlain v. West End of London & C. P. Ry. Co.*, 2 Best & S. 605;

s. c., 110 Eng. C. L. 605; *Wood v. Stourbridge Ry. Co.*, 16 C. B. N. S. 222; *Senior v. Metropolitan Ry. Co.*, 2 Hurl. & C. 258.

Damage to Business carried on on Land condemned or affected.—In *Cameron v. Charing Cross Ry. Co.*, 16 C. B. N. S. 430, 447, the court said, "Damage to a man's interest in land necessarily includes damage to the business which he carries on upon the land, by diverting it from its accustomed channel. Such an interest is not merely personal, it is an interest which a man enjoys in respect of land; a reasonable expectation of profit is commonly called 'good-will,' and is a 'marketable thing.' . . . Then, if an action would have lain for this injury against a person doing it without the sanction of an Act of Parliament, the party injured is entitled to claim compensation for it under the Lands Clauses Consolidation Act."

5. *Lafayette, M., & B. R. R. v. Murdock*, 68 Ind. 137; *St. Louis V. & T. H. R. R. v. Capps*, 67 Ill. 607; s. c., 72 Ill. 188; *Edmands v. Boston*, 108 Mass. 535; *Boston & W. R. R. v. Old Colony R. R.*, 67 Mass. (12 Cush.) 605; s. c., 85 Mass. (3 Allen) 142; *Sherwood v. St. Paul & C. R. R. Co.*, 21 Minn. 127; *Western Pennsylvania R. R. v. Hill*, 56 Pa. St. 460; *Driver v. Western Union R. R.*, 32 Wis. 569.

Good-will of Business.—In *Edmands v. Boston*, 108 Mass. 535, 549, the court say, "Good-will of the business of a lessee or other owner is not property for which damages can be included, and is to be considered only so far as it tends to enhance the market value of the estate that is injured," thus admitting that such evidence should properly be considered where it does tend to enhance the market value.

6. *Jeffersonville, M. & I. R. R. Co. v. Esterle*, 13 Bush (Ky.) 667; *Bangor & P.*

f. Noise and Vibration. — It has been held that the vibration and jarring of property by the construction of a railroad are proper subjects of compensation.¹ Inconvenience and annoyance occasioned by noise and confusion of passing trains has also been allowed an injury for which compensation may be claimed.² But anticipated inconvenience, arising from noise in the highway, caused by people brought there by means of the improvement, will not be a ground for damages.³

g. Obstruction of Light. — Any improvement which impairs the easement of light, whether by reason of the structure itself or either the passage of cars or other vehicles along it, injuriously affects property, and compensation must be made therefor.⁴

h. Injury to Residue of Tract. — Where a part of a tract of land of a city or village lot is taken, the owner is entitled to recover for the injuries inflicted upon the residue of the property.⁵ But

R. R. Co. v. McComb, 60 Me. 290; *Lahr v. Metropolitan E. Ry. Co.*, 104 N. Y. 268, 295; *Drucker v. Manhattan R. R. Co.*, 106 N. Y. 157; s. c., 60 Am. Rep. 437; *Caro v. Metropolitan E. R. R. Co.*, 46 N. Y. Super. Ct. (14 J. & S.) 138; *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. St. 325; *Brand v. Hammersmith & C. R. R.*, L. R. 2 Q. B. 223; *East & West India Docks, etc., v. Gattke*, 3 Mac. & G. 155. *Contra*, *Mix v. Lafayette B. & M. R. R. Co.*, 67 Ill. 319; *Dimmick v. Council Bluffs & St. L. R. Co.*, 62 Iowa, 409; s. c., 10 Am. & Eng. R. R. Cas. 105; *Atchison & N. R. R. Co. v. Garside*, 10 Kans. 552; *Cogswell v. New York, N. H. & H. R. R. Co.*, 48 N. Y. Super. Ct. (16 J. & S.) 31; *Houston & T. C. R. R. Co. v. Odum*, 53 Tex. 343; *City of Glasgow U. Ry. Co. v. Hunter*, L. R. 2 H. L. Sc. App. 78.

Noise, Smoke, Soot, etc. — In *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; s. c., 4 Am. Rep. 509, the court held that the effects of noise, smoke, soot, and the like are not distinct elements of damages in estimating the depreciation in value of the entire tract; these causes may be considered, in so far as the annoyance and inconvenience arising therefrom are increased by reason of, and as incident to, the taking of a part of the land. *Dimmick v. Council Bluffs & St. L. R. Co.*, 62 Iowa, 409; s. c., 10 Am. & Eng. R. R. Cas. 105; *Bowen v. Atlantic & F. B. V. R. Co.*, 17 S. C. 574; s. c., 14 Am. & Eng. R. R. Cas. 332.

1. *Henderson v. New York C. R. R. Co.*, 17 Hun (N. Y.), 344; *In re New York C. & H. R. R. R. Co.*, 15 Hun (N. Y.), 63; *Cohen v. City of Cleveland*, 43 Ohio St. 190; s. c., 9 Am. & Eng. Corp. Cas. 405; *Croft v. London & N. W. Ry. Co.*, 3 Best & S. 436; s. c., 113 Eng. C. L. 435.

Vibration — Actual Injury — English Doctrine. — But in *Penny v. South E. Ry. Co.*,

7 El. & Bl. 660; s. c., 90 Eng. C. L. 658, the court held, under the English statute, that actual injury to the premises from the vibration caused by ballast-trains on the railway during the construction of the works is a ground for compensation; but Lord Campbell indicated that injury from that cause, after the construction had been completed, is not.

2. *Little Rock, M. R. & T. Ry. v. Allen*, 41 Ark. 431; *Mix v. Lafayette B. & M. Ry. Co.*, 67 Ill. 319; *Wilson v. Des Moines, O. & S. R. Co.*, 67 Iowa, 509; *Bangor & P. R. R. Co. v. McComb*, 60 Me. 290; *County of Blue Earth v. St. Paul & S. C. R. R. Co.*, 28 Minn. 503; *First Baptist Church of S. v. Schenectady & T. R. R. Co.*, 5 Barb. (N. Y.) 79; *White v. Charlotte & S. C. R. R. Co.*, 6 Rich. (S. C.) L. 47; *Gulf, C. & S. F. R. R. v. Eddins*, 60 Tex. 656. *Contra*, *Republican V. R. R. Co. v. Linn*, 15 Neb. 234; s. c., 14 Am. & Eng. R. R. Cas. 198; *Hammersmith & C. Ry. Co. v. Brand*, L. R. 4 H. L. Cas. 176; s. c., 38 L. J. Q. B. 265; 21 L. T. N. S. 238; *City of Glasgow U. Ry. Co. v. Hunter*, L. R. 2 H. L. Sc. App. 78.

3. *St. Louis, V. & T. H. R. R. Co. v. Haller*, 82 Ill. 208; *First Parish v. Middlesex*, 73 Mass. (7 Gray) 106.

4. *Lahr v. Metropolitan E. Ry. Co.*, 104 N. Y. 268; *Drucker v. Manhattan Ry. Co.*, 106 N. Y. 157; s. c., 60 Am. Rep. 437; *Cohen v. City of Cleveland*, 43 Ohio St. 190; s. c., 9 Am. & Eng. Corp. Cas. 405.

Destruction of Privacy of Premises. — The Court of King's Bench holds that mere destruction of the privacy of premises, which might be overlooked by a railway, was not such an injury as entitled the owner to compensation under the English statutes. *In re Penny*, 7 El. & Bl. 660.

5. **Injury to Residue of Tract.** — *St. Louis, A. & T. R. R. Co. v. Anderson*, 39 Ark.

he can only recover for those injuries which are direct in their nature, and can in no case recover for those which he shares in common with the rest of the public ;¹ and his recovery is limited to cases where the improvement, if properly constructed and managed, will, with reasonable certainty, injure his property.² Thus in the case of farms, the owners can recover for the inconvenience caused by dividing the farm into parts,³ or from cuts, ditches, and embankments ;⁴ but the adjoining land to which the injury has been done must have been used in connection with the part taken. Thus, when a portion of a village property is taken the owner is not entitled to compensation for injuries affected upon adjacent farm land.⁵

i. Change of Grade. — Injuries resulting from the change of the grade of a street, made in accordance with the statute, do not afford a ground for the recovery of damages against municipal corporations, in the absence of a statute rendering such corporation liable therefor.⁶ But under the provisions of the constitu-

- 167 ; s. c., 17 Am. & Eng. R. R. Cas. 97 ; Selma, R. & D. R. R. Co. v. Redwine, 51 Ga. 470 ; Keithsburg & E. R. R. v. Henry, 79 Ill. 290 ; Peoria, A. & D. R. R. Co. v. Sawyer, 71 Ill. 361 ; Mix v. Lafayette, B. & M. R. R. Co., 67 Ill. 319 ; Tonica & P. R. R. Co. v. Unsicker, 22 Ill. 221 ; Baltimore, P. & C. R. R. v. Lansing, 52 Ind. 229 ; Montmorency G. Road Co. v. Stockton, 43 Ind. 328 ; Grand Rapids & I. R. R. Co. v. Horn, 41 Ind. 479 ; White W. V. R. Co. v. McClure, 29 Ind. 536 ; Kucheman v. C. C. & D. R. R. Co., 46 Iowa, 366 ; Reisner v. Atchison, U. D. & R. Co., 27 Kans. 382 ; s. c., 10 Am. & Eng. R. R. Cas. 155 ; Kansas C. E. & S. R. R. v. Merrill, 25 Kans. 421 ; s. c., 2 Am. & Eng. R. R. Cas. 485 ; Atchison & N. R. R. v. Gough, 29 Kans. 94 ; s. c., 10 Am. & Eng. R. R. Cas. 151 ; Richmond & L. T. Road Co. v. Rogers, 1 Duv. (Ky.) 135 ; Walker v. Old Colony & N. R. Co., 103 Mass. 10 ; s. c., 4 Am. Rep. 509 ; First Church in Boston v. Boston, 80 Mass. (14 Gray) 214 ; Commonwealth v. Coombs, 2 Mass. 489 ; Scott v. St. Paul & C. R. R., 21 Minn. 322 ; Simmons v. St. Paul & C. R. R. Co., 18 Minn. 184 ; Lake Superior & M. R. R. Co. v. Greve, 17 Minn. 322 ; Winona & St. P. R. R. Co. v. Waldron, 11 Minn. 515 ; Winona & St. P. R. R. v. Denman, 10 Minn. 267 ; Wilmes v. Minneapolis & N. R. R., 29 Minn. 242 ; s. c., 10 Am. & Eng. R. R. Cas. 161 ; Board of County Comm'rs of Blue Earth Co. v. St. Paul & S. C. R. R., 28 Minn. 503 ; s. c., 10 Am. & Eng. R. R. Cas. 209 ; Wyandotte, K. C. & N. W. R. R. Co. v. Waldo, 70 Mo. 629 ; Pacific R. R. v. Chrystal, 25 Mo. 544 ; Missouri, P. R. R. Co. v. Hays, 15 Neb. 224 ; s. c., 14 Am. & Eng. R. R. Cas. 177 ; Fremont, E. & M. V. R. R. v. Lamb, 11 Neb. 592 ; s. c., 5 Am. & Eng. R. R. Cas. 367 ; *In re* Mount Washington, 35 N. H. 134 ; Dearborn v. Boston C. & M. R. R. Co., 24 N. H. (4 Fost.) 179 ; Virginia & T. R. R. v. Henry, 8 Nev. 165 ; Raleigh & A. A. L. R. R. Co. v. Wicker, 74 N. C. 220 ; Cleveland & P. R. R. Co. v. Ball, 5 Ohio St. 568 ; East Pennsylvania R. R. v. Hiester, 40 Pa. St. 53 ; Watson v. Pittsburg & C. R. R., 37 Pa. St. 469 ; White v. Charlotte & S. C. R. R. Co., 6 Rich. (S. C.) 47 ; Baltimore & O. R. R. v. Pittsburg, W. & K. R. R., 17 W. Va. 812 ; s. c., 10 Am. & Eng. R. R. Cas. 444 ; Chapman v. Oshkosh & M. R. R. Co., 33 Wis. 629 ; Parks v. Wisconsin C. R. R., 33 Wis. 413 ; Robbins v. Milwaukee & H. R. R., 6 Wis. 636.
1. Keithsburg & E. R. R. Co. v. Henry, 79 Ill. 290 ; Presbrey v. Old Colony & N. R. R., 103 Mass. 1.
2. Fremont, E. & M. V. R. R. Co. v. Whalen, 11 Neb. 592 ; s. c., 5 Am. & Eng. R. R. Cas. 364.
3. McReynolds v. Burlington & O. Ry. Co., 106 Ill. 152 ; s. c., 14 Am. & Eng. R. R. Cas. 172 ; Peoria, A. & D. R. R. Co. v. Sawyer, 71 Ill. 566 ; Tucker v. Massachusetts R. R. Co., 118 Mass. 546 ; s. c., 9 Am. Ry. Rep. 279.
4. St. Louis A. & T. R. R. Co. v. Anderson, 39 Ark. 167 ; Atchison, T. & S. F. R. R. Co. v. Blackshire, 10 Kans. 477 ; Missouri P. R. R. Co. v. Hays, 15 Neb. 224 ; s. c., 14 Am. & Eng. R. R. Cas. 177 ; Pittsburgh V. & C. R. R. Co. v. Rose, 74 Pa. St. 362 ; Wilmington, etc., R. R. Co. v. Stauffer, 60 Pa. St. 374.
5. Haines v. St. Louis, DesM. & N. R. R., 65 Iowa, 216 ; s. c., 20 Am. & Eng. R. R. Cas. 260.
6. Change of Grade of Street — Injuries resulting from. — Simmons v. Camden, 26

tions and statutes of many States, municipal corporations are bound to respond in damages.¹ If in making changes in the

Ark. 276; s. c., 7 Am. Rep. 620; Shaw v. Crocker, 42 Cal. 435; Fellowes v. New Haven, 44 Conn. 240; s. c., 26 Am. Rep. 447; Burritt v. New Haven, 42 Conn. 174; Skinner v. Bridge Co., 29 Conn. 523; Clark v. Saybrook, 21 Conn. 313; Bradley v. New York & N. H. R. R. Co., 21 Conn. 294; Hooker v. New Haven & N. Co., 14 Conn. 146; s. c., 36 Am. Dec. 477; Dorman v. Jacksonville, 13 Fla. 538; s. c., 7 Am. Dec. 523; Fuller v. Atlanta, 66 Ga. 80; Mitchell v. Rome, 49 Ga. 29; Roll v. Augusta, 34 Ga. 326; Rome v. Omberg, 28 Ga. 46; s. c., 73 Am. Dec. 748; Markham v. Mayor, etc., 23 Ga. 402; Quincy v. Jones, 76 Ill. 231; s. c., 20 Am. Rep. 243; Nevins v. Peoria, 41 Ill. 502; Murphy v. Chicago, 29 Ill. 279; Roberts v. Chicago, 26 Ill. 249; Terre Haute v. Turner, 36 Ind. 522; City of Delphi v. Evans, 36 Ind. 90; s. c., 10 Am. Rep. 12; Lafayette v. Fowler, 34 Ind. 140; Vincennes v. Richards, 23 Ind. 381; Lafayette v. Bush, 19 Ind. 326; Macy v. Indianapolis, 17 Ind. 267; Lafayette v. Spencer, 14 Ind. 399; Snyder v. Rockport, 6 Ind. 237; Hendershott v. Ottumwa, 46 Iowa, 658; s. c., 26 Am. Rep. 182; Burlington v. Gilbert, 31 Iowa, 356; s. c., 7 Am. Rep. 143; Russell v. Burlington, 30 Iowa, 262; Ellis v. Iowa City, 29 Iowa, 229; Cole v. Muscatine, 14 Iowa, 296; Cotes v. Davenport, 9 Iowa, 227; Creal v. Keokuk, 4 G. Greene (Iowa), 47; Newport & C. B. Co. v. Foote, 9 Bush (Ky.), 264; Keasy v. Louisville, 4 Dana (Ky.), 154; Reynolds v. Shreveport, 13 La. An. 426; Hovey v. Mayo, 43 Me. 322; Mason v. Kennebec & P. Co., 31 Me. 215; Burr v. Leicester, 121 Mass. 241, 242; Snow v. Provincetown, 109 Mass. 123; Griggs v. Foot, 86 Mass. (4 Allen) 195; Morse v. Stocker, 83 Mass. (1 Allen) 150, 154; Benjamin v. Wheeler, 74 Mass. (8 Gray) 409; Fernald v. Boston, 66 Mass. (12 Cush.) 574, 577; Brown v. Lowell, 49 Mass. (8 Metc.) 172; Callender v. Marsh, 18 Mass. (1 Pick.) 418; Thurston v. Hancock, 12 Mass. 220; Pontiac v. Carter, 32 Mich. 164; Alden v. Minneapolis, 24 Minn. 254; Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118; Lee v. Minneapolis, 22 Minn. 13; White v. Yazoo City, 27 Miss. 357; Thomson v. Boonville, 61 Mo. 282; Wegmann v. Jefferson, 61 Mo. 55; Imler v. Springfield, 55 Mo. 119; Schattner v. Kansas City, 53 Mo. 162; Hoffman v. St. Louis, 15 Mo. 651; Taylor v. St. Louis, 14 Mo. 20; St. Louis v. Gurno, 12 Mo. 414; Stickford v. St. Louis, 7 Mo. App. 217; Foster v. St. Louis, 4 Mo. App. 564; Schumacher v. St. Louis, 3 Mo. App. 297; Nebraska City v. Lampkin, 6 Neb. 27; Eaton v. Boston C. & M. R. R. Co., 51 N. H. 504; Trenton W. P. Co. v. Raff, 36 N. J. L. (7 Vr.) 335; Quinn v. Paterson, 27 N. J. L. (3 Dutch.) 35; Plum v. Morris Canal & B. Co., 10 N. J. Eq. (2 Stockt.) 256; People v. Green, 64 N. Y. 606; St. Peter v. Denison, 58 N. Y. 416; Mills v. Brooklyn, 32 N. Y. 489; Radcliff v. Brooklyn, 4 N. Y. 195; Waddell v. Mayor, 8 Barb. (N. Y.) 95; Benedict v. Goit, 3 Barb. (N. Y.) 459; Wilson v. Mayor of N. Y., 1 Den. (N. Y.) 595; Graves v. Otis, 2 Hill (N. Y.) 466; Matter of Furman St., 17 Wend. (N. Y.) 667; Pusey v. City of Allegheny, 98 Pa. St. 522; Carr v. Northern Liberties, 35 Pa. St. 324; s. c., 78 Am. Dec. 342; *In re* Ridge Street, 29 Pa. St. 391; O'Connor v. Pittsburgh, 18 Pa. St. 187; Commissioners v. Wood, 10 Pa. St. 93; s. c., 49 Am. Dec. 582; Charlton v. Allegheny City, 1 Grant Cas. (Pa.) 208; Green v. Reading, 9 Watts (Pa.), 382; Henry v. Pittsburgh & A. B. Co., 8 Watts & S. (Pa.) 85; Simmons v. Providence, 12 R. I. 8; Humes v. Mayor, 1 Humph. (Tenn.) 403; Tyson v. Milwaukee, 50 Wis. 78; Owens v. Milwaukee, 47 Wis. 461; Stowell v. Milwaukee, 31 Wis. 523; Church v. Milwaukee, 31 Wis. 512; Goodrich v. Milwaukee, 24 Wis. 422; Pearce v. Milwaukee, 18 Wis. 428; Weeks v. Milwaukee, 10 Wis. 242; Goodall v. Milwaukee, 5 Wis. 32; Transportation Co. v. Chicago, 99 U. S. (9 Otto) 635; bk. 25, L. ed. 336; Smith v. Washington, 61 U. S. (20 How.) 135; bk. 15, L. ed. 858; Goszler v. Georgetown, 19 U. S. (6 Wheat.) 593; bk. 5, L. ed. 339.

Ohio Doctrine.—In Ohio the courts hold that damages are recoverable for injuries resulting from a change of grade. Keating v. Cincinnati, 38 Ohio St. 141; s. c., 43 Am. Rep. 421; Akron v. Chamberlain Co., 34 Ohio St. 328; Dodson v. Cincinnati, 34 Ohio St. 276; Richards v. Cincinnati, 31 Ohio St. 506; Youngstown v. Moore, 30 Ohio St. 133; Cincinnati v. Penny, 21 Ohio St. 499; Cincinnati Street Ry. v. Cumminsville, 14 Ohio St. 523; Crawford v. Delaware, 7 Ohio St. 459; Little Miami R. Co. v. Naylor, 2 Ohio St. 235; McComb v. Akron, 15 Ohio, 479; s. c., 51 Am. Dec. 453; 18 Ohio, 229; Rhodes v. Cleveland, 10 Ohio, 159; s. c., 36 Am. Dec. 82; Hickox v. Cleveland, 8 Ohio, 543; s. c., 32 Am. Dec. 730; Goodloe v. Cincinnati, 4 Ohio, 500; s. c., 22 Am. Dec. 764; Scovil v. Geddings, 7 Ohio, pt. 2, 211.

1. Liability of Corporations under Special Statutes.—Columbus v. Woollen Mills Co., 33 Ind. 435; Cole v. Muscatine, 14 Iowa, 296; Dalzell v. Davenport, 12 Iowa, 437;

natural surface of streets the city is negligent in the construction of the new grade, so that adjacent lots are injured by reason thereof, the city is liable for the injury.¹

j. Injury to Access. — In any operation other than the change of grade, which injures the access to property, is in general to be considered as sufficient to give a claim for damages.² But the owner must sustain a private and particular injury; some particular inconvenience, or annoyance, such as is only common to the public, being insufficient.³

k. Injuries to Crops. — If growing crops are destroyed by the appropriation of the right of way and entry thereunder, or if they are injured, the owner is entitled to compensation therefor.⁴

l. Danger of Fire. — If the value of a building for the purpose of a residence, for business, or for sale, should be greatly diminished by the effect of constant liability to take fire on account of the proximity of the railroad, such danger amounts to injuriously affecting the owner's property, and he is entitled to recover damages.⁵ And the fact that the railroad company is responsible

Freeland *v.* Muscatine, 9 Iowa, 461; Burr *v.* Leicester, 121 Mass. 241; Snow *v.* Provincetown, 109 Mass. 123; Morse *v.* Stocker, 83 Mass. (1 Allen) 150; Fernald *v.* Boston, 66 Mass. (12 Cush.) 574; Flagg *v.* Worcester, 79 Mass. (13 Gray) 601; McCarthy *v.* St. Paul, 22 Minn. 527; Nebraska City *v.* Lampkin, 6 Neb. 27; Hurford *v.* Omaha, 4 Neb. 336; Harmon *v.* City of Omaha, 17 Neb. 548; s. c., 7 Am. & Eng. Corp. Cas. 474; 52 Am. Rep. 420; Pusey *v.* City of Allegheny, 98 Pa. St. 522; Crossett *v.* Janesville, 28 Wis. 420.

1. Shawneetown *v.* Mason, 82 Ill. 337; Bloomington *v.* Brokaw, 77 Ill. 194; City of Aurora *v.* Reed, 57 Ill. 30; s. c., 11 Am. Rep. 1; Ellis *v.* Iowa City, 29 Iowa, 229; Cotes *v.* Davenport, 9 Iowa, 227; Wallace *v.* Muscatine, 4 G. Greene (Iowa), 373.

2. *Injury to Access.* — Hooper *v.* Savannah & M. R. R. Co., 69 Ala. 529; s. c., 14 Am. & Eng. R. R. Cas. 259; Ford *v.* Santa Cruz R. R. Co., 59 Cal. 290; Mason *v.* Kennebec & P. R. R. Co., 31 Me. 215; Parker *v.* Boston & M. R. R. Co., 57 Mass. (3 Cush.) 107; Minnesota V. R. R. Co. *v.* Doran, 17 Minn. 188; Virginia & T. R. R. Co. *v.* Lynch, 13 Nev. 92; Cohen *v.* City of Cleveland, 43 Ohio St. 190; Brainard *v.* Missisquoi R. R. Co., 48 Vt. 107; Delaplaine *v.* Chicago & N. W. R. R. Co., 42 Wis. 214; s. c., 24 Am. Rep. 386; 15 Am. Ry. Rep. 28; Caledonian R. Co. *v.* Walker, L. R. 7 App. Cas. 259; s. c., 6 Am. & Eng. R. R. Cas. 518; Lyon *v.* Fishmongers' Co., L. R. 1 App. Cas. 662; Rangeley *v.* Midland Ry. Co., L. R. 3 Ch. App. 306; Metropolitan B. of Works *v.* McCarthy, L. R. 7 H. L. Cas. 243; Chamberlain *v.* West End of London

& C. P. R. R. Co., 2 Best & S. 605; s. c., 9 Jur. N. S. 1051; 32 L. J. Q. B. 173; Reg. *v.* Eastern Co. Ry. Co., 2 Q. B. 347; Quilinan *v.* Canada S. R. Co., 6 Ont. C. P. Div. 567; s. c., 20 Am. & Eng. R. R. Cas. 31.

3. *Special Injuries necessary to Recovery.* — Central Br. U. Pac. R. R. Co. *v.* Andrews, 30 Kans. 590; s. c., 14 Am. & Eng. R. R. Cas. 248; Rochette *v.* Chicago, M. & St. P. Ry. Co., 32 Minn. 201; s. c., 17 Am. & Eng. R. R. Cas. 192; Patten *v.* Northern C. R. R. Co., 33 Pa. St. 426; s. c., 75 Am. Dec. 612; Richardson *v.* Vermont C. R. R. Co., 25 Vt. 465; s. c., 60 Am. Dec. 283; Caledonian Ry. Co. *v.* Walker, L. R. 7 App. Cas. 259; s. c., 6 Am. & Eng. R. R. Cas. 518; Caledonian R. R. Co. *v.* Ogilvy, 2 MacQ. 229; Wood *v.* Stourbridge R. R. Co., 16 C. B. N. S. 236; Glover *v.* North Staffordshire R. R. Co., 16 Q. B. 912; Law *v.* Caledonian Ry. Co., 13 Sc. Sess. Cas. (2d series) 1122.

4. *Injury to Crops.* — Selma, R. & D. R. Co. *v.* Redwine, 51 Ga. 470; St. Louis, V. & T. H. R. R. Co. *v.* Mollet, 59 Ill. 235; Lance *v.* Chicago, M. & St. P. R. R. Co., 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617.

5. *Danger from Fire.* — St. Louis, J. & C. R. R. Co. *v.* Springfield & N. W. R. Co., 96 Ill. 274; Lafayette, M. & B. R. R. Co. *v.* Murdock, 68 Ind. 137; Swinney *v.* Ft. Wayne, M. & C. R. R. Co., 59 Ind. 205; Kansas City & E. R. R. Co. *v.* Kregelo, 32 Kans. 608; s. c., 20 Am. & Eng. R. R. Cas. 241; Pierce *v.* Worcester & N. R. R., 105 Mass. 199; Colvill *v.* St. Paul & C. Ry. Co., 19 Minn. 283; Adden *v.* White Mts. N. H. R. R. Co., 55 N. H. 413; s. c., 20 Am. Rep. 220; *In re* Utica, C. & S. V.

for all damages, whether resulting from negligence or not, will not defeat the land-owner's right of recovery,¹ although such liability may be taken into consideration as affecting the amount of the recovery;² but the danger must be real and imminent, and must be to buildings that are not at a distance.³ But this rule does not appear to be absolute in its application. In some States compensation has been refused.⁴

m. Exposure of Property during Construction.—The inconvenience of having one's land temporarily thrown open in the process of constructing a railway over it is a proper subject of compensation;⁵ but such right of recovery is confined to exposure during construction. The land-owner cannot recover for the disadvantage arising from increased numbers of the public frequenting the locality.⁶

n. Injuries to Fences.—If by the construction of a railroad through the owner's premises it becomes necessary to construct fences, the owner is entitled to compensation for doing so.⁷ But

R. R., 56 Barb. (N. Y.) 456; Oregon & C. Ry. v. Barlow, 3 Oreg. 311; Wilmington & C. R. R. v. Stauffer, 60 Pa. St. 374.

If the danger is so great as to render it necessary to remove the building, the cost of removing may be considered in assessing the damages. Oregon & C. Ry. Co. v. Barlow, 3 Oreg. 311. The increase of the cost of insurance may be given in evidence as affecting the amount of recovery. Weber v. Eastern R. R., 43 Mass. (2 Metc.) 147; Wooster v. Sugar R. Valley R. R. Co., 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

1. Keithsburg & E. R. R. v. Henry, 79 Ill. 290; Bangor & P. R. R. v. McComb, 60 Me. 290; Pierce v. Worcester & N. R. R., 105 Mass. 199; Adden v. White Mts. N. H. R. R., 55 N. H. 413; s. c., 20 Am. Rep. 220; Somerville & E. R. R. v. Doughty, 22 N. J. L. (2 Zab.) 495.

2. Bangor & P. R. R. Co. v. McComb, 60 Me. 290.

3. Jones v. Chicago & I. R. R., 68 Ill. 380; St. Louis & S. R. R. v. Teters, 68 Ill. 144; Proprietors of Locks & Canals v. Nashua & L. R. R. Corp., 64 Mass. (10 Cush.) 385; Hatch v. Cincinnati & I. R. R., 18 Ohio St. 92.

4. Lance v. Chicago, M. & St. P. R. R., 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617; Rodemacher v. Milwaukee & St. P. R. R., 41 Iowa, 297; s. c., 20 Am. Rep. 592; *In re Union Village & J. R. R. Co.*, 53 Barb. (N. Y.) 457; s. c., 35 How. (N. Y.) Pr. 420; Wilmington & C. R. R. v. Stauffer, 60 Pa. St. 374; Patten v. Northern Cent. R. R., 33 Pa. St. 426; s. c., 75 Am. Dec. 612; Lehigh Valley R. R. v. Lazarus, 28 Pa. St. 203; Sunbury & E. R. R. v. Hummell, 27 Pa. St. 99; Ontario &

Q. R. Co. v. Taylor, 6 Ont. Q. B. Div. 338; s. c., 17 Am. & Eng. R. R. Cas. 100.

5. St. Louis, J., & S. R. R. Co. v. Kirby, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214.

6. Patten v. Northern Cent. R. R., 33 Pa. St. 426; s. c., 75 Am. Dec. 612; Houston, E. & W. T. R. v. Adams, 63 Tex. 200; s. c., 20 Am. & Eng. R. R. Cas. 246. See also Kansas City, C., & E. R. R. Co. v. Kregelo, 32 Kans. 608; s. c., 20 Am. & Eng. R. R. Cas. 241.

7. *Recovery for Construction of Fences rendered Necessary.*—St. Louis, A., & T. R. R. Co. v. Anderson, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; Sacramento V. R. R. Co. v. Moffatt, 6 Cal. 74; Vandegrift v. Delaware R. R. Co., 2 Houst. (Del.) 287; St. Louis, J., & S. R. R. Co. v. Kirby, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; St. Louis, J., & C. R. R. Co. v. Mitchell, 47 Ill. 165; Baltimore, P., & C. R. R. Co. v. Lansing, 52 Ind. 229; Grand Rapids & I. R. R. Co. v. Horn, 41 Ind. 479; White Water V. R. R. v. McClure, 29 Ind. 536; Evansville, I., & C. S. L. R. R. Co. v. Fitzpatrick, 10 Ind. 120; Leavenworth, T. & S. R. R. Co. v. Paul, 28 Kans. 816; s. c., 10 Am. & Eng. R. R. Cas. 490; Winona & St. Peters R. R. Co. v. Waldron, 11 Minn. 515; Crowell v. New Orleans & N. E. R. R., 61 Miss. 631; s. c., 20 Am. & Eng. R. R. Cas. 306. *In re Mt. Washington R. R. Co.*, 35 N. H. 134; New York & G. L. Ry. Co. v. Stanley, 35 N. J. Eq. (8 Stew.) 283; s. c., 10 Am. & Eng. R. R. Cas. 345. *In re Rensselaer & S. R. R. Co.*, 4 Paige Ch. (N. Y.) 553; Raleigh & A. A. L. R. R. Co. v. Wicker, 74 N. C. 220; Pennsylvania & N. Y. R. R. & C. Co. v. Bunnell, 81 Pa. St. 414; s. c., 16 Am. Ry. Rep. 1; Delaware, L., & W. R. R. Co. v. Burson, 61

where the owner is not required by law to fence uncleared and uncultivated land, he is not entitled to compensation for the cost of fencing the same along the railroad-track.¹ And where the railway company has fenced its track, it has been held that the obligation to maintain cannot be taken into account in assessing compensation.²

o. Injuries from Improper Construction. — A person whose property is injured in any way from negligence or want of skill in the construction of any work authorized under the power of eminent domain may recover for such injuries.³ Thus a railroad company is liable for damages caused by the negligent removal of support from an adjacent property.⁴ But it is not liable for injuries caused by the independent acts of its contractors.⁵ Damages resulting from improper construction are not recoverable by assessment as part of the compensation for the taking, but by subsequent action at law.⁶

6. Imposition of Additional Burden. — *a. Construction of Railroads in Streets.* — (1) *Where Fee in abutting Land-Owner.* — The appropriation of a street to railway uses imposes a new and additional servitude thereon;⁷ and when the fee of the street is in the

Pa. St. 369; *Watson v. Pittsburg & C. R. R. Co.*, 37 Pa. St. 469; *Danville, H., & W. R. R. v. Gearhart*, 32 Leg. Int. (Pa.) 219; s. c., 1 W. N. Cas. 237; *Greenville & C. R. R. Co. v. Partlow*, 5 Rich (S. C.), L. 428. Compare *Alabama & F. R. R. Co. v. Burkett*, 46 Ala. 569; *Richards v. Des Moines Valley R. R. Co.*, 18 Iowa, 259; *Kennedy v. Dubuque & P. R. R. Co.*, 2 Iowa, 521; *Henry v. Dubuque & P. R. R. Co.*, 2 Iowa, 288.

It has been held that where damages have been assessed for the cost of fencing, the railroad company may maintain an action against the land-owner, if he neglects to fence, and that the obligation to fence becomes a covenant running with the land. *St. Louis, J. & C. R. R. Co. v. Mitchell*, 47 Ill. 165.

1. *Raleigh & A. A. L. R. R. v. Wicker*, 74 N. C. 220; *North-Eastern R. R. Co. v. Sineath*, 8 Rich (S. C.) L. 185.

2. *Jones v. Chicago & I. R. R. Co.*, 68 Ill. 380.

3. *Injuries resulting from Negligence and Want of Skill in Construction.* — *Terre Haute & I. R. R. Co. v. McKinley*, 33 Ind. 274; *Lafayette P. R. Co. v. New Albany & S. R. R.*, 13 Ind. 90; s. c., 74 Am. Dec. 246; *Miller v. Keokuk & D. M. R. R.*, 63 Iowa, 680; s. c., 14 Am. & Eng. R. R. Cas. 293; *Cadle v. Muscatine W. R. R. Co.*, 44 Iowa, 11; *Fleming v. Chicago, D., & M. R. R.*, 34 Iowa, 353; *Perley v. B. C. & M. R. Co.*, 57 N. H. 212; *Brewer v. Boston, C. & F. R. R.*, 113 Mass. 52; *Pittsburgh, F. W. & C. R. R. Co. v. Gilleland*, 56 Pa. St. 445; *Waterman v.*

Connecticut & P. R. R. Co., 30 Vt. 610; s. c., 73 Vt. 326.

4. *Removal of Lateral Support.* — *Rear-don v. San Francisco*, 66 Cal. 492; s. c., 56 Am. Rep. 109; 7 Am. & Eng. Corp. Cas. 454; *Williams v. Natural Br. Plank Road Co.*, 21 Mo. 580; *Richardson v. Vermont C. R. R. Co.*, 25 Vt. 465; s. c., 60 Am. Dec. 283; *Thompson v. Milwaukee & St. P. R. R. Co.*, 27 Wis. 93. Compare *Bradley v. New York & N. H. R. R. Co.*, Conn. 294.

But the railroad company is not liable for damages resulting from a caving in, where the company has been without fault or negligence. *Boothby v. Androscoggin & K. R. R.*, 51 Me. 318.

5. *Edmundson v. Pittsburg, M., & Y. R. R. Co.*, 111 Pa. St. 316; s. c., 23 Am. & Eng. R. R. Cas. 423; *Cunningham v. International R. R. Co.*, 51 Tex. 503; s. c., 32 Am. Rep. 632.

6. *Terre Haute & I. R. R. v. McKinley*, 33 Ind. 274; *Cummins v. Des Moines & St. L. R. R. Co.*, 63 Iowa, 397; s. c., 17 Am. & Eng. R. R. Cas. 86; *King v. Iowa M. R. R. Co.*, 34 Iowa, 458; *Republican Valley R. R. v. Linn*, 15 Neb. 234; s. c., 14 Am. & Eng. R. R. Cas. 198; *Dearborn v. Boston, C. & M. R. R. Co.*, 24 N. H. 179; *Delaware, L., & W. R. R. Co. v. Salmon*, 39 N. J. L. (10 Vr.) 299; s. c., 23 Am. Rep. 214; *South Side R. R. Co. v. Daniel*, 20 Gratt. (Va.) 344.

7. *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; s. c., 68 Am. Dec. 392; *Bloomfield, etc., Gas Light Co. v. Calkins*, 62 N. Y. 389; *Mahon v. New York Cent.*

abutting land-owner, the construction of a railroad thereon is a taking of his property within the meaning of the constitutional provision, and he is entitled to compensation therefor.¹

(2) *Where Fee vested in Public.*—Where the fee of the street is not in the land-owner, but is vested in the public or the municipality, the construction of a railroad in a street confers no claim to compensation upon an abutting land-owner, if there is no interference or prevention of the public use of the street.² Where

R. R. Co., 24 N. Y. 658; *Craig v. Rochester C. & B. R. R. Co.*, 39 Barb. (N. Y.) 494; *Trustees of Presbyterian Society, etc., v. Auburn & R. R. Co.*, 3 Hill (N. Y.), 567.

1. Fee of Street in Land-Owner—Railway in Street—Damages.—Southern Pacific R. R. Co. *v.* Reed, 41 Cal. 256; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; s. c., 68 Am. Dec. 392; *Stetson v. Chicago & E. R. R. Co.*, 75 Ill. 74; *Indianapolis, B. & W. R. R. Co. v. Hartley*, 67 Ill. 439; s. c., 16 Am. Rep. 624; *Eichels v. Evansville S. Ry.*, 78 Ind. 261; *Terre Haute & I. R. R. Co. v. Scott*, 74 Ind. 29; *Cox v. Louisville, N. A. & C. R. R. Co.*, 48 Ind. 178; *Kucheman v. C. C. & D. Ry. Co.*, 46 Iowa, 366; *Werges v. St. Louis, C. & N. O. R. R.*, 35 La. An. 641; *Harrison v. New Orleans Pac. Ry.*, 34 La. An. 462; *Grand Rapids & I. R. R. v. Heisel*, 47 Mich. 393; s. c., 31 Am. Rep. 306; *Carli v. Stillwater, St. R. & T. Co.*, 28 Minn. 373; s. c., 25 Alb. L. J. 156; *Kaiser v. St. Paul, S. & T. F. R. R. Co.*, 22 Minn. 149; *Adams v. Hastings & D. R. R. Co.*, 18 Minn. 260; *Harrington v. St. Paul & S. C. R. R. Co.*, 17 Minn. 215; *Gray v. First Div. St. Paul & P. R. R. Co.*, 13 Minn. 315; *Schurmeier v. St. Paul & P. R. R. Co.*, 10 Minn. 82; *State v. Laverack*, 34 N. J. L. (5 Vr.) 201; *Citizens Coach Co. v. Camden H. R. R.*, 33 N. J. Eq. (6 Stew.) 267; *Morris & E. R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq. (10 C. E. Gr.) 385; *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. (2 C. E. Gr.) 75; *Story v. New York E. R. R. Co.*, 90 N. Y. 122; s. c., 43 Am. Rep. 146; *Am. & Eng. R. R. Cas.* 596; *Henderson v. New York C. R. R.*, 78 N. Y. 423; *Craig v. Rochester, C. & B. R. R.*, 39 N. Y. 404; *Wager v. Troy U. R. R. Co.*, 25 N. Y. 526; *Mahon v. New York C. R. R. Co.*, 24 N. Y. 658; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655; *Bissell v. New York C. R. R.*, 23 N. Y. 61; *Williams v. New York Cent. R. R.*, 16 N. Y. 97; s. c., 69 Am. Dec. 651; *Davis v. Mayor of New York*, 14 N. Y. 506; s. c., 67 Am. Dec. 186; *Presbyterian Society v. Auburn & R. R. Co.*, 3 Hill (N. Y.), 567; *Lawrence R. R. Co. v. Williams*, 35 Ohio St. 168; *Spencer v. Point Pleasant & O. R. R.*, 23 W. Va. 406; *Buchner v. Chicago M. & N. Ry.*, 60 Wis. 264; *Blesch v. Chicago*

& N. W. R. R. Co., 43 Wis. 183; *Sherman v. Milwaukee, L. S. & W. R. R. Co.*, 40 Wis. 645; *Pomeroy v. Milwaukee & C. R. R. Co.*, 16 Wis. 640; *Ford v. Chicago & N. W. R. R. Co.*, 14 Wis. 609; s. c., 80 Am. Dec. 791; *Pacific R. R. v. Leavenworth*, 1 Dill. C. C. 393. *Compare Whittier v. Portland & K. R. R. Co.*, 38 Me. 26; *Peddicord v. Baltimore C. & E. M. P. R. R. Co.*, 34 Md. 463; *Jones v. Keith*, 37 Tex. 394; *Brainard v. Missisquoi R. R. Co.*, 48 Vt. 107.

Pennsylvania Doctrine.—But in Pennsylvania it was held that the streets and highways might be used for railroad purposes, with the legislative sanction, without making compensation to abutting land-owners, even though they owned the fee. *Struthers v. Dunkirk, W. & P. R. R. Co.*, 87 Pa. St. 282; s. c., 7 Cent. L. J. 213; *Danville, H. & W. R. R. Co. v. Com.*, 73 Pa. St. 29; *Cleveland & P. R. R. v. Speer*, 56 Pa. St. 325; *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. St. 340; *Mercer v. Pittsburg, N. F. W. & C. R. R. Co.*, 36 Pa. St. 99; *Com. v. Erie & N. E. R. R. Co.*, 27 Pa. St. 339; s. c., 67 Am. Dec. 471; *Mifflin v. Harrisburg, P. M. & L. R. R.*, 16 Pa. St. 182; *Case of "Philadelphia & T. R. R. Co."*, 6 Whart. (Pa.) 25. This rule, however, has been altered by the provision of the present Pennsylvania constitution adopted in 1874, art. 16, sect. 8, of which provides as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements;" and it has been held that this clause gives the right to consequential damages in the cases therein mentioned. *Minnig v. New York C. & St. L. R. R. Co.*, 11 W. N. C. (Pa.) 297; *Pusey v. City of Allegheny*, 10 W. N. C. (Pa.) 561. See also *City of Reading v. Althouse*, 93 Pa. St. 400.

2. Fee in City — When Damage recoverable.—*Market Street R. R. Co. v. Central R. R. Co.*, 51 Cal. 583; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Elliott v. Fair Haven & W. R. R. Co.*, 32 Conn. 579; *Nicholson v. New York & N. H. R. R. Co.*, 22 Conn. 74; s. c., 56 Am. Dec. 390; *Colorado C. R. R. Co. v. Mollandin*, 4 Colo. 154; *Savan-*

the property is seriously injured by reason of the fact that the use of the street as such is interfered with, there are many cases holding that the owner is entitled to compensation.¹

(3) *Railroad Crossings*.—When a highway is laid out by the proper authority across a railroad company's right of way, this is not such a taking of property as entitles the company to damages;²

nah & T. R. R. v. Savannah, 45 Ga. 602; Pittsburg, Ft. W. & C. R. R. Co. v. Reich, 101 Ill. 157; Chicago v. Rumsey, 87 Ill. 348; Chicago, B. & Q. R. R. Co. v. McGinnis, 79 Ill. 269; Chicago, R. I. & P. R. R. Co. v. Joliet, 79 Ill. 25; Patterson v. Chicago, D. & V. R. R. Co., 75 Ill. 588; Stetson v. Chicago & E. R. R. Co., 75 Ill. 74; Stone v. Fairbury, P. & N. R. R., 68 Ill. 394; Murphy v. City of Chicago, 29 Ill. 279; Moses v. Pittsburg, Ft. W. & C. R. R. Co., 21 Ill. 516; New Albany & S. R. R. Co. v. O'Daily, 12 Ind. 551; Heath v. Des Moines & St. L. R. R. Co., 61 Iowa, 11; s. c., 10 Am. & Eng. R. R. Cas. 313; Franz v. Sioux City & P. Ry., 55 Iowa, 107; Barr v. City of Oskaloosa, 45 Iowa, 275; Ingram v. C. D. & M. R. R. Co., 38 Iowa, 669; Chicago N. & S. R. R. Co. v. Mayor, etc., of Newton, 36 Iowa, 299; Slatten v. Des Moines Valley V. R. Co., 29 Iowa, 148; s. c., 4 Am. Rep. 205; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Milburn v. City of Cedar Rapids, 12 Iowa, 246; Atchison & N. R. R. Co. v. Garside, 10 Kans. 552; Cosby v. Owensboro & R. R. Co., 10 Bush (Ky.), 288; Newport & C. B. Co. v. Foote, 9 Bush (Ky.), 264; Lexington & O. R. R. Co. v. Applegate, 8 Dana (Ky.), 289; Louisville & F. R. R. Co. v. Brown, 17 B. Mon. (Ky.) 763; Wolfe v. Covington & L. R. R., 15 B. Mon. (Ky.) 404; Hiss v. Baltimore & H. P. R. R. Co., 52 Md. 242; s. c., 36 Am. Rep. 371; s. c., 4 Am. & Eng. R. R. Cas. 201; Brown v. Duplessis, 14 La. An. 854; Whittier v. Portland & K. R. R. Co., 38 Me. 26; Attorney-General v. Metropolitan R. R. Co., 125 Mass. 515; s. c., 28 Am. Rep. 264; Grand Rapids & I. R. R. v. Heisel, 47 Mich. 393; Lackland v. North Missouri R. R. Co., 34 Mo. 259; Porter v. North Missouri R. R. Co., 33 Mo. 128; Kellinger v. Forty-second St. & Grand St. R. R. Co., 50 N. Y. 206; People v. Kerr, 27 N. Y. 188; Drake v. Hudson R. R., 7 Barb. (N. Y.) 508; Cincinnati & S. G. Ave. R. Co. v. Cummins, 14 Ohio St. 523; McLauchlin v. Charlotte & S. C. R. R. Co., 5 Rich. (S. C.) 583; Houston & T. C. R. R. Co. v. Odum, 52 Tex. 343; s. c., 2 Am. & Eng. R. R. Cas. 503; Brainerd v. Missisquoi R. R. Co., 48 Vt. 107; Spencer v. Point Pleasant & O. R. R., 23 W. Va. 406.

Colorado Doctrine.—But in the case of City of Denver v. Bayer, 7 Colo. 113; s. c., 2 Am. & Eng. Corp. Cas. 465, the court

discuss this question, and remark, "The position taken in some of the cases is, that, if the adjoining owner have not the fee of the streets, and the value of his property be diminished fifty per cent by the construction of a railroad therein, he has no redress; while, if he be the fortunate owner of this fee, he may recover not only for the taking or appropriation of the street, but also for the interference with his easement, and the decrease occasioned in the value of his premises. Yet, whether he own the fee or not, his rights in connection with the street, while it remains a street, are practically the same. His possession of his fee in no special way contributes to the use or enjoyment of his lot, and enables him to exercise no greater control over the street than he would have without it. The distinction as to the fee seems to rest upon the fact that in one case there is a wrongful incumbrance of his freehold, while in the other there is not. The actual injury is about the same in both. But while, if the fee rests in the city, there may be no wrongful incumbrance of his estate in the sense of these cases, there is, under our Constitution, at least, a damaging thereof for which he is entitled to compensation."

1. Fee in Public Property seriously injured—Damages.—Terre Haute & I. R. R. Co. v. Scott, 74 Ind. 29; s. c., 3 Am. & Eng. R. R. Cas. 208; Scott v. Indianapolis & V. R. Co. (Ind.), s. c., 10 Am. & Eng. R. R. Cas. 189; Mulholland v. Des Moines A. & W. R. R. Co., 60 Iowa, 740; s. c., 10 Am. & Eng. R. R. Cas. 99; Grand Rapids & I. R. R. Co. v. Heisel, 47 Mich. 393; s. c., 10 Am. & Eng. R. R. Cas. 260; Brakken v. Minneapolis & St. L. R. R. Co., 29 Minn. 41; s. c., 7 Am. & Eng. R. R. Cas. 593; Starr v. Camden & A. R. R. Co., 24 N. J. L. (4 Zab.) 592; Scioto Valley R. R. Co. v. Lawrence, 38 Ohio, 41; s. c., 7 Am. & Eng. R. R. Cas. 93; Gulf, Colorado & S. F. R. R. Co. v. Graves (Tex.); 10 Am. & Eng. R. R. Cas. 199; Dixon v. Baltimore & P. R. R. Co., 1 Mackey (D. C.), 78; s. c., 3 Am. & Eng. R. R. Cas. 201.

2. Public Road across Railway's Right of Way.—Bridgeport v. New York & N. H. R. R. Co., 36 Conn. 255; s. c., 4 Am. Dec. 63; Chicago, R. I. & P. R. R. Co. v. Lake, 71 Ill. 333; Gilman v. Haverhill, 128 Mass. 36; s. c., 1 Am. & Eng. R. R. Cas. 20; City of Hannibal v. Hannibal & St. J. R. R. Co., 49 Mo. 480; Boston & A. R. R. Co.

but where the company is required to erect sign-posts and maintain the crossing, there is in such case a taking for which compensation must be made.¹ Where a railroad company constructs its track across a turnpike, compensation must be made to the turnpike company.² The owner of property which abuts upon a highway cannot recover damages for the mere crossing of the highway by the tracks of the railroad;³ but if his property is injured by a change of grade made for the purpose of laying said track, he can recover.⁴ Where one railroad company is authorized to run its tracks over the land of another, this is a taking for which compensation must be made.⁵

b. Construction of Horse-Railways in Street. — The construction of a horse-railway in a public street is a legitimate use of the highway and an exercise of the right of public travel. It is generally held, therefore, that no additional burden is imposed, and the owner of abutting property is not entitled to recover,⁶ even though the land-owner have the fee in the street.⁷ But a horse-

v. Greenbush, 52 N. Y. 510; *Albany N. R. Co. v. Brownell*, 24 N. Y. 345; *Sixth Ave. R. R. Co. v. Kerr*, 45 Barb. (N. Y.) 138; *Little Miami & C. & X. R. R. Cos. v. Dayton*, 23 Ohio St. 510; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Philadelphia & R. R. Co. v. City of Philadelphia*, 47 Pa. St. 325. *Compare* *Boston & M. R. R. Co. v. Middlesex*, 83 Mass. (1 Allen) 324; *Grand Junction R. & D. Co. v. County Commissioners*, 80 Mass. (14 Gray) 553; *Old Colony & F. R. R. Co. v. Plymouth Co.*, 80 Mass. (14 Gray) 155.

1. *Crossley v. O'Brien*, 24 Ind. 325; *Old Colony & F. R. R. Co. v. Plymouth Co.*, 80 Mass. (14 Gray) 155.

2. *Troy & B. R. R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Seneca R. Co. v. Albany & R. R. Co.*, 5 Hill (N. Y.), 170; *Mahon v. Utica & S. R. R. Co.*, Hill & Den. (N. Y.) 156.

3. *Morgan v. Des Moines & St. Louis R. R. Co.*, 64 Iowa, 589; s. c., 52 Am. Rep. 462; 20 Am. & Eng. R. R. Cas. 67; *Morris & E. R. R. Co. v. Newark*, 10 N. J. Eq. (2 Stockt.) 352. *Compare* *Starr v. Camden & A. R. R. Co.*, 22 N. J. L. (4 Zab.) 592.

4. *Buchner v. Chicago, M. & N. W. R. R. Co.*, 60 Wis. 264; s. c., 14 Am. & Eng. R. R. Cas. 447.

5. *One Railroad crossing Another.* — *Lake Shore & M. S. R. R. Co. v. Chicago & W. I. R. R. Co.*, 100 Ill. 21; s. c., 2 Am. & Eng. R. R. Cas. 454; *St. Louis, J. & C. R. R. Co. v. Springfield & N. W. R. R. Co.*, 96 Ill. 274; s. c., 2 Am. & Eng. R. R. Cas. 487; *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. R. Co.*, 96 Ill. 125; s. c., 2 Am. & Eng. R. R. Cas. 437; *Grand Junction R. & D. Co. v. County Commissioners*, 80 Mass. (14 Gray) 553;

East Pennsylvania R. R. Co. v. Hiester, 40 Pa. St. 53.

The right to recover compensation in such case is entirely denied by some authorities. It is said that a mere crossing is not properly a taking. *Eastern R. R. Co. v. Concord & P. R. R. Co.*, 47 N. H. 108; *Lehigh Valley R. R. Co. v. Dover & R. R. Co.*, 43 N. J. L. (14 Vr.) 538; s. c., 14 Am. & Eng. R. R. Cas. 87; *New Jersey S. R. R. Co. v. Long Branch Commissioners*, 39 N. J. L. (10 Vr.) 28; *State v. Easton & A. R. R. Co.*, 36 N. J. L. (7 Vr.) 181; *New York & H. R. R. Co. v. Forty-second & G. St. F. R. R. Co.*, 50 Barb. (N. Y.) 309; *Lake Shore & M. S. R. R. Co. v. Cincinnati, S. & C. R. R. Co.*, 30 Ohio St. 604.

The right to recover compensation for such crossing is sometimes conferred by statute. *In re Boston, H. T. & W. R. R. Co.*, 79 N. Y. 64; *In re Lockport & B. R. R. Co.*, 77 N. Y. 557.

6. *Railway in Street.* — *Randall v. Jacksonville St. R. R.*, 19 Fla. 409; s. c., 17 Am. & Eng. R. R. Cas. 184; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Brown v. Duplessis*, 14 La. An. 854; *Hiss v. Baltimore & H. P. R. R. Co.*, 52 Md. 242; s. c., 36 Am. Rep. 371; *Peddicord v. Baltimore, C. & E. M. P. R. R. Co.*, 34 Md. 463; *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515; s. c., 28 Am. Rep. 264; *Jersey City & B. R. R. Co. v. Jersey City Hoboken Horse R. R. Co.*, 20 N. J. Eq. (5 C. E. Gr.) 61; *Texas & P. R. R. Co. v. Rosedale St. R. R. Co.*, 64 Tex. 80; s. c., 22 Am. & Eng. R. R. Cas. 160. *Compare* *Craig v. Rochester City & B. R. R. Co.*, 39 N. Y. 404.

7. *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148; s. c., 43 Am. Rep. 661; 14 Am. & Eng. R. R. Cas. 142.

railway made in a city street solely as a transfer track between two steam-railways has been held to be such a taking or injuring of property as would entitle abutting proprietors to compensation.¹

c. Erection of Telegraph-Poles.—The decisions on the question whether the erection of telegraph-poles in a public street and highway constitutes an additional servitude, for which the abutting owner is entitled to compensation, are not unanimous. In Massachusetts it is held that an additional servitude is not imposed, and that therefore no compensation is payable.² In Illinois the courts hold that the use of the street for such purposes is a new and additional burden for which the owner of the fee is entitled to compensation.³ The construction of a telegraph-line along the right of way of a railroad is the taking of a company's railroad property, for which the railroad is entitled to compensation;⁴ but the railroad company may construct a telegraph-line along its own route for its own use, and may cut standing trees on its right of way without incurring any additional liability to the original owner of the land for compensation. If, however, the telegraph-line should be erected by another company, that company is liable to the land-owner for the damages to the land caused by the telegraph-line; and if such telegraph-line is constructed by the railroad company and another, for their joint use, the latter, and the latter alone, is liable to such land-owner for the additional damage to the land by the use of the telegraph-line.⁵

1. *Carli v. Stillwater St. Ry. & T. R. R. Co.*, 28 Minn. 373; s. c., 41 Am. Rep. 290.

2. *Pierce v. Drew*, 136 Mass. 75; s. c., 49 Am. Rep. 7.

3. *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 508; s. c., 47 Am. Rep. 453.

Illinois Doctrine.—In the well-known case of *Indianapolis, B. & W. R. R. Co. v. Hartley*, 67 Ill. 439; s. c., 16 Am. Rep. 624, the court say, "A distinction has been taken where the municipality granting the right to lay a track owns the fee in the street, and where the fee remains in the abutting land-owner; and it seems to us it rests on sound principle, and is supported by the highest authority. Where the fee remains in the original proprietor, it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication. It is only for the use of ordinary travel such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land, it was for no other purpose; and if it was condemned, his damages were assessed with no other view. A different use of the land cannot be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road-bed, and the carriages propelled thereon, are owned by private individuals,

and not by the public. Fares are charged by travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where one travels at his own pleasure, in his own conveyance, without paying tolls or fares. The uses are totally different and even inconsistent. The one is exclusive in favor of private interests, and the other is open and free to all. The doctrine most in consonance with our sense of justice is, when the fee of the street remains in the abutting land-owner, the corporation may grant the right to the railway company to lay its track along or across any street, but the company avails of its privileges at its peril. If, in laying its track, it causes a private injury to him who owns the fee on the adjoining premises, it must make good the damages sustained."

4. *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. R. Co.*, 6 Biss. C. C. 158; *Southwestern R. R. Co. v. Southern & Atl. Tel. Co.*, 46 Ga. 43; s. c., 12 Am. Rep. 585.

5. *Western U. Tel. Co. v. Rich*, 19 Kans. 517; s. c., 27 Am. Rep. 159.

d. Use of Highways for Gas-Works, etc. — A corporation organized for the supply of gas for public use has no authority to lay its pipe in a country highway without the consent, or without an appraisal and payment of compensation, to the owner of the land.¹

e. Other Instances. — The general rule is, that property which has already been so taken or devoted to public use must be used only for the purpose for which it was originally taken, or any purpose incidental thereto. If used for any purpose incongruous with the use to which the land was originally devoted, a further right of compensation accrues to persons injured thereby. Thus it has been held that the Legislature cannot authorize the conversion of a street into a public market without providing for compensation;² but the conversion of a turnpike road into a public highway does not impose an additional burden, or divert the turnpike from its original purpose, and no compensation need be made to the owners of the soil.³

7. User of Another's Property. — Where one railroad company is authorized to run its cars over the track of another, this is a taking for which compensation must be made.⁴

8. Appropriation, Diversion, and Obstruction of Waters. — *a. Appropriation.* — Riparian owners have a right in the nature of an easement to have the waters in water-courses flow past their premises undiminished in quantity and quality, and they are entitled to compensation for any act done under the power of eminent domain, which diminishes the volume of the stream;⁵

1. *In re Bloomfield & R. Nat. Gaslight Co. v. Calkins*, 62 N. Y. 386; s. c., 1 T. & C. (N. Y.) 541; *Kelsey v. King*, 32 Barb. (N. Y.) 410; *People v. Bowen*, 30 Barb. (N. Y.) 24; *Milhau v. Sharp*, 15 Barb. (N. Y.) 193; *Sterling's Appeal*, 111 Pa. St. 35; s. c., 56 Am. Rep. 246; 12 Am. & Eng. Corp. Cas. 330.

2. *Public Highway.* — *State v. Laverack*, 34 N. J. L. (5 Vr.) 201. In this case the court say, "The right of the public in a highway consists in the privilege of passage and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes. These subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the land-holder. But I am not aware of any case in which it has been held that the public has any right in a highway which is incongruous with the purpose for which it was originally created, and which at the same time is injurious to the proprietors of the soil."

3. *State v. Maine*, 27 Conn. 641; s. c., 71 Am. Dec. 89; *Hingham & Q. Br. & Turnpike Co. v. Norfolk*, 88 Mass. (6 Allen) 353. Compare *Williams v. Natural Br. Plank Road Co.*, 21 Mo. 580.

4. *Metropolitan R. R. Co. v. Quincy*

R. R. Co., 94 Mass. (12 Allen) 262; *Boston & W. R. R. Co. v. Western R. R. Co.*, 80 Mass. (14 Gray) 253; *Jersey City & B. R. R. Co. v. Jersey City & H. H. R. R. Co.*, 20 N. J. Eq. (5 C. E. Gr.) 61; *Sixth Ave. R. R. Co. v. Kerr*, 45 Barb. (N. Y.) 138.

5. *Appropriation of Water.* — *Burden v. Stein*, 27 Ala. 104; *Stein v. Ashley*, 34 Ala. 521; *Stein v. Burden*, 24 Ala. 130; *Charnock v. Rose*, 70 Cal. 189; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316; *Nevins v. Peoria*, 41 Ill. 502; *McCord v. High*, 24 Iowa, 336; *City of Emporia v. Soden*, 25 Kans. 588; s. c., 37 Am. Rep. 265; *Ware v. Allen*, 140 Mass. 513; s. c., 60 Am. Rep. 67; *Moulton v. Newburyport W. Co.*, 137 Mass. 163; *Bailey v. Woburn*, 126 Mass. 416; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *Lund v. New Bedford*, 121 Mass. 286; *Commissioners v. Withers*, 29 Miss. 21; *Garwood v. New York C. & H. R. R. Co.*, 83 N. Y. 400; s. c., 38 Am. Rep. 452; *Smith v. City of Rochester*, 92 N. Y. 463; s. c., 44 Am. Rep. 393; *Cooper v. Williams*, 5 Ohio, 391; s. c., 24 Am. Dec. 299; *Weiss v. Oregon Iron & Steel Co.*, 13 Oreg. 496; *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34; *Hough v. Doyleston*, 4 Brewst. (Pa.) 333.

and it has been held that it makes no difference whether the water is withdrawn by means of pipes, conduits, water-galleries, or simply by percolation through the natural soil.¹

b. Diversion. — A riparian proprietor whose land is bounded by a navigable stream has a right of access to the stream, and a right to make a landing, wharf, or pier for his own use, or for the use of the public.² And the owner of lands bordering upon a non-navigable stream usually has a title *ad filum aquæ*.³ And in either case, for any diversion, whether effected by cutting an entirely new channel, or by making an erection along the margin of the water, by which the riparian owner's access is cut off, a right of property belonging to the riparian owner is taken or injured, and he must be compensated therefor.⁴

1. *Ætna Mills v. Brookline*, 127 Mass. 69; *Ætna Mills v. Waltham*, 126 Mass. 422; *Bailey v. Woburn*, 126 Mass. 416; *Village Delhi v. Youmans*, 45 N. Y. 362; s. c., 6 Am. Rep. 100; *Grand Junction Canal Co. v. Shugar*, 6 Ch. App. Cas. 487; *Dickinson v. Grand Junc. Canal Co.*, 7 Ex. 282.

2. *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. (12 Otto) 180; bk. 21 L. ed. 51; *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497; bk. 19 L. ed. 984; *Lyon v. Fishmongers Co. L. R.* 1 App. Cas. 662; s. c., 46 L. J. Ch. 68; 35 L. T. N. S. 569; 25 W. R. 165; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 3 Ex. 306; s. c., L. R. 5 Ex. 221; 5 H. L. Cas. 418.

3. *Title to Middle of Stream.* — *Adams v. Pease*, 2 Conn. 481; *Bradford v. Cressey*, 45 Me. 9; *Pike v. Munroe*, 36 Me. 309; s. c., 58 Am. Dec. 751; *Brown v. Chadbourne*, 31 Me. 9; *Blanchard v. Baker*, 8 Me. (8 Greenl.) 253; s. c., 23 Am. Dec. 504; *Browne v. Kennedy*, 5 Har. & J. (Md.) 195, 205; *Trustees of Hopkins Academy v. Dickinson*, 63 Mass. (9 Cush.) 546; *Coldspring I. Co. v. Tolland*, 63 Mass. (9 Cush.) 492; *Knight v. Wilder*, 66 Mass. (2 Cush.) 200; s. c., 48 Am. Dec. 660; *Bliss v. Rice*, 34 Mass. (17 Pick.) 23; *Dearfield v. Arms*, 34 Mass. (17 Pick.) 41; *Waterman v. Johnson*, 30 Mass. (13 Pick.) 261; *Ingraham v. Wilkinson*, 21 Mass. (4 Pick.) 268; s. c., 16 Am. Dec. 342; *Hatch v. Dwight*, 17 Mass. 289; *Lunt v. Holland*, 14 Mass. 149; *King v. King*, 7 Mass. 499; *Woodman v. Spencer*, 54 N. H. 507; *State v. Gilmanton*, 9 N. H. 463; *Claremont v. Carlton*, 2 N. H. 369; *Arnold v. Munday*, 6 N. J. L. (1 Halst.) 1; s. c., 10 Am. Dec. 356; *Seneca Nation v. Knight*, 23 N. Y. 498; *Palmer v. Mulligan*, 3 Cai. (N. Y.) 319; s. c., 2 Am. Dec. 270; *People v. Seymour*, 6 Cow. (N. Y.) 579; *Child v. Starr*, 4 Hill (N. Y.) 369; *Hooker v. Cummings*, 20 Johns. (N. Y.) 91; s. c., 11 Am. Dec. 249; *Jackson v. Louw*, 12 Johns. (N. Y.) 252; *Commissioners of Fanal Fund*

v. Kempshall, 26 Wend. (N. Y.) 404; *Canal Appraisers v. People*, 17 Wend. (N. Y.) 590; *Canal Commissioners v. People*, 5 Wend. (N. Y.) 423; *Smith v. Ingram*, 7 Ired. (N. C.) L. 175; *Williams v. Buchanan*, 1 Ired. (N. C.) L. 535; s. c., 35 Am. Dec. 760; *Ingram v. Threadgill*, 3 Dev. (N. C.) 59; *Poor v. McClure*, 77 Pa. St. 214; *Barclay R. & C. Co. v. Ingham*, 36 Pa. St. 194; *Coovert v. O'Conner*, 8 Watts (Pa.) 470; *Ball v. Slack*, 2 Whart. (Pa.) 538; *Cates v. Wadlington*, 1 McC. (S. C.) 580; s. c., 10 Am. Dec. 699; *Noble v. Cunningham*, McMull. (S. C.) Eq. 289; *McCullough v. Wall*, 4 Rich. (S. C.) 68; s. c., 53 Am. Dec. 715; *Adams v. Barney*, 25 Vt. 225; *Home v. Richards*, 4 Call (Va.) 441; *Mead v. Haynes*, 3 Rand. (Va.) 33; *Hayes v. Bowman*, 1 Rand. (Va.) 417; *Camden v. Creel*, 4 W. Va. 365; *Tyler v. Wilkinson*, 4 Mason C. C. 397; *Carter v. Murcot*, 4 Burr. 2162; *Rex v. Wharton*, Holt 499; s. c., 12 Mod. 510; *Wishart v. Wyllie*, 1 McCQ. H. L. Cas. 389; *Wright v. Howard*, 1 Sim. & Stew. 190; *Mayo v. Quimby*, 3 Dane Abr. 4.

4. *Diversion and Injury to Access.* — *Bottoms v. Brewer*, 54 Ala. 288; *Carli v. Stillwater*, St. R. & T. Co., 28 Minn. 373; s. c., 41 Am. Rep. 290; *Tinsman v. Belvidere R. R.*, 26 N. J. L. (2 Dutcht.) 148; s. c., 71 Am. Dec. 514; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526; *Clark v. Peckham*, 10 R. I. 35; s. c., 14 Am. Rep. 654; *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. (12 Otto) 180; bk. 21 L. ed. 51; *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497; bk. 19 L. ed. 984; *Van Dolsen v. New York*, 17 Fed. Rep. 817; s. c., 16 Rep. 387; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; s. c., 46 L. J. Ch. 68; 35 L. T. N. S. 569; 25 W. R. 165; *Ferrand v. Corp. of Bradford*, 21 Beav. 412; *Little v. Dublin & D. R. Co.*, 7 Ir. C. L. 82; *Reg. v. North Midland R. Co.*, 2 Eng. R. & Corp. Cas. 1. *Compare Thayer v. New Bedford R. R. Co.*, 125

c. Obstruction. — (1) *Water Courses.* — A riparian owner is entitled to compensation for any obstruction placed in the bed of a stream, whereby an increased burden is imposed upon his lands.¹

(2) *Of Surface Waters.* — In those States which follow the doctrine of the civil law, and hold that the owner of higher land has a servitude or natural easement upon the lower adjoining land, for the discharge of all surface waters flowing naturally thereon from the higher land, the owner of the dominant tenement is entitled to compensation for any obstruction to the flow of such surface waters.²

Mass. 253; *City of Boston v. Richardson*, 105 Mass. 353; *Commissioners of Canal Fund v. Kempshall*, 26 Wend. (N. Y.) 404; *Smith v. Gould*, 61 Wis. 31.

1. Obstructions Imposing an Additional Burden. — *Denslow v. New Haven & N. Co.*, 16 Conn. 103; *Hooker v. New Haven & N. Co.*, 14 Conn. 147; s. c., 36 Am. Dec. 477; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Baltimore & P. R. Co. v. Magruder*, 34 Md. 79; s. c., 6 Am. Rep. 310; *Estabrooks v. Peterborough & S. R. Co.*, 66 Mass. (12 Cush.) 224; *Turner v. Blodgett*, 46 Mass. (5 Metc.) 240, note; *Rowe v. Granite B. Corp.*, 38 Mass. (21 Pick.) 344; *Thatcher v. Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501; *Cogswell v. Essex Mill Corp.*, 23 Mass. (6 Pick.) 94; *Thunder Bay R. Booming Co. v. Speechly*, 31 Mich. 336; s. c., 18 Am. Rep. 184; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Dodd v. Williams*, 3 Mo. App. 278; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *March v. Portsmouth & C. R. Co.*, 19 N. H. 372; *Trenton W. P. Co. v. Raff*, 36 N. J. L. (7 Vr.) 335; *Delaware & R. C. Co. v. Lee*, 22 N. J. L. (2 Zab.) 243; *Ten Eyck v. Delaware & R. C. Co.*, 18 N. J. L. (3 Harr.) 200; s. c., 37 Am. Dec. 233; *Sinnickson v. Johnson*, 17 N. J. L. (2 Harr.) 129; s. c., 34 Am. Dec. 184; *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214; *People v. Kingman*, 24 N. Y. 559; *Brown v. Cayuga & S. R. R. Co.*, 12 N. Y. 486; *Robinson v. New York & E. R. R. Co.*, 27 Barb. (N. Y.) 512; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; s. c., 15 Am. Dec. 462; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526; *Crump v. Mims*, 64 N. C. 767; *Fisher v. Richards*, 9 Ohio St. 495; *Henry v. Vermont C. R. R. Co.*, 30 Vt. 638; s. c., 73 Am. Dec. 329; *Norris v. Vermont C. R. R. Co.*, 28 Vt. 99; *Hatch v. Vermont C. R. R. Co.*, 25 Vt. 49; *Arlmond v. Green Bay & M. Canal Co.*, 31 Wis. 316; *Harper v. Milwaukee*, 30 Wis. 365; *Cobb v. Smith*, 23 Wis. 261; *Sheboygan v. Sheboygan & F. R. R. Co.*, 21 Wis. 667; *Thien v. Voegtlander*, 3 Wis. 461; *Lawrence v. Great Northern Ry. Co.*, 20 L. J. N. S. Q. B. 293.

2. Surface Waters. — The decisions of the various courts of the several States concerning surface waters, show an irreconcilable difference of opinion. In a number of States the courts have adopted what is known as the common-law rule, while in others what is known as the civil-law rule has been followed. Referring to the origin of this difference, the Supreme Court of Missouri say, in the case of *Shane v. Kansas City, St. J., & C. B. R. R. Co.*, 71 Mo. 237; s. c., 36 Am. Rep. 480; 5 Am. & Eng. R. R. Cas. 64: "This difference may be traced to the great importance attached by the courts on one side, to the maxim, *sic utere tuo, ut alienum non ladas*, whilst those adopting a contrary view seem disposed to give unlimited effect to the maxim, *cujus est solum, ejus est usque ad cælum*, and therefore to leave every proprietor to take care of himself except where living streams are concerned."

Common Law Rule. — The common-law rule was stated by the Massachusetts Supreme Court in the case of *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106, 109, in the following terms: "The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface or the erection of buildings, or other structures, thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on it from the surface of adjoining lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. . . . *Cujus est solum, ejus est usque ad cælum*, is a general rule applicable to the use and enjoyment of real property and the right of a party to the free and unfettered control of his own land, above, upon, and beneath the surface, cannot be interfered with, or restrained by any consideration of injury to other land, which

And in States where no natural servitude or easement for the flow

may be occasioned by the flow of more surface water in consequence of the lawful appropriation of the land by its owner to a particular use or mode of enjoyment; nor is it at all material in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface waters by preventing it from going within the limits of his land or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries, the obstruction of surface waters or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act consistent with the due exercise of dominion over his own soil." This rule has been adopted in the following States; to wit, —

Connecticut. — *Adams v. Walker*, 34 Conn. 466; *Gillett v. Johnson*, 30 Conn. 180; *Wadsworth v. Tillotson*, 15 Conn. 366; s. c., 39 Am. Dec. 391.

Indiana. — *Cairo & V. R. R. Co. v. Stevens*, 73 Ind. 278; s. c., 38 Am. Rep. 139; *Schlichter v. Phillipy*, 67 Ind. 201; *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114.

Kansas. — *Kansas City & E. R. R. Co. v. Riley*, 33 Kans. 374; *Gibbs v. Williams*, 25 Kans. 214; s. c., 37 Am. Rep. 241; *Atchison, T. & S. F. R. R. Co. v. Hammer*, 22 Kans. 763; *Palmer v. Waddell*, 22 Kans. 352.

Maine. — *Murphy v. Kelley*, 68 Me. 521; *Morrison v. Bucksport & B. R. R. Co.*, 67 Me. 353; *Greeley v. Maine Cent. R. R. Co.*, 53 Me. 200; *Bangor v. Lansil*, 51 Me. 521.

Massachusetts. — *Jackman v. Allington Mills*, 137 Mass. 277; *Rathke v. Gardner*, 134 Mass. 14; *Macomber v. Godfrey*, 108 Mass. 219; s. c., 11 Am. Rep. 349; *Emery v. Lowell*, 104 Mass. 13; *Bates v. Smith*, 100 Mass. 181; *Curtis v. Eastern R. R. Co.*, 96 Mass. (14 Allen) 55; *Franklin v. Fisk*, 95 Mass. (13 Allen) 211; *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106; *Dickinson v. Worcester*, 89 Mass. (7 Allen) 19; *Flagg v. Worcester*, 79 Mass. (13 Gray) 601; *Parks v. Newburyport*, 76 Mass. (10 Gray) 28; *Ashley v. Wolcott*, 65 Mass. (11 Cush.) 192.

New Hampshire. — *Swett v. Cutts*, 50 N. H. 439; s. c., 9 Am. Rep. 276.

New York. — *Barkley v. Wilcox*, 86 N. Y. 140; s. c., 40 Am. Rep. 519; *Lynch v. Mayor of N. Y.*, 76 N. Y. 60; s. c., 32 Am. Rep. 271; *Gould v. Booth*, 66 N. Y. 62; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Cochocton Stone Road v. Buffalo, N. Y., & E. R. R.*, 51 N. Y. 573; *Curtis v. Ayrault*, 47 N. Y. 73; *Cott v. Lewiston R. Co.*, 36 N. Y.

214; *Pixley v. Clark*, 35 N. Y. 532; *Brown v. Bowen*, 30 N. Y. 538; *Goodale v. Tuttle*, 29 N. Y. 459; *Bellinger v. New York C. R. R.*, 23 N. Y. 42; *Waffle v. Porter*, 61 Barb. (N. Y.) 130; *Waffle v. New York C. R. R.*, 58 Barb. (N. Y.) 413; *Trustees v. Youmans*, 50 Barb. (N. Y.) 316; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Sleight v. Kingston*, 11 Hun (N. Y.), 594; *Wagner v. Long Island R. R.*, 2 Hun (N. Y.), 633; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526.

Rhode Island. — *Wakefield v. Newell*, 12 R. I. 75; s. c., 34 Am. Rep. 598; *Bufum v. Harris*, 5 R. I. 253.

Vermont. — *Beard v. Murphy*, 37 Vt. 104; *Chatfield v. Wilson*, 28 Vt. 49; *Davis v. Fuller*, 12 Vt. 178; s. c., 36 Am. Dec. 334.

Wisconsin. — *Lessard v. Stram*, 62 Wis. 112; s. c., 51 Am. Rep. 715; *Hanlin v. Chicago & N. W. Ry.*, 61 Wis. 515; *O'Connor v. Fond du Lac, A., & P. Ry. Co.*, 52 Wis. 526; s. c., 38 Am. Rep. 753; *Allen v. Chippewa Falls*, 52 Wis. 434; s. c., 38 Am. Rep. 748; *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Hoyt v. Hudson*, 27 Wis. 656; s. c., 9 Am. Rep. 473; *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50.

Civil-Law Rule. — Under what is known as the civil-law rule, the owner of the higher land has a servitude or natural easement upon the lower adjoining land for the discharge of all surface waters flowing naturally thereon from the higher land, and the owner of the lower land cannot prevent or obstruct the natural passage of such water to the injury of the higher land. The grounds upon which this rule rests are given in the case of *Martin v. Riddle*, 26 Pa. St. 415, in which the court said, "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one; the inconvenience arising from this position is usually more than compensated by other circumstances, hence the owner of the lower ground has no right to erect embankments, whereby the natural flow of the water from the upper grounds shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the waste upon the lower fields." And in the case of *Kauffman v. Grisemer*, 26 Pa. St. 407; s. c., 67 Am. Dec. 437, it was remarked, "Almost the whole law of water-courses is founded in the maxim of the civil law,

of surface water exists, the obstruction of the flow from one part

Aqua currit et debet currere. Because water is descendable by nature, the owner of the dominant or superior heritage has an easement in 'the servient or inferior tenement, for the discharge of all waters which by nature rise in or fall upon the superior.' The rules set out in these two cases have been adopted in the following States; to wit,—

Alabama.—*Farris v. Dudley*, 78 Ala. 124; s. c., 56 Am. Rep. 24; *Crabtree v. Baker*, 75 Ala. 91; s. c., 51 Am. Rep. 424; *Nininger v. Norwood*, 72 Ala. 277; s. c., 47 Am. Rep. 412; *Hughes v. Anderson*, 68 Ala. 280; s. c., 44 Am. Rep. 147.

California.—*Ogburn v. Connor*, 46 Cal. 346; s. c., 13 Am. Rep. 213.

Illinois.—*Peck v. Herrington*, 109 Ill. 611; s. c., 50 Am. Rep. 627; *Gormley v. Sanford*, 52 Ill. 158; *Gillham v. Madison R. Co.*, 49 Ill. 484; *Nevins v. City of Peoria*, 41 Ill. 502.

Iowa.—*Bartle v. City of Des Moines*, 38 Iowa, 414; *Simpson v. Keokuk*, 34 Iowa, 568; *Russell v. Burlington*, 30 Iowa, 262; *Ellis v. Iowa City*, 29 Iowa, 229; *Livingston v. McDonald*, 21 Iowa, 160.

Louisiana.—*Lattimore v. Davis*, 14 La. 161; s. c., 33 Am. Dec. 581; *Martin v. Jett*, 12 La. 501; s. c., 32 Am. Dec. 120; *Minor v. Wright*, 16 La. An. 151; *Hooper v. Wilkinson*, 15 La. An. 497; s. c., 72 Am. Dec. 194.

Maryland.—*Philadelphia, W. & B. R. Co. v. Davis (Md.)*, 10 Cent. Rep. 551.

Michigan.—*Boyd v. Conklin*, 54 Mich. 583; s. c., 52 Am. Rep. 831.

North Carolina.—*Porter v. Durham*, 74 N. C. 767; *Overton v. Sawyer*, 1 Jones (N. C.) L. 308; s. c., 52 Am. Dec. 170.

Ohio.—*Tootle v. Clifton*, 22 Ohio St. 247; s. c., 10 Am. Rep. 732; *Butler v. Peck*, 16 Ohio St. 334; *Crawford v. Rambo*, 44 Ohio St. 279.

Pennsylvania.—*Hays v. Hinkleman*, 68 Pa. St. 324; *Martin v. Riddle*, 26 Pa. St. 415; *Kauffmann v. Griesemer*, 26 Pa. St. 407; s. c., 67 Am. Dec. 437.

Tennessee.—*Louisville & N. R. R. Co. v. Hays*, 11 Lea (Tenn.), 382; *Carriger v. East Tennessee, V. & Gr. Co.*, 7 Lea (Tenn.), 388.

Modified Doctrine.—In *Arkansas* the court in the case of *Little Rock & F. S. R. R. Co. v. Chapman*, 39 Ark. 463; s. c., 43 Am. Rep. 280, repudiated the civil-law rule purely as such, and also the common-law rule in its utmost rigidity, and expressed preference for a rule under which each case would be decided upon its merits, with a reasonable regard at once to the right of the lower owner to ward off

surface waters from his premises, and of the maxim, *sic utere tuo, ut alienum non laedas*."

In South Carolina.—In *Waldrop v. Greenville, L. & S. R. Co. (S. C.)*, 34 Am. & Eng. R. R. Cas., the South Carolina court has, in an opinion *obiter*, expressed its preference for the rule of the Arkansas court.

Conflicting Decisions — Missouri.—In Missouri the courts in their earlier decisions followed the common-law rule,—see *Hosher v. Kansas City, St. J. & C. B. R. R. Co.*, 60 Mo. 329; *Munkers v. Kansas City, St. J. & C. B. R. R. Co.*, 60 Mo. 334; s. c., 72 Mo. 514; 5 Am. & Eng. R. R. Cas. 79; *McCormick v. Kansas City, St. J. & C. B. R. R. Co.*, 57 Mo. 433; *Imler v. Springfield*, 55 Mo. 119,—but departed therefrom in two subsequent cases, and announced their preference for the civil-law rule. See *Shane v. Kansas City, St. J. & C. B. Ry. Co.*, 71 Mo. 239; s. c., 36 Am. Rep. 480; 5 Am. & Eng. R. R. Cas. 64; *McCormick v. Kansas City, St. J. & C. B. R. R. Co.*, 70 Mo. 359; s. c., 35 Am. Rep. 435. In the later cases it has, however, reverted to the common-law rule. See *Benson v. Chicago & A. R. R. Co.*, 78 Mo. 504; *Stewart v. City of Clinton*, 79 Mo. 603. And in the case of *Abbott v. Kansas City, St. J. & C. B. R. R. Co.*, 83 Mo. 271; s. c., 53 Am. Rep. 581, it expressly overruled the decisions which follow the civil law rule.

New Jersey.—In New Jersey the only decision directly in point adopts the common-law rule. See *Bowlsby v. Speer*, 31 N. J. L. (2 Vr.) 352. But in the case of *Field v. West Orange*, 36 N. J. Eq. (9 Stew.) 118; s. c., 37 N. J. Eq. (10 Stew.) 600, the vice-chancellor said, "The broad doctrine declared by some courts that no right of any kind can be claimed in the flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission will constitute an actionable injury, has never been adopted in all its length and breadth in this State."

Obitor Dicta — West Virginia.—In this State there is no decision bearing directly upon the point; but in *Gillison v. Charleston*, 16 W. Va. 284, 303; s. c., 37 Am. Rep. 763, the court, after an examination of the authorities, say, "A part of the authorities we have cited seem to recognize the principle that individuals and municipal corporations have the right to dispose of surface water in any manner they please to prevent its flow over adjoining land upon their premises, although the result may be to flood the adjoining land or expel it, throw it upon the lands of their neighbors,

of the premises to another by the construction of a public improvement is a proper ground for damages.¹

d. Destruction of Wells and Springs. — Where a spring is destroyed, the owner will be entitled to compensation therefor,² even though no part of such owner's lands have been taken.³

g. Temporary User. — a. For Surveys. — An entry for the purpose of making preliminary surveys may be authorized without providing for compensation.⁴ The only right the owner has in such case is to compensation for any injury done to his property.⁵

b. To aid Construction. — When it is necessary for the construction of a public work, that there should be a temporary occupation of lands adjoining, such occupation may be authorized; and the compensation of the owner will be measured by the length of the use and the damage done to the owner.⁶

io. Taxation. — Taxation, however great, for a public purpose, is not a taking of private property for public use within the meaning of a constitutional provision prohibiting such taking.⁷

and, in either case, are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics, as well as law, that a man may use his own property in any manner he pleases, providing he does not thereby interfere with the rights of his neighbor."

Statutory Provisions. — Texas. — In Texas there has been no decision upon the point; but in the case of railroads there is a statute of that State which provides that railroads shall be liable for any obstruction in the flow of surface waters. See *Gulf, Colorado, & S. F. R. R. Co. v. Helsley*, 62 Tex. 593.

1. *Morrison v. Bucksport & B. R. R. Co.*, 67 Me. 353; *Walker v. Old Colony & N. R. R. Co.*, 103 Mass. 10, 16; s. c., 4 Am. Rep. 509; *Pfegar v. Hastings & D. R. R. Co.*, 28 Minn. 510; s. c., 5 Am. & Eng. R. R. Cas. 85.

2. *Peoria & R. I. R. R. Co. v. Bryant*, 57 Ill. 473; *Winkelmans v. Des Moines N. W. Ry. Co.*, 62 Iowa, 11; s. c., 14 Am. & Eng. R. R. Cas. 186; *Aldrich v. Cheshire R. R. Co.*, 21 N. H. (1 Fost.) 359; s. c., 53 Am. Dec. 272; *Lehigh Valley R. R. Co. v. Trone*, 28 Pa. St. 206.

3. *Parker v. Boston & M. R. R. Co.*, 57 Mass. (3 Cush.) 107; s. c., 50 Am. Dec. 709.

4. *Nichols v. Somerset & K. Ry. Co.*, 43 Me. 357; *Cushman v. Smith*, 34 Me. 247; *Walther v. Warner*, 25 Mo. 289; *Orr v. Quimby*, 54 N. H. 596; *Merritt v. Northern R. R. Co.*, 12 Barb. (N. Y.) 608; *Polly v. Saratoga & W. R. R. Co.*, 9 Barb. (N. Y.) 449; *Bloodgood v. Mohawk & Hudson Ry. Co.*, 14 Wend. (N. Y.) 52; s. c., 18 Wend. (N. Y.) 9; s. c., 31 Am. Dec. 313.

Compensation for Private Property taken for Public Use. — In *Stewart v. Mayor and City Council of Baltimore*, 7 Md. 516, the

court say, "The constitutional prohibition against taking private property for public use, until compensation is first paid or tendered, means the taking of property from the owner, and actually applying it to the use of the public. It does not mean the preliminary measures necessary in such cases. To hold that compensation must be paid or tendered before a survey should be made, or other preparatory steps taken, would be a construction of the Constitution not required by its language, or necessary for the protection of private rights. It is quite a sufficient protection if the owner is secured in the use and enjoyment of his property until the damages he may sustain are constitutionally ascertained and paid or tendered."

5. *Bonaparte v. Camden & A. Ry. Co.*, Bald. C. C. 205.

6. *Lynch v. Stone*, 4 Den. (N. Y.) 356; *Great North of England C. & N. J. Ry. Co. v. Clarence Ry. Co.*, 13 M. & W. 706; 1 Coll. Ch. 507; s. c., 3 Eng. & Canal Cas. 605.

Temporary Obstruction. — In *Transportation Co. v. Chicago*, 99 U. S. (9 Otto) 635; bk. 25, L. ed. 336, it was held that the mere temporary blocking of a street by a city in constructing a tunnel by legislative authority did not vest any right to compensation in the abutting property-owners. Compare *Sabin v. Vermont Cent. R. R. Co.*, 25 Vt. 363.

7. *Gilman v. Sheboygan*, 67 U. S. (2 Black) 510; bk. 17 L. ed. 305.

Bonds for Improvements. — In *Mobile County v. Kimball*, 102 U. S. (12 Otto) 691; bk. 26, L. ed. 238, it is held that a State law authorizing a county to issue its bonds for improvement of a harbor within its territory and to levy a tax therefor, is not objectionable as involving a taking of pri-

11. *Destruction from Public Necessity.* — At common law, every one has the right to destroy real or personal property in case of actual necessity to prevent the spreading of fire; and there is no responsibility on the part of such destroyer, and no remedy for the owner.¹ In some of the States the remedy is conferred by statutes, which, being in derogation of the common law, are to be strictly construed.²

12. *Exercise of Governmental and Police Powers.* — Acts done in the proper exercise of governmental and police powers, and not directly encroaching upon private property, although their consequence may be to impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property without just compensation therefor.³

VII. *Damages.* — 1. *Necessity of Provision for.* — In every case where property is authorized to be taken under the power of eminent domain, it is requisite that there should be some provision requiring the person or corporation taking to make compensation.⁴ But a law directing the taking of private property is not void for want of such provision, if it is supplemented by a subsequent law providing therefor.⁵ And a statute authorizing the taking is not rendered wholly invalid by the fact that it contains an unconstitutional provision allowing the company to take possession of the land against the owner's will before making compensation.⁶ Where

vate property by the tax without compensation, although the effect may be to impose on the one county the expense of an improvement in which the whole State is interested. See also *Chambers v. Satterlee*, 40 Cal. 497; *Griffin v. Dogan*, 48 Miss. 111; *Moran v. Troy*, 9 Hun (N. Y.), 540; *Norris v. Waco*, 57 Tex. 635; *Allen v. Drew*, 44 Vt. 174.

1. *American Print Works v. Lawrence*, 23 N. J. L. (3 Zab.) 590; *Russell v. Mayor of New York*, 2 Den. (N. Y.) 461; *Keller v. City of Corpus Christi*, 50 Tex. 614; s. c., 32 Am. Rep. 613; *Bowditch v. Boston*, 101 U. S. (11 Otto) 16; bk. 25 L. ed. 908; s. c., 4 Cliff. C. C. 323; *Respublica v. Sparhawk*, 1 U. S. (1 Dall.) 357; bk. 1 L. ed. 174; *Mouse's Case*, 12 Co. 63; *The Prerogative*, 12 Co. 13.

2. *Parsons v. Pettingill*, 93 Mass. (11 Allen) 507; *Ruggles v. Nantucket*, 65 Mass. (11 Cush.) 436; *Taylor v. Plymouth*, 49 Mass. (8 Metc.) 462; *Russell v. Mayor of New York*, 2 Den. 461; *Stone v. Mayor of New York*, 25 Wend. (N. Y.) 157.

3. *Green v. Swift*, 47 Cal. 536; *Markham v. Brown*, 37 Ga. 277; *Chicago & A. R. R. Co. v. Joliet, L., & A. R. R. Co.*, 105 Ill. 388; s. c., 44 Am. Rep. 799; *Rodemacher v. Milwaukee & St. P. R. R. Co.*, 41 Iowa, 297; s. c., 20 Am. Rep. 592; *Bancroft v. Cambridge*, 126 Mass. 438;

Com. v. Alger, 61 Mass. (7 Cush.) 53; *Baker v. Boston*, 29 Mass. (12 Pick.) 184; s. c., 22 Am. Dec. 421; *St. Louis v. Stern*, 13 Mo. App. 48; *Transportation Co. v. Chicago*, 99 U. S. (9 Otto) 635; bk. 25 L. ed. 336; *Graham v. United States*, 2 Ct. of Cl. 327; *United States v. Army*, 4 Quart. L. J. 163.

4. *Colton v. Rossi*, 9 Cal. 595; *Cushman v. Smith*, 34 Me. 247; *Connecticut River R. Co. v. Commissioners of Franklin County*, 127 Mass. 50; s. c., 34 Am. Rep. 338; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 68 Mass. (2 Gray) 1; *Ash v. Cummings*, 50 N. H. 591; *Matter of Hamilton Ave.*, 14 Barb. (N. Y.) 405; *Matter of Flatbush Ave.*, 1 Barb. (N. Y.) 286; *University v. North Carolina R. Co.*, 76 N. C. 103; s. c., 22 Am. Rep. 671; *McClinton v. Pittsburg, Fort Wayne, & C. R. Co.*, 66 Pa. St. 404; *Sterling's Appeal*, 111 Pa. St. 35; s. c., 56 Am. Rep. 246; 12 Am. & Eng. Corp. Cas. 330; *Norris v. City of Waco*, 57 Tex. 635; *Bohlman v. Green Bay & S. P. R. R. Co.*, 30 Wis. 105; *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605; *Atlantic & Pacific Tel. Co. v. Chicago, R. I. & P. R. R. Co.*, 6 Biss. C. C. 158.

5. *Bonaparte v. Camden & A. R. R. Co.*, 1 Bald. C. C. 205.

6. *Kennedy v. Milwaukee & St. P. R. R. Co.*, 22 Wis. 581.

property to which the State asserts no title is taken by its officer or agent, pursuant to a statute, as private property for public use, the government is under the implied obligation to make just compensation to the owner.¹ But where private property has been permanently injured, an action lies for the injury, although no statute has ever been enacted for the enforcement of the constitutional provision requiring compensation to be made.² Where the Constitution provides a method for the assessment of damages, it is beyond the power of the Legislature to prescribe another;³ and the Legislature cannot constitutionally determine the value of the land, or the amount of the compensation to be made.⁴

2. *Time of Computation.* — A rule as to the time at which the damages are to be computed does not appear to be universally settled, many cases holding that the assessment is to be made as at the time of entry,⁵ while many others hold that the time of the

1. *United States v. Great Falls Man. Co.*, 112 U. S. (12 Otto) 645; bk. 28 L. ed. 846.

2. *Johnson v. City of Parkersburg*, 16 W. Va. 402; s. c., 37 Am. Rep. 779.

3. *Rochester Water Works Co. v. Wood*, 60 Barb. (N. Y.) 137; *House v. Rochester*, 15 Barb. (N. Y.) 517.

4. *Cunningham v. Campbell*, 33 Ga. 625; *Rich v. Chicago*, 59 Ill. 286; *Pennsylvania R. R. Co. v. Baltimore & O. R. R. Co.*, 60 Md. 263; s. c., 14 Am. & Eng. R. R. Cas. 79; *Langford v. Commissioners*, 16 Minn. 375; *Kramer v. Cleveland & P. R. R. Co.*, 5 Ohio St. 140; *Palaret's Appeal*, 67 Pa. St. 479; s. c., 5 Am. Rep. 450; *Vanhorne v. Dorrance*, 2 U. S. (2 Dall.) 304, 312; bk. 1, L. ed. 391.

5. *Jones v. New Orleans & S. R. R. Co.*, 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217; *San Francisco & S. J. R. R. Co. v. Mahoney*, 29 Cal. 112; *Logansport, C. & S. R. R. Co. v. Buchanan*, 52 Ind. 163; *Warren v. First Div. St. Paul & Pac. R. R. Co.*, 21 Minn. 424; s. c., 19 Am. Ry. Rep. 227; *Williams v. New Orleans, M. & T. R. R. Co.*, 60 Miss. 689; *New York & G. L. Ry. Co. v. Stanley's Heirs*, 35 N. J. Eq. (8 Stew.) 283; s. c., 10 Am. Ry. Rep. 345; *Driver v. Western Union R. Co.*, 32 Wis. 569; s. c., 14 Am. Rep. 726.

Alabama Doctrine. — It was said by the Supreme Court of Alabama, in *Jones v. New Orleans & S. R. Co.*, 7 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217, 220, that "it has long been settled in this State that the General Assembly may confer on corporations, created for the construction of railroads, the right to take lands necessary for the use and maintenance of the road, upon making to the owner just compensation." *Alabama & F. R. Co. v. Kenney*, 39 Ala. 307; *Aldridge v. T. C. & D. R. Co.*, 2 Stew. & P. (Ala.) 199; *Davis v. T. C. & D.*

R. Co., 4 Stew. & P. (Ala.) 421. Whether it was essential to the validity of a law conferring this right on such a corporation, that it should require payment of the compensation to precede, or to be concurrent with, the taking and appropriation of the land, or whether all the demands of the Constitution were not satisfied if adequate remedies were provided by which the owner could secure the compensation, was an unsettled question. *Aldridge v. T. C. & D. R. R. Co.*, 2 Stew. & P. (Ala.) 199; *Sadler v. Langham*, 34 Ala. 311. The Constitution of 1868 (Art. xiii. sect. 5) required that the compensation should be paid before or at the time of the taking and appropriation; and a provision similar in substance and effect is incorporated in the present Constitution. Art. xiv. sect. 7; Art. i. sect. 24."

Wisconsin Doctrine. — In *Driver v. Western Union R. Co.*, 22 Wis. 569; s. c., 14 Am. Rep. 726, the "plaintiff was notified by defendants that part of certain lands bought by him to erect buildings on would be taken by defendants for their railroad, and proceedings were commenced therefor; plaintiff, notwithstanding, erected his buildings, and defendants afterward took the land. It was held that the damage for the taking of the land was to be estimated as of the day when the defendants acquired the right to the property, and that plaintiff was entitled to damages according to the value of the lands as improved." In the course of the opinion the court say, "It is very clear to our minds that there was no error in the ruling of the court below in holding that the jury, in estimating the damages, should consider the value of the premises as of the seventh day of May, 1870, the time of the taking and condemnation of lot seven for railroad purposes. This is the time the land was actually taken by the company

assessment or filing the act of appropriation or award is to govern,¹ and some cases lay down the time as being the date of the

under its charter, and when the commissioners appointed to appraise the damages made their award. The charter makes it the duty of the commissioners to view and examine the lands which are taken for the use of the road, with the buildings and improvements thereon, and to estimate the value of the lands so taken or required by the company, and all damages which the owner should or might sustain by reason of the taking of the same for the construction and use of the road, taking into consideration the advantages as well as the disadvantages of the same, by means of the construction of the road, to the owner of the property. Sect. 1, ch. 16, P. & L. Laws of 1854. Upon the commissioners making and filing their report, and payment or legal tender of the appraisement to the owner, or upon the payment of the amount to the clerk of the court to which the appeal has been taken, title vests in the company. Now, the 7th of May was the time the commissioners made and filed their award, and when the company, by depositing the amount thereof with the clerk, acquired, under the charter, the right to lot seven. This, then, was the actual taking of the property for the use of the road, and the time to fix its value, not only within the intent of the charter, but upon general principles applicable to these cases. *The Milwaukee & Miss. R. Co. v. Ebel*, 4 Chand. 72; *Robbins v. Milwaukee & Horicon R. Co.*, 6 Wis. 636; *Kennedy v. The Milwaukee & S. P. R. Co.*, 22 Wis. 581. The plaintiffs were entitled to recover the value of lot seven at the time it was condemned and appropriated by the company, together with such damages as they sustained by reason of the taking of the same, over and above the advantages to them in consequence of the construction and operation of the road."

1. *Lafayette, M. & B. R. R. Co. v. Murdock*, 68 Ind. 137; *Hampden Paint & C. Co. v. Springfield A. & N. R. R. Co.*, 124 Mass. 118; *Morin v. St. Paul, M. & M. R. Co.*, 30 Minn. 100; s. c., 10 Am. & Eng. R. R. Cas. 223; *Blue Earth County v. St. Paul & S. C. R. R. Co.*, 28 Minn. 503; s. c., 10 Am. & Eng. R. R. Cas. 209; *Sherwood v. St. Paul & Chicago R. Co.*, 21 Minn. 122; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500; *Warren v. First Div. St. Paul & P. R. Co.*, 18 Minn. 384; *Winona & St. Peter R. Co. v. Denman*, 10 Minn. 267; *Pennsylvania R. R. Co. v. Lutheran Cong. of Pittsburgh*, 53 Pa. St. 445; *Stafford v. Providence*, 10 R. I. 567; s. c., 14 Am. Rep. 710; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; s. c., 15 Am. Ry. Rep. 91.

Minnesota Doctrine. — It was held by the Supreme Court of Minnesota, in the case of the Board of Commissioners of Blue Earth Co. *v.* St. Paul & S. C. R., 28 Minn. 503; s. c., 10 Am. & Eng. R. R. Cas. 209, that the compensation of a land-owner for property taken for public use is to be estimated as of the time of the award of the commissioners, or, where the assessment is made by a jury, as of the time of the trial; and that this rule is not changed by the fact that a railroad company has, without the consent of the land-owner, entered upon the premises and constructed its road prior to acquiring the right of way by appropriate legal proceedings. The court say, "The universal rule laid down in the books is, that when property is taken for uses by the exercise of the right of eminent domain, the compensation must be fixed as of the date of taking of the property; that is, at the time the public make the appropriation. *Isom v. Mississippi, etc., R. R.*, 36 Miss. 300. That this means the time of taking and appropriating the property by appropriate legal proceedings, and not the time of some previous wrongful and tortious entry, necessarily follows from the constitutional provisions which require compensation to be first made. Until that time the property still belongs to the original owner.

"The fact that a railroad company has, in advance of proper condemnation proceedings, committed a trespass, and wrongfully taken possession of the land, gives it no right to insist that such proceedings, subsequently instituted, shall relate back to the date of the trespass. In accordance with the general doctrine on this subject, this court has adopted, as a convenient practical rule, that compensation must be estimated as of the time of the award of the commissioners. *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267."

Rhode Island Doctrine. — The Supreme Court of Rhode Island held, in *Stafford v. City of Providence*, 10 R. I. 567; s. c., 14 Am. Rep. 710, that the value of complainants' land was to be estimated as it was at the time it was condemned, and not at the time of the location of the improvement. The court say, in the course of the opinion, "The question is, is the value to be estimated at the time of the location of the works, or at the time the land is condemned? Obviously the latter, otherwise this gross injustice would ensue: If the first location had increased the value of the land in the neighborhood, and the then owner sold for this increased value, and the land was subsequently condemned, the purchaser would lose the difference.

filing the petition for assessment, or of the commencement of action.¹

Upon any principle of justice, the person whose land is taken, whether in whole or in part, should be no worse off than his neighbors whose land is not taken, otherwise he does not receive that just compensation the Constitution provides for. "The transaction (says Judge Dillon, sect. 487), is a compulsory purchase, the compulsion, however, coming from the public; and the amount to which the owner is entitled is not simply the value of the property at a forced sale, but such a sum as the property is worth in the market, if persons desiring to purchase were found, who were willing to pay its just and full value and no more. Same rule in *Somerville, etc.*, R. R. Co. v. Doughty, 2 Zab. 495."

1. Missouri Pac. R. R. Co. v. Hays, 15 Neb. 224; s. c., 14 Am. & Eng. R. R. Cas. 177; Oregon & Cal. R. R. Co. v. Barlow, 3 Oreg. 311. Compare California S. R. Co. v. Colton Land & Water Co. (Cal.), 14 Am. & Eng. R. R. Cas. 194, affirmed on authority of California S. R. Co. v. Kimball, 61 Cal. 90, no opinion. See 65 Cal. p. xix.

The California Rule, as laid down in California S. R. Co. v. Colton Land & Water Co., published only in 14 Am. & Eng. R. R. Cas. 194, is that the compensation to which the owner of the land is entitled in a proceeding to condemn the same for the use of a railroad, is the market-value of such land at the time of making the assessment, and not such value at the time of issuing the summons. The court say, "One of the principal objects of condemnatory proceedings is the ascertainment and assessment of such compensation; and the chief element in the compensation is the value of the land required by the public necessity. Upon proof of that necessity the value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for up to the moment of making the assessment the land, or its equivalent value, belongs to the owner, and it is not subject to be taken for public use until the compensation has been first made; the owner is, therefore, entitled to receive its market-value at that time. 'The fact to be ascertained,' said the late Supreme Court, in *S. & C. R. R. Co. v. Galgiani*, 49 Cal. 139, 'is the value of the land at the time of the taking.' And Mr. Justice Sanderson says, in *Fox v. W. P. R. R. Co.*, 31 Cal. 556, it cannot be said, in any legal sense, that the land has been taken until the act has transpired which divests the title or subjects the land to servitude. So long as the title remains in the individual, or the land remains unchanged by the servitude, there

could have been no taking. 'It is a mistake to suppose,' says Mr. Justice Baldwin, in *Bensley v. Mountain Lake Water Co.*, 13 Cal. 317, 'that any title comes from mere appropriation of another's property, or from the taking of the legal proceeding to condemn it. The Constitution is express. Private property shall not be taken for public use without compensation. The compensation precedes the title. The compensation must be adequate. But adequate when? Of course, when the property is so taken. See also *S. F. & S. J. R. R. Co. v. Mahoney*, 13 Cal. 112, and *C. P. R. R. Co. v. Pearson*, No. 2654, not reported.'"

Nebraska Rule.—It was held, in Missouri Pac. R. Co. v. Hays, 15 Neb. 224; s. c., 14 Am. & Eng. R. R. Cas. 177, that the valuation of property, taken for right of way for a railroad, should be made as of the time of the filing of the petition for the assessment of damages. The court say, "The next question in order relates to the assessment of damages,—to the time as of which land taken for right of way should be valued in fixing the amount to be paid to the owner. It is an important question, and a new one in this court. On the part of the plaintiff, it was contended on the trial, and is here, that the assessment should be made as of the time when the proceedings to condemn the property are instituted; in other words, when the petition for the appointment of commissioners to assess the damages is filed with the county judge. The court below, however, held that the jury should make the assessment as of the date of the filing the commissioners' report, which was something over two months later. There was evidence before the jury tending to show that during this time the market-value of the land had materially advanced in consequence of the location of the road. The authorities seem to agree pretty generally that the damages in such cases must be assessed as of the time of taking (*Pierce* on R. R., 209; *Parks v. Boston*, 15 Pick. 198; *Edmands v. Boston*, 108 Mass. 535; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Daniels v. C. I. & N. R. Co.*, 41 Iowa, 52; *Cook v. South Park Comrs.*, 61 Ill. 115; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316; *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *Graham v. Connorsville & N. C. J. R. Co.*, 36 Ind. 463); also that the increased value given to the property by the location of the road should be excluded in making the estimate." See *Pierce* on R. R. 219, citing *New Orleans, O., & G.*

3. *For Improvements made before Assessment.* — Where a railroad company has entered upon the land without obtaining an assessment, and has made improvements thereon, the owner is not entitled to have the value of these improvements included in the amount of damages payable to him.¹ But while the weight of authority supports the rule, as before stated, there are decisions holding that the value of the improvements must be included in the compensation payable.² An improvement, erected by the owner, on the property in order to prevent its being taken for public use, was held not to be a proper subject of compensation where the company had instituted proceedings, had filed a bond to secure payment of the compensation, obtained an appraisalment, and afterwards all the proceedings except the bond were set aside by the court.³

4. *Measure.* — *a. Where Entire Tract taken.* — (1) *Market Value.* — Where property is taken for public purposes the measure of the compensation to be paid to the owner is its market value.⁴ Where

W. R. Co. v. Lagarde, 10 La. An. 150; Stater v. Burlington & Mt. P. Plank Road Co., 1 Iowa, 386; Elizabethtown & P. R. Co. v. Helm, 8 Bush (Ky.), 681; Carli v. Stillwater & St. P. R. Co., 16 Minn. 260.

1. Jones v. New Orleans & S. R. R. Co., 70 Ala. 227; California Southern R. R. Co. v. Southern Pac. R. R. Co., 65 Cal. 293; s. c., 20 Am. & Eng. R. R. Cas. 309; California Pac. R. R. Co. v. Armstrong, 46 Cal. 85; s. c., 7 Am. Ry. Cas. 259; Emerson v. Western Union R. R. Co., 75 Ill. 176; North Hudson Co. R. R. Co. v. Booraem, 28 N. J. Eq. (1 Stew.) 450; s. c., 14 Am. Ry. Rep. 202; Toledo A. A. & G. T. R. R. Co. v. Dunlap, 47 Mich. 456; s. c., 5 Am. & Eng. R. R. Cas. 378; Morgan v. Chicago & N. E. R. R. Co., 39 Mich. 675; Greve v. St. Paul & Pac. R. R. Co., 26 Minn. 66; Justice v. Nesquehoning V. R. Co., 87 Pa. St. 28; Lyon v. Green Bay & M. Ry. Co., 42 Wis. 538; s. c., 15 Am. Ry. Rep. 91; Aspinwall v. Chicago & N. W. R. R. Co., 41 Wis. 474.

2. Graham v. Connersville & N. C. J. R. R. Co., 36 Ind. 463; s. c., 10 Am. Rep. 56; Stafford v. City of Providence, 10 R. I. 567; s. c., 14 Am. Rep. 710.

3. Shick v. Pennsylvania R. R. Co., 1 Pears. (Pa.) 264. In Cobb v. Boston, 109 Mass. 438, it was held in a case where land was condemned at the instance of the city authorities, that only the value of the land at the taking could be recovered, although the city authorities might have induced the owner to expend money and work thereon for such taking.

4. Jones v. New Orleans & S. R. R. Co., 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217; Little Rock & F. S. Ry. v. McGehee, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82; St. Louis, A. & T. R. R. v. Anderson, 39 Ark. 167; s. c., 17 Am. &

Eng. R. R. Cas. 97; California S. R. R. v. Colton, L. & W. R. R. (Cal.); 14 Am. & Eng. R. R. Cas. 194, affirmed on authority California Sou. v. Kimball, 61 Cal. 90; no opinion, see 65 Cal. p. xix.; Chicago & E. R. R. Co. v. Jacobs, 110 Ill. 414; s. c., 22 Am. & Eng. R. R. Cas. 97; Jacksonville & S. E. R. R. v. Walsh, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; South Park Com. v. Dunlevy, 91 Ill. 49; St. Louis V. & T. H. R. R. Co. v. Haller, 82 Ill. 208; Eberhart v. Chicago, M. & St. P. R. R. Co., 70 Ill. 347; Chicago & P. R. R. v. Francis, 70 Ill. 238; Page v. Chicago, M. & St. P. R. R., 70 Ill. 324; Lafayette B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Haslam v. Galena & S. W. R. R. Co., 64 Ill. 535; Sidener v. Essex, 22 Ind. 201; Cummins v. Des Moines & St. L. R. R. Co., 63 Iowa, 397; Everett v. Union Pacific R. R., 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203; Lance v. Chicago, M. & St. P. R. R., 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617; Henry v. Dubuque & Pac. R. R. Co., 2 Iowa, 288; Cohen v. St. Louis F. S. & W. R. R. Co., 34 Kans. 158; s. c., 55 Am. Rep. 242; 22 Am. & Eng. R. R. Cas. 116; Bangor & P. R. R. v. McComb, 60 Me. 290; Lawrence v. Boston, 119 Mass. 126; Burt v. Brigham, 117 Mass. 307; Cobb v. Boston, 112 Mass. 181; Fall River Works v. Fall River, 110 Mass. 428; Edmonds v. City of Boston, 108 Mass. 535; Tufts v. Charlestown, 70 Mass. (4 Gray) 537; Davis v. Charles River R. R., 65 Mass. (11 Cush.) 506; King v. Minneapolis Union Ry. Co., 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; Union Depot S. R. & T. Co. of Stillwater v. Brunswick, 31 Minn. 297; s. c., 47 Am. Rep. 789; s. c., 14 Am. & Eng. R. R. Cas. 233; Robbins v. St. Paul S. & T. F. R. R. Co., 22 Minn. 286; Sherwood v. St.

a perpetual easement in the land is appropriated, the rule is the same as when the fee is taken.¹ Where the land taken contains minerals, the measure is the sum that would be given for the land with the minerals in it; and any inquiry as to the profits or the price or value of the minerals, if the minerals themselves had been taken, will not be permitted.² Where there are improvements upon the land the owner is not entitled necessarily to recover the cost thereof; he will only be entitled to their reasonable value.³ By the term "market value" is to be understood not what the land or property would bring at a forced sale, but what it would bring in the hands of a prudent seller, at liberty to fix the time and the conditions of the sale.⁴ The value which the owner of the property taken places upon it cannot be considered as the true basis of damages.⁵ It is not proper to consider what one would give rather than be turned out of the property;⁶ or what would

Paul & C. R. R., 21 Minn. 122; St. Paul & S. R. R. v. Murphy, 19 Minn. 500; Warren v. First Div. St. P. & P. R. R., 18 Minn. 384; Winona & St. Paul R. R. v. Denman, 10 Minn. 267; Fremont E. & M. V. R. R. v. Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; Virginia & T. R. R. v. Elliott, 5 Nev. 358; Somerville & E. R. R. Co. v. Doughty, 22 N. J. L. (2 Zab.) 495; *In re* Utica, C. & S. V. R. R., 56 Barb. (N. Y.) 456; *In re* Union Village & J. R. R., 53 Barb. (N. Y.) 457; s. c., 35 How. (N. Y.) Pr. 420; Canandaigua & N. F. R. R. v. Payne, 16 Barb. (N. Y.) 273; Troy & Boston R. R. v. Lee, 13 Barb. (N. Y.) 169; Hill v. Mohawk & H. R. R. Co., 5 Den. (N. Y.) 206; Rochester & S. R. R. v. Budlong, 6 How. (N. Y.) Pr. 467; Black River M. R. R. Co. v. Barnard, 9 Hun (N. Y.), 106; People v. Mayor, 2 Hun (N. Y.), 433; *In re* Furman St. 17 Wend. (N. Y.) 649; Pittsburgh V. & C. R. R. Co. v. Rose, 74 Pa. St. 362; Delaware L. & W. R. R. v. Burson, 61 Pa. St. 369; Harvey v. Lackawanna & B. R. R., 47 Pa. St. 428; East Pennsylvania R. R. Co. v. Hiester, 40 Pa. St. 53; Watson v. Pittsburgh & C. R. R. Co., 37 Pa. St. 469; Searle v. Lackawanna & B. R. R. Co., 33 Pa. St. 57; Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. (Pa.) 411; Howard v. Providence, 6 R. I. 514; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Chicago & M. C. R. R. Co. v. Ritter, (Tex.), 10 Am. & Eng. R. R. Cas. 202; Chapman v. Oshkosh & M. R. R. Co., 33 Wis. 629; West v. Milwaukee L. S. & W. R. R., 56 Wis. 318; s. c., 10 Am. & Eng. R. R. Cas. 415; Driver v. Western Union R. R. Co., 32 Wis. 569; s. c., 14 Am. Rep. 726; Neilson v. Chicago, M. & N. Ry. Co., 58 Wis. 164; s. c., 14 Am. & Eng. R. R. Cas. 239; Patterson v. Mississippi & R. R. Boom Co., 3 Dill. C. C. 465; Ontario & Q. R. R. v. Taylor, 6 Ont. Rep. Q. B. Div.

338; s. c., 17 Am. & Eng. R. R. Cas. 100; Penny v. Penny, 37 L. J. Ch. 340.

1. Hollingsworth v. Des Moines & St. L. R. R. Co., 63 Iowa, 443; s. c., 17 Am. & Eng. R. R. Cas. 113; Cummins v. Des Moines & St. L. R. R. Co., 63 Iowa, 397; s. c., 17 Am. & Eng. R. R. Cas. 86; Robbins v. St. Paul S. & T. F. R. R. Co., 22 Minn. 286; s. c., 19 Am. Ry. Rep. 398.

2. Stockton & C. R. R. Co. v. Galgiani, 49 Cal. 139; Searle v. Lackawanna & B. R. R. Co., 33 Pa. St. 57.

3. Jacksonville & S. E. Ry. Co. v. Walsh, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; Lafayette, B. & M. Ry. Co. v. Winslow, 66 Ill. 219.

4. Everett v. Union Pac. Ry. Co., 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203; Lawrence v. Boston, 119 Mass. 126; Somerville & E. R. R. Co. v. Doughty, 22 N. J. L. (2 Zab.) 495; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Patterson v. Mississippi & R. R. Boom Co., 3 Dill. C. C. 465. See also Lance v. Chicago, M. & St. P. R. R. Co., 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617; Cobb v. Boston, 112 Mass. 181; Fall River Works v. Fall River, 110 Mass. 428; Davis v. Charles River R. R., 65 Mass. (11 Cush.) 506; Tufts v. Charlestown, 70 Mass. (4 Gray) 537; Fremont, E. & M. V. R. R. v. Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; Virginia & T. R. R. v. Elliott, 5 Nev. 358; Howard v. Providence, 6 R. I. 514; Chicago & M. C. R. R. v. Ritter (Tex.), 10 Am. & Eng. R. R. Cas. 202; West v. Milwaukee L. S. & W. R. R., 56 Wis. 318; s. c., 10 Am. & Eng. R. R. Cas. 415; Penny v. Penny, 37 L. J. Ch. 340.

5. Matter of Furman Street, 17 Wend. (N. Y.) 649.

6. Tufts v. Charlestown, 70 Mass. (4 Gray) 537.

be given as a compromise price by the public, when there could be no other purchaser, and the seller had the option of selling or awaiting condemnation proceedings to assess the price.¹ The fact that overtures looking to a compromise had been made, and an offer made, cannot be given in evidence.² It is not proper to add to the value because the land was indispensable to the railroad.³ The difference in the rental value of the property, where held for the purpose of renting, may be taken as a criterion.⁴ Where the use made of the land is simply temporary, the measure of damages is not the full value of the land, but only a fair recompense to the owner for the use made of it, and for any injury done to it.⁵

(2) *Uses to which Land is adapted.*—Where property has been improved for carrying on a special business, and such business in fact enhances the value of the site, this fact may be considered in estimating the damages.⁶ But the jury are not confined to only the purpose to which land is devoted: they may consider any purpose for which it is adapted, and which enters into and affects its market value.⁷

1. *Cobb v. Boston*, 112 Mass. 181; *Fall River Print Works v. Fall River*, 110 Mass. 428; *Howard v. Providence*, 6 R. I. 514.

2. *Davis v. Charles River R. R. Co.*, 65 Mass. (11 Cush.) 506.

3. *Virginia & T. R. R. Co. v. Elliott*, 5 Nev. 358; *Penny v. Penny*, 37 L. J. Ch. 340.

4. *St. Louis, V. & T. H. R. R. Co. v. Haller*, 82 Ill. 208.

5. *Griswold v. St. Louis, etc., R. R. Co.*, 8 Mo. App. 582; s. c., 1 Am. & Eng. R. R. Cas. 626.

6. *Chicago & Eastern R. R. Co. v. Jacobs*, 110 Ill. 414; s. c., 22 Am. & Eng. R. R. Cas. 97; *Robb v. Maysville & Mount Sterling T. R. Co.*, 3 Met. (Ky.) 117; *Michigan Air Line Ry. Co. v. Barnes*, 44 Mich. 222; *King v. Minneapolis U. R. Co.*, 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; *Price v. Milwaukee & St. P. R. R. Co.*, 27 Wis. 98.

View and Assessment by Jury.—It has been held that the jury should value the property without reference to the person of the owner or the actual state of his business. *Pittsburgh & Lake E. R. R. Co. v. Robinson*, 95 Pa. St. 426; s. c., 1 Am. & Eng. R. R. Cas. 468.

Statutory Right to Damages.—By statute the right to recover damages is sometimes confined to the loss resulting from the actual taking without considering the use of the part appropriated. *Brooks v. Davenport & St. P. R. R. Co.*, 37 Iowa, 99; *Albany N. R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68.

7. *Little Rock & F. S. R. R. Co. v. McGehee*, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82; *Selma, R. & D. R. R. v.*

Keith, 53 Ga. 178; *Young v. Harrison*, 17 Ga. 30; *Harrison v. Young*, 9 Ga. 359; *Haslam v. Galena & S. W. R. R.*, 64 Ill. 353; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Burt v. Wigglesworth*, 117 Mass. 302; *Eastern R. R. v. Boston & M. R. R.*, 111 Mass. 125; *Boston & W. R. R. v. Old Colony R. R.*, 66 Mass. (12 Cush.) 605; *King v. Minneapolis Union Ry. Co.*, 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; *Sherman v. St. Paul M. & M. Ry. Co.*, 30 Minn. 227; *Brisbine v. St. Paul & S. C. Ry. Co.*, 23 Minn. 114; *Mississippi River Bridge Co. v. King*, 58 Mo. 491; *Somerville & E. R. v. Doughty*, 22 N. J. L. (2 Zab.) 495; *In re Furman St.*, 17 Wend. (N. Y.) 649; *Shenango & A. R. R. v. Braham*, 79 Pa. St. 447; *Dorlan v. East Brandywine & W. R. R.*, 46 Pa. St. 520; *Washburn v. Milwaukee & L. W. R. R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225; *Mississippi & R. R. Boom Co. v. Paterson*, 98 U. S. (8 Otto) 403; bk. 25, L. ed. 206. See also *Everett v. Union Pac. R. R. Co.*, 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203.

Arkansas Doctrine.—In *Little Rock & F. S. R. Co. v. McGehee*, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82, it is held that "in determining the value of lands appropriated for public uses, the same considerations are to be regarded as in sales between private parties; the inquiry being in such cases, what, from their availability for valuable uses, are they worth in the market. As a general rule, compensation to the owner for lands appropriated to public uses is estimated by reference to the uses for which the lands are suitable, having regard to the existing business or wants of

the community, or such as may be reasonably expected in the near future." The court say, "The defendant here contends that the adaptability of the land for the purpose of a ferry was not a proper element for consideration in estimating the value of the land condemned, assuming that such adaptability could never be made available to the plaintiff by reason of supposed exclusive privileges in the proprietors of the Van Buren Ferry; or, if it was competent for the county court to license a rival ferry near the town of Van Buren, that it was extremely problematical whether, if the incline had never been built, such license would have been granted, and a ferry established by the present or any future owner of the land, and consequently the damages were too remote, speculative, and inestimable by any standard approximating correctness. A similar question came before the Supreme Court of the United States, in *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403; bk. 26 L. ed. 206. The Boom Company was a corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum Rivers in that State. It was authorized to enter upon and occupy any land necessary for properly conducting its business; and where such land was private property, to apply to the district court of the proper county for the appointment of commissioners to appraise its value and take proceedings for its condemnation. Patterson was the owner of an island and parts of two other islands in the Mississippi River. The land owned by him amounted to a little over thirty-four acres, and the position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. This land the Boom Company sought to condemn for its uses, and upon its application commissioners were appointed by the district court to appraise its value. The case finally got into the federal court. The jury found a general verdict assessing the value of the land at \$9,358.33, but accompanied it with a special verdict assessing its value, aside from any consideration of its value for boom purposes, at \$300, and in view of its adaptability for those purposes, a further and additional value of \$9,058.33. The circuit court, under a threat of new trial, compelled the plaintiff to reduce his verdict to 5,500, and judgment was entered for that amount. Upon a writ of error the judgment was affirmed. Mr. Justice Field, in delivering the unanimous opinion of the court, said, 'In determining the value of the land appropriated for public purposes, the same

considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market-value which can be readily estimated. So many and varied are the circumstances to be taken into consideration in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. This Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river, as by utilizing them in the manner proposed they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

In *Minnesota* it is *held*, in the case of *King v. Minneapolis W. R. Co.*, 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93, that when property is taken for public uses the owner is entitled to its market-value for the use to which it may be most advantageously applied, and for which it would sell for the highest price in the market; that any evidence is competent, and any fact is proper to be considered which legitimately bears upon the market-value of the property; and that where the property has been improved for a special purpose, for which it is especially suited (as in this case, for the manufacture of ploughs), if the fact that the business has been thereon established and in operation has enhanced the market-value of the property as a site for

b. Where Part of Tract taken. — (1) *Depreciation in Market Value.* — Where part of a tract is taken, the owner is entitled to recover not simply the market value of what is taken, but the difference between the market value of the entire tract and the market value of the part which is left.¹

carrying on such business, it is proper to take this fact into consideration. The court say, "We think it may be stated as elementary that a person is entitled to the fair value of his property for any use to which it is adapted, and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be the one to which it is presently applied, or some other to which it is adapted. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legitimately bears upon the question of the marketable value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on on the premises for so long a time materially increased the market-value of this property. If this was the fact, it was competent to prove it; and, if proved, we cannot see why it was not proper to take it into consideration in estimating the value. Who can say that this circumstance would not affect its value; that is, what a purchaser would ordinarily be willing to pay? When we speak of the market-value of property as being what purchasers generally would pay for it, we do not mean what men would pay who had no particular object in view in purchasing, and no definite plan as to the use to which to put it. The owner has a right to its value for the use for which it would bring the most in the market. This property was expressly built for a plough-factory, and was especially suited for such a use. And it is not unreasonable to suppose that a purchaser would give more for it than he would if the business had been suspended for a time, or had never been established there. Take, for example, a hotel built expressly as a public house, and not capable of advantageous use for any thing else, might it not be worth more, that is, bring more in the market, by reason of the fact that it had been for years run as a hotel? So with a stand long used for some branch of mercantile business. From that very fact it might be worth more for that kind of business than any other, and a man who wished to buy might give more for it than he otherwise would. If so, why is not that a proper element to take into account in determining its value? To do so is not, as counsel seems to argue, to pay the owner

for his loss of business or loss of future profits, but simply to give him the marketable value for his property for the use for which it is best adapted, and for which it would bring the most."

1. St. Louis, A. & T. R. R. Co. v. Anderson, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; San Francisco, A. & S. R. R. Co. v. Caldwell, 31 Cal. 367; Selma R. & D. R. Co. v. Keith, 53 Ga. 178; Village of Hyde Park v. Dunham, 85 Ill. 569; Eberhart v. Chicago M. & St. P. Ry. Co., 70 Ill. 347; Page v. Chicago, M. St. P. R. Co., 70 Ill. 324; Chicago & P. R. R. Co. v. Francis, 70 Ill. 238; Sidener v. Essex, 22 Ind. 201; Lance v. Chicago, M. & St. P. R. R. Co., 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617; Jewett v. Israel, 35 Iowa, 261; Fleming v. Chicago, D. & M. Ry. Co., 34 Iowa, 353; Henry v. Dubuque Pac. R. R. Co., 2 Iowa, 288; Missouri River, F. S. & G. R. R. Co. v. Owen, 8 Kans. 409; Bangor & P. R. R. Co. v. McComb, 60 Me. 290; Edmonds v. City of Boston, 108 Mass. 535; Blue Earth Co. v. St. Paul & S. C. Ry. Co., 28 Minn. 503; s. c., 10 Am. & Eng. R. R. Cas. 209; Winona & St. P. R. Co. v. Denman, 10 Minn. 267; Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; Virginia & T. R. R. Co. v. Henry, 8 Nev. 165; Somerville & E. R. Co. v. Doughty, 22 N. J. L. (2 Zab.) 495; Albany & S. R. R. Co. v. Dayton, 10 Abb. (N. Y.) Pr. N. S. 182; *In re Utica*, C. & S. V. R. R. Co., 56 Barb. (N. Y.) 456; *In re Union Village & J. R. R. Co.*, 53 Barb. (N. Y.) 457; s. c., 35 How. (N. Y.) Pr. 420; Canandaigua & N. F. R. R. Co. v. Payne, 16 Barb. (N. Y.) 273; Troy & Boston R. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Rochester & S. R. R. v. Budlong, 6 How. (N. Y.) Pr. 467; *In re Black River & M. R. R. v. Barnard*, 9 Hun (N. Y.), 104; People v. Mayor, 2 Hun (N. Y.), 433; Putnam v. Douglas County, 6 Oreg. 328; s. c., 25 Am. Rep. 527; Pittsburg, V. & C. Ry. Co. v. Bentley, 88 Pa. St. 178; Danville, H. & W. R. R. Co. v. Gearhart, 81 * Pa. St. 260; East Brandywine & W. R. R. Co. v. Ranck, 78 Pa. St. 454; Pittsburg, V. & G. R. R. Co. v. Rose, 74 Pa. St. 362; Delaware, L. & W. R. R. Co. v. Burson, 61 Pa. St. 369; Hornstein v. Atlantic & G. W. R. R. Co., 51 Pa. St. 87; Harvey v. Lackawanna & B. R. R. Co., 47 Pa. St. 428; East Pennsylvania R. R. Co. v. Hottenstein, 47 Pa. St. 28; Watson v. Pittsburg & C. R. R. Co., 37 Pa. St. 469;

Searle v. Lackawanna & B. R. R. Co., 33 Pa. St. 57; *Schuykill N. Co. v. Thoburn*, 7 Serg. & R. (Pa.) 411; *Chicago & M. R. R. Co. v. Ritter* (Tex.), 10 Am. & Eng. R. R. Cas. 202; *Parks v. Wisconsin Cent. R. R. Co.*, 33 Wis. 413; *Ontario & Q. R. R. Co. v. Taylor*, 16 Ont. Q. B. Div. 338; s. c., 17 Am. & Eng. R. R. Cas. 100.

In Arkansas, in the case of *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97, it is held that "the elements composing the owner's damages for a right of way over his lands, include not only the value of the land taken for the way, but also the injury to his remaining land, arising from the increased difficulty of communication between the severed parts (see *Mason v. Kennebeck & P. R. Co.*, 31 Me. 215; *Clark v. Boston, C., & M. R. Co.*, 24 N. H. 114; *Imlay v. Union Branch R. Co.*, 26, 249; *Utica, C., & S. R. Co.*, *In re*, 56 Barb. 456; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495; *Mifflin v. Harrisburg, P., M. & L. R. Co.*, 16 Pa. St. 182), the inconvenient shape in which the remaining land is left (see *Mifflin v. Harrisburg, P., M. & L. R. Co.*, 16 Pa. St. 182; *White v. Charlotte & S. C. R. Co.*, 6 Rich. 47), the cost of the new fences required by the road (see *Mason v. Kennebeck & P. R. Co.*, 31 Me. 215; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495, 513; *Henry v. Pacific R. Co.*, 2 Iowa, 288; *Sater v. Burlington & Mt. P. R. Co.*, 1 Iowa, 386, 391; *Milwaukee & M. R. Co. v. Eble*, 4 Chandler (Wis.), 72; *North Eastern R. Co. v. Sineath*, 8 Rich. 185. The expense of one-half of the cost of fencing was allowed in *Rensselaer & S. R. Co.*, *In re*, 4 Paige, 553. See *Long Island R. Co.*, *In re*, 3 Edw. Ch. 487), and various other causes not of a remote or speculative character (see *Boothby v. Androscoggin R. Co.*, 51 Me. 318; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Hoffer v. Penn. Canal Co.*, 87 Pa. St. 221; *Curtis v. Eastern R. Co.*, 98 Mass. (14 Allen) 55, 428; *Estabrooks v. Peterborough & S. R. Co.*, 12 Cush. 224. See *Stodghill v. Chicago, B., & Q. R. Co.*, 43 Iowa, 26; *Baltimore & O. R. Co. v. Magruder*, 34 Md. 79; *Chesapeake & O. C. Co., v. Grove*, 11 G. & J. 398; *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 79; *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363; *Dodge v. County Comrs.*, 3 Met. 380; *Brown v. Providence, W., & B. R. Co.*, 5 Gray, 35; *Curtis v. Eastern R. Co.*, 14 Allen, 55, 58, 98 Mass. 428; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Hays v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399; *East Penn. R. Co. v. Schollenberger*, 54 Pa. St. 144; *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. St. 374; *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Somerville & E. R. Co. v.*

Doughty, 2 Zab. 495; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92, 124; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385, 392; *Utica, C., & S. V. R. Co.*, *In re*, 56 Barb. 456). Some authorities hold such a risk to be too uncertain and contingent to be considered in an assessment (*Sunbury & E. R. Co. v. Hummell*, 27 Pa. St. 99; *Lehigh Valley R. Co. v. Lazarus*, 28 Pa. St. 203; *Patten v. Northern Cent. R. Co.*, 33 Pa. St. 426. See *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 273; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Union Village & J. R. Co.*, *In re* 53 Barb. 457; *Utica, Mount Washington Road Co.*, *In re*, 35 N. H. 134; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Sunbury & E. R. Co. v. Hummell*, 27 Pa. St. 99; *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57; *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636). The true measure of damages is the difference between the market-value of the whole tract before the taking, and that of the remainder after the taking, excluding any enhancement of value by the building of the road; and the opinions of witnesses conversant with the land and its value before and after the taking are admissible as evidence."

The Iowa Doctrine, as laid down in *Lance v. Chicago, M. & St. P. R. Co.*, 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617, is that "the measure of compensation for the right of way in such cases is the difference in value of the land immediately before and the value after the right of way is taken, excluding the benefits of the road to the farm."

In Nebraska, where land is condemned for railroad purposes, the owner is entitled to have, as one item of damage, in all cases, the fair market-value of the part actually taken; and where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that; but injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364.

In Oregon.—It is said in the case of *Putnam v. Douglas Co.*, 6 Oreg. 378; s. c., 25 Am. Rep. 527, that "the measure of damages which appears to be established by most of the cases, for building a road

(2) *Depreciation for Specific Purpose.* — Where a part of a tract of land is taken, the owner is entitled to recover by way of compensation any diminution in value caused to the adjoining land, by the fact that it is rendered less available for present or future purposes to which the whole tract was adapted.¹

through a man's land, is the difference between the value of the land before the road was built, and its value after the road is finished. And this is the rule adopted by our statute. This rule appears to have been sanctioned by the judicial decisions of Indiana, Pennsylvania, New York, and Massachusetts. *McIntyre v. The State*, 5 Blackf. 384; *Hornstein v. A. & G. W. R. R. Co.*, 51 Penn. St. 87."

1. *St. Louis, J. & S. R. R. Co. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328; *Fleming v. Chicago, D. & M. R. R. Co.*, 34 Iowa, 353; *Bangor & P. R. R. Co. v. McComb*, 60 Me. 290; *In re New York, L. & W. Ry. Co.*, 29 Hun (N. Y.), 1; *In re New York, W. & R. R. Co.*, 21 Hun (N. Y.), 250; *Powers v. Hazelton & L. R. R. Co.*, 33 Ohio St. 429; *Cincinnati & S. R. R. Co. v. Longworth*, 30 Ohio St. 108; *Pittsburg V. & C. R. R. Co. v. Rose*, 74 Pa. St. 362; *White v. Charlotte & S. C. R. R. Co.*, 6 Rich. (S. C.) L. 47; *Driver v. Western Union R. R. Co.*, 32 Wis. 569; s. c., 14 Am. Rep. 726.

Ohio Doctrine. — The Supreme Court of Ohio, in the case of *Powers v. Hazelton & L. R. Co.*, 33 Ohio St. 429, 435, say that "When the land is appropriated by the State for a public use, a compensatory, not a speculative, remuneration is guaranteed by the law for the land taken, and for the damages occasioned thereby to the remainder of the premises. The difference in the value of the owner's property with the appropriation, and that without it, is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation, and surroundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons. *Patten v. Railway Co.*, 33 Penn. St. 426; *Rhodes v. Baird*, 16 Ohio St. 573; *Goodin v. Canal Co.*, 18 Ohio St. 169; *Lake Shore Railway v. Cin. S. & C. Railway*, 30 Ohio St. 604."

Damages to Trade or Business, etc. — Damages to the trade or business of a landowner are generally too remote to be a subject of damages, because they depend on contingencies too uncertain and specu-

lative to be allowed. *Lake Shore & M. S. R. Co. v. Cincinnati S. & C. R. Co.*, 30 Ohio St. 604, 623. In ascertaining the depreciated value of the land out of which the appropriation is made, reference must be had to the immediate consequences, and consequences cannot be heaped on each other. *Sater v. Burlington R. R. Co.*, 1 Iowa, 386; *Brannan v. Johnson*, 19 Me. 361.

The present value, in consideration of the extent of the right conferred, and the immediate and necessary consequences which depreciate the property, are only to be considered. *Henry v. Dubuque R. R. Co.*, 11 Iowa, 283; *The President, etc., v. Thoburn*, 7 S. & R. (Pa.) 15; *Watson v. The P. & C. R. R.*, 37 Pa. St. 469.

It is the difference in value of the land, and not the diminished annual rental, that is to determine the damage. *Amsden v. The Dubuque R. R. Co.*, 28 Iowa, 542.

Where a railroad crosses a turnpike, the fact that the future business of the latter will be diminished should be disregarded. *Troy & B. R. R. Co. v. The President, etc.*, 16 Barb. (N. Y.) 100.

Damages to a ferry, on the land out of which the right of way for a bridge across a river is taken, cannot be considered in assessing damages for the bridge. *Richmond v. Rodgers*, 1 Duvall (Ky.), 135.

In the case of the Mount Washington Road, 35 N. H. 134, the land of a Mr. Thompson was condemned for a right of way for a carriage-road to the top of the mountain. He was the proprietor of a hotel on the remainder of the land, called the Glen House, with a large income from letting horses to tourists, who desired to ascend the mountain by a bridle-path. The commissioners, in making the award, allowed him for the probable injury to his business by reason of the competition of a carriage-road to the summit. The actual damage to Thompson's land was small, and the principal allowance was for the injury to his business by the proposed road. It was held "That the land-owner should receive compensation for damages done to the land through which the road may be laid out," and "not for any loss or damage he may suffer incidentally resulting from the operation of the road when completed." "Such remote and consequential damages are not caused by the taking of the land for the road, but the change which the public improvement introduces into the course of business,

(3) *Injuries affecting Whole Tract.* — In estimating the damages which a property-owner may recover, where a part of the tract is taken, not only the value of the land actually taken may be considered, but also the direct injury to the rest of the tract resulting therefrom.¹ Thus the jury are entitled to know how a railroad

and for such damage the public is not bound to make compensation. Every man, when he embarks in any business, must do so at the risk of such changes as time and the progress of the age may introduce. The damages awarded to the land-owner are limited to the direct injury done to the land; and he cannot, as a land-owner, claim damages for a loss which he sustains in his business by the operation of the road."

1. *Hooper v. Savannah & M. R. R. Co.*, 69 Ala. 529; s. c., 14 Am. & Eng. R. R. Cas. 256; *Selma, R. & D. R. R. Co. v. Keith*, 53 Ga. 178; *Selma, R. & D. R. R. Co. v. Redwine*, 51 Ga. 470; *McReynolds v. Burlington & O. R. R.*, 106 Ill. 152; s. c., 14 Am. & Eng. R. R. Cas. 172; *Keithsburg & E. R. R. v. Henry*, 79 Ill. 290; *Jones v. Chicago and I. R. R. Co.*, 68 Ill. 380; *Mix v. Lafayette, B. & M. R. R. Co.*, 67 Ill. 319; *Tonica & P. R. R. Co. v. Unsicker*, 22 Ill. 221; *Baltimore, P. & C. R. R. Co. v. Lansing*, 52 Ind. 229; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328; *Grand Rapids & I. R. R. Co. v. Horn*, 41 Ind. 479; *White Water V. R. v. McClure*, 29 Ind. 536; *Ham v. Wisconsin, I. & N. R. R.*, 61 Iowa, 716; s. c., 14 Am. & Eng. R. R. Cas. 204; *Kucheman v. C. C. & D. R. R. Co.*, 46 Iowa, 366; *Atchison & N. R. R. v. Gough*, 29 Kans. 94; s. c., 10 Am. & Eng. R. R. Cas. 151; *Reisner v. Atchison U. D. & R. R. Co.*, 27 Kans. 382; s. c., 10 Am. & Eng. R. R. Cas. 155; *Kansas City, E. & S. R. R. v. Merrill*, 25 Kans. 421; s. c., 2 Am. & Eng. R. R. Cas. 485; *Richmond & L. Turnpike R. Co. v. Rogers*, 1 Duv. (Ky.) 135; *Henderson & N. R. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *Walker v. Old Colony & N. R. R. Co.*, 103 Mass. 10; s. c., 4 Am. Rep. 509; *First Church v. Boston*, 80 Mass. (14 Gray) 214; *Com. v. Coombs*, 2 Mass. 489; *Sheldon v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 318; *Wilmes v. Minneapolis & N. R. R.*, 29 Minn. 242; s. c., 10 Am. & Eng. R. R. Cas. 161; *Blue Earth Co. v. St. Paul & S. C. R. R.*, 28 Minn. 503; s. c., 10 Am. & Eng. R. R. Cas. 209; *Scott v. St. Paul & C. R. R.*, 21 Minn. 322; *Simmons v. St. Paul & C. R. R. Co.*, 18 Minn. 184; *Lake Superior & M. R. R. Co. v. Greve*, 17 Minn. 322; *Winona & St. P. R. R. Co. v. Waldron*, 11 Minn. 515; *Winona & St. P. R. R. Co. v. Denman*, 10 Minn. 267; *Wyandotte, K. C. & N. W. R. R. Co. v. Waldon*, 70 Mo. 629; *Pacific R. R. Co. v. Chrystal*, 25 Mo. 544; *Missouri P. R. R. v. Hays*, 15 Neb. 224; s. c., 14 Am. & Eng.

R. R. Cas. 177; *Fremont, E. & M. V. R. R. v. Lamb*, 11 Neb. 592; s. c., 5 Am. & Eng. R. R. Cas. 367; *Dearborn v. Boston, C. & M. R. R. Co.*, 24 N. H. 179; *Virginia & T. R. R. Co. v. Henry*, 8 Nev. 165; *In re Mount Washington R. Co.*, 35 N. H. 134; *Albany N. R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68; *Raleigh & A. A. L. R. R. Co. v. Wicker*, 74 N. C. 220; *Cleveland & P. R. R. Co. v. Ball*, 5 Ohio St. 568; *East Pennsylvania R. R. Co. v. Hottenstein*, 47 Pa. St. 28; *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. St. 53; *Watson v. Pittsburgh & C. R. R.*, 37 Pa. St. 469; *White v. Charlotte & S. C. R. R. Co.*, 6 Rich. (S. C.) 47; *Baltimore & O. R. R. v. Pittsburgh, W. & K. R. R.*, 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444; *Washburn v. Milwaukee, L. W. R. R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225; *Chapman v. Oshkosh & M. R. R. Co.*, 33 Wis. 629; *Parks v. Wisconsin C. R. R. Co.*, 33 Wis. 413; *Snyder v. West Union R. R. Co.*, 25 Wis. 60; *Robbins v. Milwaukee & H. R. R. Co.*, 6 Wis. 636.

In Alabama. — In *Hooper v. Savannah & M. R. Co.*, 69 Ala. 529; s. c., 14 Am. & Eng. R. R. Cas. 256, it is said that just compensation, under the Constitution, to the owner of a city lot, for a part of the lot taken and applied to the use of a railroad company, includes not only the value of the part of the lot so taken and applied, but also the injury resulting therefrom to the remaining parts of the lot; and if the ways of access to, and egress from, the lot are obstructed or interrupted thereby, such obstruction or interruption forms a part of the injury, for which the owner is entitled to compensation.

In Illinois. — The Supreme Court of Illinois hold, in the case of *McReynolds v. Burlington & O. R. R. Co.*, 106 Ill. 152; s. c., 14 Am. & Eng. R. R. Cas. 172, that "the inconvenience of carrying on a farm divided into two parts by a railroad, is a legitimate element of damages to be considered by the jury in assessing damages for right of way, although such damages may be entirely conjectural, and not susceptible of any thing like definite ascertainment. But damages from danger of crossing the road with teams, and for danger to children and members of the family of the owner, are so unreliable and uncertain as not to form a proper basis in the assessment of damages. The assessment should be confined to such damages only as are reasonably

divides a farm, in the case of farm-lands, how it affects it as to water, pastures, improvements, etc., and also the dangers and

profitable. See *Jones v. Chicago & I. R. Co.*, 68 Ill. 380."

In Iowa.—In *How v. Wisconsin, I & N. R. Co.*, 61 Iowa, 716; s. c., 14 Am. & Eng. R. R. Cas. 204, a railroad was constructed through plaintiff's farm, along a road which followed a Government subdivision,—plaintiff's house and other buildings being on the south side of the road, and much, if not the greater part, of the farm lying upon the north side. The court said, "In determining the damage sustained by reason of the construction of the railroad, the injury to the whole farm was considered. Defendant claims that the inquiry should have been confined to the Government subdivision upon which the road is located. The separate tracts of land, as fixed by the Government survey, were used together as one farm, not separately and as distinct farms. The improvements, and some cultivated land are on the south side of the road; the greater quantity of plough and pasture land is on the north, thus constituting the whole one farm, made up of all the separate Government subdivisions. In determining the plaintiff's damage, the court properly held that the injury to the whole farm should be considered. See *Hartshorn v. B. C. R. & N. R. Co.*, 52 Iowa, 613; *Renwick v. D. & N. W. R. Co.*, 49 Iowa, 664."

In Kansas.—G. was the owner of a contiguous and compact tract of two hundred and forty acres, used by him as one farm. Independence Creek ran in a curved and irregular line through the southwestern portion of the farm. This creek was the boundary-line between Atchison and Doniphan Counties, and by it some sixty acres of the farm were in Atchison and the balance in Doniphan County. Proceedings were instituted in Doniphan County to condemn a right of way for the A. & N. R. R. Co. through this farm. The right of way crossed the farm only in Doniphan County, and touched no part of the farm in Atchison. By whom the condemnation proceedings were instituted, and under what arrangements between the parties, does not appear. The commissioners, in their report, fixed the value of the land taken, and so awarded damages to the balance of the farm as an entirety. The amount of this award was deposited by the railroad company with the treasurer of Doniphan County. On a trial of an appeal from this award to the District Court of Doniphan County, held, that such court did not err in permitting an inquiry as to the damage to the farm as a whole, including that part in Atchison County and in rendering judgment for such damages.

Atchison & N. R. R. Co. v. Gough, 29 Kan. 94; s. c., 10 Am. & Eng. R. R. Cas. 151.

In *Reisner v. Atchison Union Depot & R. Co.*, 27 Kan. 382; s. c., 10 Am. & Eng. Cas. 155, it is held that where the land-owner is in the occupation of two lots within the limits of a city, which are occupied and enjoyed as one tract, and commissioners appointed for the purpose condemn a corner of one of the lots for the right of way of a railroad company, and the land-owner appeals from the award of the commissioners, reciting in the bond for appeal the lot referred to in the proceedings of the commissioners, the damages allowed, and alleges that the valuation and assessment of damages are totally inadequate and insufficient; the land-owner, on the hearing upon appeal, is entitled to offer evidence not only of the portion of the land taken, but of the diminution of the value of the whole property from which it is severed, and thereon to recover the actual damages sustained to the whole property by reason of the right of way so appropriated from a portion of one of the lots. The court say, "We think the court ought to have permitted, under the appeal, proof of all actual damages sustained by the plaintiff by reason of the right of way being taken and appropriated by the defendant. 'In such cases the damages must always very much depend upon the use to which the property is appropriated, and its situation and value with reference to other property of the same owner with which it is connected in use; and that rule of assessment or valuation would seem to be the only true one which makes the compensation go hand in hand with the actual loss or injury sustained by the person whose land is thus taken. People may do what they will with their own,—this is the essential idea of property; and whilst speculative damages cannot be allowed, yet actual damages—its value to the owner, his use being considered—must always be.' *Welch v. Ry. Co.*, 27 Wis. 108; *R. R. Co. v. Merrill*, 25 Kan. 421."

"It was the duty of the commissioners, not only to have appraised the value of the right of way appropriated, but also to have assessed the damages of the owner's interest; and the appeal is had from the determination of the commissioners as to the value of the land, and for all other damages sustained by the owner by reason of such right of way so appropriated. Therefore, if the land-owner is injured as to a whole tract of land, he is entitled to recover damages for the injury to the whole prop-

inconveniences arising from the practical use of the tract.¹ In some States the land-owner is by statute entitled to have farm-

erty, not merely for that to the separate lot or piece of land over which the railroad is built. In our view, it is always better for the court, upon appeal, to permit the land-owner to file his petition setting forth his actual damages sustained by reason of the right of way being appropriated over his property, so that the railroad company may be fully informed before the trial of the evidence to be offered. But, independent of the filing of such petition, we think evidence should go to the jury as to all actual damages sustained by the land-owner by reason of the right of way appropriated, as to all the premises used as one tract or piece of property, whether it consists of one or more lots, of one or more quarter-sections of land. In condemnation proceedings, the company is the party that sets in motion the steps whereby the owner is deprived of his land, and if such company only take a few feet from a tract of property consisting of more than one lot, and used together as one property, the damages are to be assessed with reference to the injury to the whole property, and not to the lot alone from which the right of way is taken."

"Under the provision of sect. 4, art. 12, of the Constitution of the State, a railway company must pay for the right of way irrespective of any benefit from the proposed improvement of the company, and the compensation for such right of way appropriated to the use of the company includes not only the value of the property taken, but also the loss the land-owner sustains in the value of his property by being deprived of a portion of it. Constitution of Kansas, art. 12, sect. 4; *St. Joe & Denver City R. R. Co. v. Orr*, 8 Kan. 420; *M. K. & T. Ry. Co. v. Haines*, 10 Kan. 439; *A. T. & S. F. R. R. Co. v. Blackshire*, 10 Kan. 477; *R. R. Co. v. Merrill*, 25 Kan. 423."

The Massachusetts Doctrine is clearly laid down in *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; s. c., 4 Am. Rep. 509, where it is *held* that in assessing the damages occasioned to the owner of a messuage by the taking of his lands for the construction of a railroad, the depreciation of value arising from the proximity of the road and the running of trains should be considered only so far as it is due to proximity, secured by means, and as a result of such taking. The effects of noise, smoke, soot, and the like, are not distinct elements of damage; but, in estimating the depreciation in value of the entire tract, these causes may be considered, in so far as the annoyance and inconvenience arising therefrom are increased by reason of, and as an incident to,

the taking of a part of the land. The turning of surface-water upon land, by the embankment of a railroad, is a proper element in estimating the damage to the land-owner by the construction of a railroad.

Injuries from Surface-Waters as an Element of Damages.—In *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; s. c., 4 Am. Rep. 509, the court says, "The injury from surface-water turned back by the embankment of the railroad, and made to flow upon the petitioner's land, or prevented from escaping therefrom in the usual mode, was proper for the consideration of the jury in estimating his damages. Where there is a public, or even, it would seem, a private, right or easement of drainage, it is the duty of the railroad corporation to make suitable provision for it; and their failure to do so subjects them to an action of tort, but not to damages upon complaint. *Proprietors of Locks and Canals v. Nashua & L. R. Co.*, 64 Mass. (10 Cush.) 385; *Perry v. Worcester*, 72 Mass. (6 Gray), 544. But no such duty exists in regard to surface-water. The cuts and embankments and necessary gutters of the railroad-track will unavoidably modify the flow of surface-water, and sometimes cause damage by keeping it back or projecting it in large quantities upon lands adjoining the road. Injuries to land from such causes would seem clearly to fall within the class of effects which have been held to afford ground for the assessment of damages under the statute." *Dodge v. County Commissioners*, 44 Mass. (3 Metc.) 380; *Babcock v. Western Railroad Co.*, 50 Mass. (9 Metc.) 553; *Parker v. Boston & M. R. Co.*, 57 Mass. (3 Cush.) 107; *Chapin v. Boston & P. R. Co.*, 60 Mass. (6 Cush.) 422; *Tower v. Boston*, 64 Mass. (10 Cush.) 235; *Brown v. Providence, W., & B. R. Co.*, 71 Mass. (5 Gray) 35; *Curtis v. Eastern Railroad Co.*, 96 Mass. (14 Allen) 55.

In Nebraska, damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof; and they must be proved before the damages are allowed. *Freemont, E., & M. V. R. Co. v. Lamb*, 11 Neb. 592; s. c., 5 Am. & Eng. R. R. Cas. 367.

1. *Hooper v. Savannah & M. R. R. Co.*, 69 Ala. 529; *St. Louis, A. & T. R. R. Co. v. Anderson*, 38 Ark. 167; *Chicago & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *Galena & S. W. R. R. Co. v. Birkbeck*, 70 Ill. 208; *Jones v. Chicago & I. R. R. Co.*, 68 Ill. 382; *Rockford R. & I. St. L. R. R. Co. v. McKinley*,

crossings constructed across railroad-tracks passing through a farm; and where the obligation to construct the crossing is upon the land-owner, he is entitled to recover compensation therefor;¹ but such an item should not be allowed where the company undertakes to construct the crossings.²

(4) *Inconvenience in working Minerals.*—In England it has been held that where a land-owner is bound to leave minerals sufficient to form an adequate support for the surface, he is entitled not only to the value of the minerals left, but also to the additional profit which could be made by getting them.³ But it has been held in Pennsylvania that contingent future disadvantages and unopened mines should not be taken into consideration as an element of damages; the value of the land taken, and the actual damage to the lessee of the property, being the limit of recovery.⁴

(5) *What is considered a Single Tract.*—Where lands are occupied as a single farm, even though consisting of sections, half or quarter sections, eighties or forties, not necessarily belonging to the same legal subdivision, it is, notwithstanding, to be treated as a single tract in estimating the compensation for property taken.⁵ And in the case of city property, the fact that the

64 Ill. 338; *White Water V. R. R. Co. v. McClure*, 29 Ind. 536; *Dreher v. Iowa S. W. Ry. Co.*, 59 Iowa, 599; s. c., 10 Am. & Eng. R. R. Cas. 221; *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52 Iowa, 613; *Brooks v. Davenport & S. P. R. R. Co.*, 37 Iowa, 99; *Henderson & N. R. R. v. Dickerson*, 17 B. Mon. (Ky.) 173; *In re Mount Washington R. R. Co.*, 35 N. H. 134; *Somerville & E. R. R. Co. v. Doughty*, 22 N. J. L. (2 Zab.) 495; *Bowen v. Atlantic & F. B. V. R. R. Co.*, 17 S. C. 574.

1. *Horne v. Atlantic & St. L. R. R. Co.*, 36 N. H. 440; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; s. c., 20 Am. & Eng. R. R. Cas. 165.

2. *Kansas, C. & E. R. R. Co. v. Kregelo*, 32 Kans. 608; s. c., 20 Am. & Eng. R. R. Cas. 241; *March v. Portsmouth & C. R. R. Co.*, 19 N. H. 372.

3. *Barnsley Can. Co. v. Twibell*, 13 L. J. Eq. N. S. 434. See also, *Sparrow v. Oxford W. & W. R. R. Co.*, 13 Eng. L. & Eq. 33; s. c., 21 L. J. Eq. N. S. 731; 16 Jur. 703.

English Statute.—By sect. 81 of 8 Vict., c. 20, it is enacted that a railway company shall "from time to time pay to the owner, lessee, or occupier of the mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner," etc., by reason of the severance of the surface-land, or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway;

and in case of dispute as to the amount of "such losses or expenses," the same shall be settled by arbitration. *Held*, that an arbitrator appointed to assess, under this section, the losses or expenses sustained and incurred by a mine-owner by reason of his land being severed, and the working of his mines interrupted, rightly included in his award items of compensation for additional losses or expenses not then incurred, but which would necessarily be sustained or incurred in working the mines, and which were capable of being immediately estimated with reasonable certainty. *Whitehouse v. Wolverhampton & W. Ry. Co.*, L. R. 5 Ex. 6.

4. *Searle v. Lackawanna & B. R. R. Co.*, 33 Pa. St. 57.

5. *Keithsburg & E. R. R. Co. v. Henry*, 79 Ill. 290; *Ham v. Wisconsin, I. & N. R. R. Co.*, 61 Iowa, 716; s. c., 14 Am. & Eng. R. R. Cas. 204; *Hartshorn v. Burlington C. R. & N. Ry. Co.*, 52 Iowa, 613; *Kansas City, E. & S. R. R. Co. v. Merrill*, 25 Kans. 421; s. c., 2 Am. & Eng. R. R. Cas. 485; *Wilmes v. Minneapolis & N. Ry. Co.*, 29 Minn. 242; s. c., 10 Am. & Eng. R. R. Cas. 161; *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230; *Wyandotte K. C. & N. W. Ry. Co. v. Walden*, 70 Mo. 629; *Parks v. Wisconsin Cent. R. R. Co.*, 33 Wis. 413; *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis. 478.

Farm considered as a Unit.—**Question for Jury.**—Part of the respondent's land lay north, and the rest, being an eighty-acre

premises have been platted as distinct lots will not affect the owner's right to recover for an injury to the whole where they are in fact used for the same purpose.¹

c. Property Injuriously affected.—Where property has been injuriously affected, although no part of it is taken, the owner is only entitled to recover for those injuries which are direct in their nature, and can in no case recover for those which he shares in common with the rest of the public.² If the value of the premises

tract, lay south of a public road, running on a line between it and the rest. Respondent testified that he bought said eighty-acre tract in 1858 of K., and that K. occupied it as a separate farm, and had a farmhouse on it, and that the road was there when he bought it; that it was tillable, and had been cultivated by a tenant the last two years. It was held that the jury were properly instructed, that, for the purpose of assessing the respondent's damages, his farm must be considered as a unit, but what such unit includes the jury must determine; that the petitioner contended that said eighty acres was a separate parcel of land, and not within the farm, and not to be considered in estimating the damages; that this was a question for them; if it were a part of the farm, they might consider the effect of the road upon respondent's convenience and safety in cultivating it from his dwelling in connection with his other land constituting his farm, otherwise not. *St. Paul & S. C. Ry. Co. v. Murphy*, 19 Minn. 500.

Same.—Where Land lies in Two Counties.—G. was the owner of a contiguous and compact farm of two hundred and forty acres. Independence Creek ran in a curved and irregular line through the south-western portion of the farm. This creek was the boundary-line between Atchison and Doniphan Counties; and some sixty acres of the farm were in Atchison, and the balance in Doniphan, County. Proceedings were instituted in Doniphan County to condemn a right of way for the A. and N. R. R. Co. through this farm. The right of way crossed the farm only in Doniphan County, and touched no part of the land in Atchison. The commissioners, in their report, fixed the value of the land taken, and also awarded damages to the balance of the farm as an entirety. The amount of this award was deposited by the railroad company with the treasurer of Doniphan County. On the trial of an appeal to the district court of Doniphan County, *held*, that such court did not err in permitting an inquiry as to damages to the farm as a whole, including that part in Atchison County, and in rendering judgment for such damages. *Atchison & N. R. R. Co. v. Gough*, 29 Kans. 94; s. c., 10 Am. & Eng. R. R. Cas. 151.

1. *Cummins v. Des Moines & St. L. R. R. Co.*, 63 Iowa, 397; s. c., 17 Am. & Eng. R. R. Cas. 86; *Welch v. Milwaukee & St. P. R. R. Co.*, 27 Wis. 108.

Injury to Homestead.—*Division by Alley.*—*Damages.*—Where proceedings are taken to condemn a portion of a city lot, and the lot is part of a homestead lying on both sides of an alley, the award of damages cannot be confined to the land actually taken, but must cover such actual injury as is done to the entire homestead, including the easement in the alley. *Port Huron & S. W. Ry. Co. v. Voorheis*, 50 Mich. 506.

Town Blocks.—*Distinct Parcels of Land for assessing Damages.*—Where a town has been laid out in blocks and streets for many years, and the same had always been recognized, treated, and dealt with by the owners and the people as blocks and streets so laid out, such blocks should be treated as distinct tracts of land for the purpose of assessment of damages, although the plat of the town may not have been made according to the statute. *Todd v. Kankakee & Ill. R. R. Co.*, 78 Ill. 530. For the English authorities on the question of what will be deemed a part of a manufactory, see *Richards v. Swansea Improvement Co.*, L. R. 9 Ch. Div. 425; or of a house, see *Steele v. Midland Ry. Co.*, L. R. 1 Ch. App. 275; *Falkner v. Somerset & D. Ry. Co.*, L. R. 16 Eq. 448; *Salter v. Metropolitan D. Ry. Co.*, L. R. 9 Eq. 432; *Marson v. London C. & D. Ry. Co.*, L. R. 6 Eq. 101; *Walker v. London & B. Ry. Co.*, 3 Ad. & El. N. S. 744; s. c., 43 Eng. C. L. 954; *Grosvenor v. Hampsted Junction Ry. Co.*, 1 D. G. & J. 446; *Reg. v. London & G. Ry. Co.*, 3 Q. B. 166; s. c., 6 Jur. 892; 2 G. & D. 444; 3 Eng. Ry. & Canal Cas. 138.

2. *Keithsburg & E. R. R. Co. v. Henry*, 79 Ill. 290; *Ham v. Wisconsin, I. & N. Ry. Co.*, 61 Iowa, 716; s. c., 14 Am. & Eng. R. R. Cas. 204; *Rogers v. Kennebec & P. R. R. Co.*, 35 Me. 319; *Presbrey v. Old Colony & N. Ry. Co.*, 103 Mass. 1; *Gulf, Colorado, & S. F. R. R. Co. v. Fuller*, 63 Tex. 467; s. c., 22 Am. & Eng. R. R. Cas. 154; *Chicago & M. E. Ry. Co. v. Ritter (Tex.)*, 10 Am. & Eng. R. R. Cas. 202.

has been reduced on account of an obstruction, the measure of damages is the diminution in value caused thereby.¹

d. Property abutting on Street.—If property abutting on a street is injured by the construction of a railroad therein, the measure of damages, where the owner is entitled to recover at all, is the diminution in value caused by the location of the railroad.² Where the property is held for the purpose of renting, the reduction in the rental value is the measure of damages.³ And the Indiana courts hold that the diminution in rental value may be recovered, although the plaintiff resided on the premises himself.⁴ But a proprietor is only entitled to recover for special injuries to his property; he cannot recover for inconvenience and annoyance suffered in common with the rest of the public.⁵

e. For Running Powers over another Railroad.—Where a railroad is granted the privilege of running its cars over the track of another, it is difficult to arrive at any rule for the computation of damages. In California, in the case of street railroads, the rule is that a railroad acquiring the right must pay for the privilege an equal portion of the cost of constructing the track.⁶ In Massachusetts the amount of compensation, and the method by which it is to be arrived at, has been left very much to the commissioners. It would seem that the following principles are to regulate the assessment: where different routes, or parts of routes, are specified in the respective charters, such routes, or parts of routes, belong exclusively to that company in whose charter alone they are specified; and where the same route, or part of a route, is specified for two or more companies, that route is the common property of all such companies, and no one of them has an exclusive right to its use, or to the profits of the carriage of passengers over it to and

1. Hot Springs R. R. Co. v. Tyler, 36 Ark. 205; s. c., 10 Am. & Eng. R. R. Cas. 145; Blesch v. Chicago & N. W. Ry. Co., 43 Wis. 183; Chapman v. Oshkosh & M. R. R. Co., 33 Wis. 629.

Private Way.—The owner of a private way may recover damages for its occupancy, but not necessarily to the amount required to construct another. Gear v. C. C. & D. Ry. Co., 39 Iowa, 23.

2. City of Denver v. Bayer, 7 Colo. 113; s. c., 2 Am. & Eng. Corp. Cas. 465; St. Louis V. & T. H. R. R. Co. v. Capps, 72 Ill. 188; Chicago & Pac. R. R. Co. v. Francis, 70 Ill. 238; Jefferson M. & I. R. R. Co. v. Esterle, 13 Bush (Ky.), 637; Elizabethtown, L. & B. S. R. R. Co. v. Combs, 10 Bush (Ky.), 382; Grand Rapids & Ind. R. R. Co. v. Heisel, 38 Mich. 62; s. c., 31 Am. Rep. 306; Gottschalk v. Chicago, B. & Q. R. R. Co., 14 Neb. 550; *In re* Prospect Park & Coney Island R. R. Co., 13 Hun (N. Y.), 345; Hegar v. Chicago & N. W. R. R. Co., 26 Wis. 624. *Compare* Chicago, B. & Q. R. Co. v. McGin-

nis, 79 Ill. 269; Newcastle & F. R. R. Co. v. McChesney, 85 Pa. St. 522; s. c., 18 Am. Ry. Rep. 518.

3. Selma & M. R. R. Co. v. Knapp, 42 Ala. N. S. 480; O'Connor v. St. Louis & Kansas City & N. Ry. Co., 56 Iowa, 735; s. c., 5 Am. & Eng. R. R. Cas. 325; Grand Rapids & Ind. R. R. Co. v. Heisel, 47 Mich. 393; s. c., 10 Am. & Eng. R. R. Cas. 260.

4. Scott v. Indianapolis & V. R. R. Co. (Ind.), 10 Am. & Eng. R. R. Cas. 189.

5. Chicago & W. R. R. Co. v. Phillips, 10 Ill. App. 648; Chicago & W. R. R. Co. v. George, 10 Ill. App. 646; Chicago & W. Ind. R. R. Co. v. Berg, 10 Ill. App. 607; Dwenger v. Chicago & G. T. Ry. Co., 90 Ind. 152; s. c., 20 Am. & Eng. R. R. Cas. 26; Frith v. City of Dubuque, 45 Iowa, 406; Gear v. C. C. & D. R. Co., 43 Iowa, 83; Parrot v. Cincinnati, H. & D. R. R. Co., 10 Ohio St. 624.

6. Omnibus R. R. Co. v. Baldwin, 57 Cal. 160; s. c., 1 Am. & Eng. R. R. Cas. 316, 320.

from places included within it ; and where the same route or part of route is common to both companies the commissioners held that the compensation must be arrived at by ascertaining the entire expense in the maintenance of the track in question including the interest on its original cost, and dividing such expense of the companies in proportion to the use of the track made by each ; that the cost of maintaining switches at all points where the company acquiring the right entered upon and left the track of the other company should be borne by the company so acquiring the right.¹ Where the right to use the track is exclusive to the company which constructed it, the commissioner may prescribe a rate of compensation founded upon the amount of business of the corporation acquiring the right to use the track, over the tracks, and may require accounts to be so kept as to exhibit the amount of such business, which accounts should be open to the inspection of the company owning the track.² Where the cars of the company acquiring the right are to be drawn by the company to whom the track belongs, the commissioners may specify the number of trains, and the times at which such trains shall be drawn.³

f. For Railroad Crossings. — In a case of the construction of one railroad across the track of another, the company whose track is crossed is entitled to recover not only just compensation for the land taken, but also for such incidental loss, inconvenience, and damage as might reasonably be expected to result from the construction and use of the crossing in a legal and proper manner.⁴ It is therefore entitled to damages for the expense of erecting and maintaining cattle guards and signs, where these are necessary.⁵ And where a railroad cuts through another company's embankment, the latter can recover the cost of building a bridge and keeping it in repair.⁶ And where the construction of the new road constitutes such an obstruction to the old one as materially interferes with or even destroys its capacity to transact business over large parts of its line, the damages should include the injuries sustained.⁷ But where land is taken which belongs to a railroad company, and is used by it in connection with its business, but not for right of way, the fact that the company has a road extending far into the interior and does a larger business, which will be materially interfered with, does not enter as an element

1. Metropolitan R. R. Co. v. Highland St. Ry. Co., 118 Mass. 290.

2. Metropolitan R. R. Co. v. Quincy R. R. Co., 94 Mass. (12 Allen) 263.

3. Lexington & W. C. R. R. Co. v. Fitchburg R. R. Co., 80 Mass. (14 Gray) 266. See also Boston & W. R. R. Corp. v. Western R. R. Corp., 80 Mass. (14 Gray) 253; Jersey City & B. R. R. Co. v. Jersey City & H. R. R. Co., 20 N. J. Eq. (5 C. E. Gr.) 61.

4. Chicago & A. R. R. Co. v. Springfield & N. W. R. R. Co., 67 Ill. 147.

5. Old Colony & F. R. R. Co. v. County of Plymouth, 80 Mass. (14 Gray) 155.

6. Chicago & A. R. R. Co. v. Springfield & N. W. R. R. Co., 67 Ill. 142. See also St. Louis, J. & C. R. R. v. Springfield & N. W. R. R. Co., 96 Ill. 274; s. c., 2 Am. & Eng. R. R. Cas. 487.

7. Chicago & W. I. R. R. Co. v. Englewood C. R. R. Co., 115 Ill. 375; s. c., 56 Am. Rep. 173; 23 Am. & Eng. R. R. Cas. 56; Lake Shore & M. S. R. R. v. Chicago & W. I. R. R. Co., 100 Ill. 21.

into the computation of damages.¹ The detention of trains, the loss of future business, and the expenses incident to the future exercise of corporate powers, caused by the construction of a crossing, are purely speculative and cannot be taken into account.² Nor can the increased expenses of ringing the bell on approaching the crossing be considered.³ Where the company desiring the crossing, covenants to construct and maintain it, the cost of constructing and maintaining cannot be considered as an element of damages.⁴

g. Limited Estates. — (1) *Lessee.* — If the right of the lessee is worth no more than he has agreed to pay in future, the appropriation of that right does not give him a claim to damages, as it is worth nothing. If his lease will bring a greater sum than it will cost the lessee, he is entitled to recover such sum as it will sell for in excess of the amount he agreed to pay for it.⁵ A mere hope or expectation of a renewal of a lease is not such a right of property as will give a claim for compensation.⁶

(2) *Life-Tenants.* — The life-tenant is entitled to the proportion of the whole damages which the value of the life estate bears thereto.⁷

h. Exemplary Damages for Trespass. — Exemplary damages for entering upon land to build a railroad without taking the steps prescribed by statute for the condemnation of the land may be recovered if the act was malicious or oppressive.⁸

i. Benefits. — In estimating the compensation to be made where part of a tract is taken, those benefits which are peculiar to the residue of the tract may be considered in reduction of the damages,⁹

1. *Boston & W. R. R. Corp. v. Old Colony R. R. Corp.*, 66 Mass. (12 Cush.) 612.

2. *Chicago & A. R. R. Co. v. Joliet, L. & A. R. R. Co.*, 105 Ill. 389; s. c., 14 Am. & Eng. R. R. Cas. 62; *Peoria & P. U. R. R. Co. v. Peoria & F. R. R. Co.*, 105 Ill. 110; s. c., 10 Am. & Eng. R. R. Cas. 129; *Lake Shore & M. S. R. R. v. Cincinnati, S. & C. R. R. Co.*, 30 Ohio St. 604.

3. *Old Colony & F. R. R. v. Plymouth Co.*, 80 Mass. (14 Gray) 155.

4. *Chicago & A. R. R. Co. v. Joliet, L. & A. R. R. Co.*, 105 Ill. 389; s. c., 14 Am. & Eng. R. R. Cas. 62.

5. *In re Morgan*, 32 La. An. 371. See also *Chicago & E. R. R. Co. v. Dresel*, 110 Ill. 89; s. c., 20 Am. & Eng. R. R. Cas. 263. In *Booker v. Venice & C. Ry. Co.*, 101 Ill. 333; s. c., 5 Am. & Eng. R. R. Cas. 357, the lessee was allowed as damages, the rent per acre for the balance of the term.

6. *Rex v. Liverpool & M. Ry. Co.*, 4 Ad. & El. 650; s. c., 31 Eng. C. L. 164. See also *In re Stroud*, 8 Man. Gr. & S. 502; s. c., 65 Eng. C. L. 500.

7. *Life-Tenants.—Value of Estate.—How determined.* — *Pittsburgh & C. Ry. Co. v. Bentley*, 88 Pa. St. 178. In this case it was held that the annual value of the premises,

multiplied by the years of the life-tenant's expectancy of life and reduced by calculation to a present cash value, is not a proper mode of determining the value of the life estate as compared with the value of the fee in remainder.

8. *Chicago & I. R. R. Co. v. Baker*, 73 Ill. 317; *Harvey v. Thomas*, 10 Watts (Pa.), 63; s. c., 35 Am. Dec. 141.

9. *San Francisco, A. & S. R. R. Co. v. Caldwell*, 31 Cal. 367; *Nichols v. City of Bridgeport*, 23 Conn. 189; s. c., 60 Am. Dec. 636; *Nicholson v. New York & N. H. R. R. Co.*, 22 Conn. 74; s. c., 56 Am. Dec. 390; *Atlanta v. Central R. & B. Co.*, 53 Ga. 120; *Selma, R. & D. R. R. Co. v. Redwine*, 51 Ga. 470; *Jones v. Wills Valley R. R. Co.*, 30 Ga. 43; *St. Louis, J. & S. R. R. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; *Pittsburgh, Ft. W., & C. R. R. v. Reich*, 101 Ill. 157; *Keithsburg & E. R. R. Co. v. Henry*, 79 Ill. 290; *Todd v. Kankakee & I. R. R. Co.*, 78 Ill. 530; *Wilson v. Rockford, R. I., & St. L. R. R. Co.*, 59 Ill. 273; *St. Louis, V. & T. H. R. R. Co. v. Brown*, 58 Ill. 61; *Hayes v. Ottawa, O. & F. R. V. R. R. Co.*, 54 Ill. 373; *Alton & S. R. R. Co. v. Carpenter*, 14 Ill. 190; *State v. Evans*, 3 Ill.

even though such benefits should amount to a sum sufficient to cancel the whole compensation.¹ But the benefits taken into consideration must not be such simply as are common to the general public;² and benefits to lands which do not form part of the

(2 Scam.) 208; *Britton v. Des Moines*, O. & S. R. R. Co., 59 Iowa, 540; s. c., 10 Am. & Eng. R. R. Cas. 412; *Tobie v. Brown Co.*, 20 Kans. 14; *Commissioners of Pottawatomie Co. v. O'Sullivan*, 17 Kans. 58; *Elizabethtown & P. R. R. Co. v. Helm*, 8 Bush (Ky.), 681; *Henderson & N. R. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *New Orleans P. R. R. v. Gay*, 31 La. An. 430; *Vicksburg, S. & T. R. R. Co. v. Calderwood*, 15 La. An. 481; *New Orleans, O. & G. W. R. R. Co. v. Lagarde*, 10 La. An. 150; *St. Louis & St. J. R. R. Co. v. Richardson*, 45 Mo. 466; *Sexton v. North Bridgewater*, 116 Mass. 200; *Dickenson v. Inhabitants of Fitchburg*, 79 Mass. (13 Gray) 546; *Farwell v. Cambridge*, 77 Mass. (11 Gray) 413; *Upton v. South Reading B. R. R. Co.*, 62 Mass. (8 Cush.) 600; *Meacham v. Fitchburg R. R.*, 58 Mass. (4 Cush.) 291; *Palmer v. Ferrill*, 34 Mass. (17 Pick.) 58; *Morin v. St. Paul, M. & R. R. Co.*, 30 Minn. 100; s. c., 10 Am. & Eng. R. R. Cas. 223; *Winona & St. P. R. R. Co. v. Waldron*, 11 Minn. 515; *Penrice v. Wallis*, 37 Miss. 172; *Wyandotte, K. C. & N. W. R. R. v. Waldo*, 70 Mo. 629; *Mississippi R. B. Co. v. Ring*, 58 Mo. 491; *Quincy, M. & P. R. R. Co. v. Ridge*, 57 Mo. 599; *Mayor, etc., of Lexington v. Long*, 31 Mo. 369; *Pacific R. R. v. Chrystal*, 25 Mo. 544; *Newby v. Platte Co.*, 25 Mo. 258; *Carpenter v. Landaff*, 42 N. H. 21; *Mount Washington Co.'s Petition*, 35 N. H. 134; *Lowerree v. Newark*, 38 N. J. L. (9 Vr.) 155; *State v. Blauvelt*, 34 N. J. L. (5 Vr.) 361; *Genet v. City of Brooklyn*, 99 N. Y. 296; *Raleigh & A. A. L. R. R. Co. v. Wicker*, 74 N. C. 220; *Columbus, P. & I. R. R. Co. v. Simpson*, 5 Ohio St. 251; *Putnam v. Douglas Co.*, 6 Ore. 328; s. c., 25 Am. Rep. 527; *Oregon C. R. R. Co. v. Wait*, 3 Ore. 91; *Pittsburgh & L. E. Ry. Co. v. Robinson*, 95 Pa. St. 426; s. c., 1 Am. & Eng. R. R. Cas. 468; *Philadelphia & E. R. R. Co. v. Cake*, 95 Pa. St. 139; *Root's Case*, 77 Pa. St. 276; *East Pennsylvania R. R. Co. v. Hottenstine*, 47 Pa. St. 28; *Patten v. Northern C. R. R. Co.*, 33 Pa. St. 426; s. c., 75 Am. Dec. 612; *Pennsylvania R. R. Co. v. Lipincott (Pa.)*, s. c., 8 Cent. Rep. 826; *Greenville & C. R. R. Co. v. Partlow*, 5 Rich. (S. C.) L. 428; *Woodfolk v. Nashville & C. R. R. Co.*, 2 Swan (Tenn.), 422; *Gulf, Colorado, & S. F. R. R. Co. v. Fuller*, 63 Tex. 467; *Buffalo Bayou, B. & C. R. R. Co. v. Ferris*, 26 Tex. 588; *Chicago & M. C. Ry. Co. v. Ritter (Tex.)*, 10 Am. & Eng. R. R. Cas. 202; *Mitchell v. Thornton*, 21 Gratt. (Va.) 178; *James River & K. Co. v. Turner*, 9 Leigh (Va.), 313; *Railroad Co. v. Tyree*, 7 W. Va. 699; *Holton v. Milwaukee*, 31 Wis. 27; *Robbins v. Milwaukee & H. R. R. Co.*, 6 Wis. 636.

1. *Trinity College v. Hartford*, 32 Conn. 452; *Nichols v. Bridgeport*, 23 Conn. 189; *Guess v. Stone Mountain Granite Ry. Co.*, 72 Ga. 320; *Atlanta v. Green*, 67 Ga. 386; *Elgin v. Eaton*, 83 Ill. 535; *Page v. Chicago, M. & St. P. R. R.*, 70 Ill. 324; *Indiana C. R. R. v. Hunter*, 8 Ind. 74; *Whitman v. Boston & M. R. R.*, 85 Mass. (3 Allen) 133; *Com. v. Middlesex*, 9 Mass. 388; *Winona & St. P. R. R. Co. v. Waldron*, 11 Minn. 515; *Jackson v. Waldo*, 85 Mo. 637; *Livingston v. Mayor, etc., of N. Y.*, 8 Wend. (N. Y.) 85; s. c., 22 Am. Dec. 622; *Platt v. Pennsylvania Co.*, 43 Ohio St. 228; s. c., 22 Am. & Eng. R. R. Cas. 130; *Putnam v. Douglas Co.*, 6 Ore. 328; *Livermore v. Jamaica*, 23 Vt. 361.

2. *Nichols v. Bridgeport*, 23 Conn. 189; *St. Louis, J. & S. R. R. Co. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; *Chicago, M. & St. P. R. R. Co. v. Hall*, 90 Ill. 42; *Keithsburg & E. R. R. Co. v. Henry*, 79 Ill. 290; *Page v. Chicago, M. & St. P. R. R. Co.*, 70 Ill. 324; *Mix v. Lafayette, B. & M. R. R. Co.*, 67 Ill. 319; *Elizabethtown & P. R. R. Co. v. Helm's Heirs*, 8 Bush (Ky.), 681; *Vicksburg, S. & T. R. R. Co. v. Calderwood*, 15 La. An. 481; *Bangor & P. R. R. Co. v. McComb*, 60 Me. 290; *Green v. Fall River*, 113 Mass. 262; *Allen v. Charlestown*, 109 Mass. 243; *Whitman v. Boston & M. R. R. Co.*, 85 Mass. (3 Allen) 133; s. c., 89 Mass. (7 Allen) 313; *Old Colony & F. R. R. Co. v. Plymouth Co.*, 80 Mass. (14 Gray) 155; *Dickinson v. Fitchburg*, 79 Mass. (13 Gray) 546; *Davis v. Charles River Br. R. R. Co.*, 65 Mass. (11 Cush.) 506; *Meacham v. Fitchburg R. R. Co.*, 58 Mass. (4 Cush.) 291; *Com. v. Coombs*, 2 Mass. 489; *Carli v. Stillwater & St. P. R. R. Co.*, 16 Minn. 260; *Minnesota C. R. R. Co. v. McNamara*, 13 Minn. 508; *Winona & St. P. R. R. Co. v. Waldron*, 11 Minn. 515; *Combs v. Smith*, 78 Mo. 32; *Wyandotte, K. C. & N. W. Ry. Co. v. Waldo*, 70 Mo. 629; *Tebo & N. Ry. Co. v. Kingsbery*, 61 Mo. 51; *Hosher v. Kansas City, St. J. & C. B. R. R. Co.*, 60 Mo. 303; s. c., 9 Am. Ry. Rep. 230; *Mississippi R. B. Co. v. Ring*, 58 Mo. 491; *Quincy, M. & P. R. R. Co. v. Ridge*, 57 Mo. 599; *Lee v. Tebo & Neosho R. R. Co.*, 53 Mo. 178; *St. Louis & St. J. R. R. Co. v. Richardson*, 45 Mo. 466, 483; *Pacific*

tract, a part of which has been taken, cannot be considered.¹ Any allowance on account of benefits is prohibited in some States either by statute or by a constitutional provision.² In many cases

R. R. Co. v. Chrystal, 25 Mo. 544; Adden v. White Mountains N. H. R. R. Co., 55 N. H. 413; s. c., 11 Am. Ry. Rep. 246; Carpenter v. Landaff, 42 N. H. 218; Betts v. Williamsburgh, 15 Barb. (N. Y.) 255; Livingston v. Mayor, etc., of N. Y., 8 Wend. (N. Y.) 85; s. c., 22 Am. Dec. 622; Raleigh & A. A. L. R. R. Co. v. Wicker, 74 N. C. 220; Commissioners of Asheville v. Johnston, 71 N. C. 393; Freedle v. North Carolina R. R. Co., 4 Jones (N. C.) L. 89; Miami R. R. Co. v. Collett, 6 Ohio St. 182; Pittsburgh & L. E. R. R. v. Robinson, 95 Pa. St. 426; s. c., 1 Am. & Eng. R. R. Cas. 463; Root's Case, 77 Pa. St. 276; Hornstein v. Atlantic & Gt. W. R. R. Co., 51 Pa. St. 87; Grafton & G. R. R. Co. v. Foreman, 24 W. Va. 662; s. c., 20 Am. & Eng. R. R. Cas. 215; Chapman v. Oshkosh & M. R. R. Co., 33 Wis. 629; Robbins v. Milwaukee & H. Ry. Co., 6 Wis. 636.

Increased Value because of Road. — A general advance in the value of land resulting from the construction of the road cannot be considered. Mississippi Ry. Co. v. McDonald, 12 Heisk. (Tenn.) 54. But a benefit attending the construction of the railway may be considered, even though it also affects other lands in the same vicinity. Credit Valley Ry. Co. v. Spragge, 24 Grant Ch. (Up. Can.) 231. The removal of other buildings which are dangerous to the property may be considered in estimating the benefits. People v. Howlett, 63 N. Y. 22. And also the increase in value by the fact that the minerals in the lands can be worked to greater advantage. Haslem v. Galena & S. W. Ry., 64 Ill. 353. But the location of a depot in the vicinity of the land, part of which is taken, is not a special benefit. Washburn v. Milwaukee & L. W. R. R., 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225. The fact that the proprietor is entitled by statute to connect his premises with the railroad by means of a side-track may be taken into consideration. Pittsburgh & L. E. R. R. v. Robinson, 95 Pa. St. 426; s. c., 10 Am. Rep. 468. Any privilege which is merely permissible, and terminable by the will of the company, cannot be considered. Old Colony v. Miller, 125 Mass. 1; s. c., 28 Am. Rep. 194.

1. Todd v. Kankakee & I. R. R. Co., 78 Ill. 530; St. Louis, V. & T. H. R. R. Co. v. Brown, 58 Ill. 61; White Water Valley R. R. Co. v. McClure, 29 Ind. 536; Newcastle & R. R. Co. v. Brumback, 5 Ind. 543; Koestebader v. Peirce, 41 Iowa, 204; Hunt v. Smith, 9 Kans. 137; St. Joseph &

D. C. R. R. Co. v. Orr, 8 Kans. 419; Louisville & N. R. R. Co. v. Glazebrook, 1 Bush (Ky.), 325; Isom v. Mississippi C. R. R. Co., 36 Miss. 300; Giesy v. Cincinnati, W., & Z. R. R. Co., 4 Ohio St. 308; Buffalo, B. & C. R. R. Co. v. Ferris, 26 Tex. 588.

2. Alabama & F. R. R. Co. v. Burkett, 42 Ala. 83; St. Louis, A. & T. R. R. Co. v. Anderson, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; Atlanta v. Central R. R. & B. Co., 53 Ga. 120; St. Louis, J., & S. R. R. Co. v. Kirby, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214; Todd v. Kankakee & I. R. R. Co., 78 Ill. 530; Carpenter v. Jennings, 77 Ill. 250; Wilson v. Rockford, R. I., & St. L. R. R. Co., 59 Ill. 273; St. Louis, V., & T. H. R. R. v. Brown, 58 Ill. 61; Evansville, I. & C. S. L. R. R. Co. v. Fitzpatrick, 10 Ind. 120; Britton v. Des Moines, O. & S. R. R. Co., 59 Iowa, 540; s. c., 10 Am. & Eng. R. R. Cas. 412; Koestebader v. Peirce, 41 Iowa, 204; Bland v. Hixenbaugh, 39 Iowa, 532; Israel v. Jewett, 29 Iowa, 475; Deaton v. County of Polk, 9 Iowa, 596; Henry v. Dubuque & P. R. R. Co., 2 Iowa, 288; Jacob v. Louisville, 9 Dana (Ky.), 114; Rice v. Danville, L. & N. Turnpike Co., 7 Dana (Ky.), 81; Sutton's Heirs v. Louisville, 5 Dana (Ky.), 28; Henderson & N. R. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; s. c., 66 Am. Dec. 149; Macon v. Patty, 57 Miss. 397; New Orleans, J. & G. N. R. R. Co. v. Moyer, 39 Miss. 385; Penrice v. Wallis, 37 Miss. 172; Isom v. Mississippi C. R. R. Co., 36 Miss. 300; Brown v. Beatty, 34 Miss. 227; s. c., 69 Am. Dec. 389; Fremont, E. & M. V. R. R. Co. v. Whalen, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; Swayze v. New Jersey M. Ry. Co., 36 N. J. L. (7 Vr.) 295; s. c., 12 Am. Ry. Rep. 404; Carson v. Coleman, 11 N. J. Eq. (3 Stockt.) 106; Albany N. R. R. Co. v. Lansing, 16 Barb. (N. Y.) 68; Giesy v. Cincinnati, W. & Z. R. R., 4 Ohio St. 308; Paducah & M. R. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Woodfolk v. Nashville & C. R. R., 2 Swan (Tenn.) 422; Milwaukee & N. R. R. Co. v. Strange, 63 Wis. 178; s. c., 20 Am. & Eng. R. R. Cas. 413; Robbins v. Milwaukee & H. R. R., 6 Wis. 636.

Statutory or Constitutional Inhibitions. — **Construction.** — But such statutory or constitutional provisions will not be construed to inhibit an assessment upon lands fronting on a street to reimburse the amount of compensation paid the owner for his other land taken for the use of the street. Cleveland v. Wick, 18 Ohio St. 303.

the rule has been adopted that special benefits may be considered in reduction of damages for injuries to the residue of the tract, but cannot be set off against the value of the part taken.¹

5. *Interest on Award.*—The owner of land taken is entitled to interest on the amount of the damages from the time of the taking.² Where an appeal is taken by the land-owner from the award of damages, when upon trial the larger sum is awarded, interest ought to be allowed on the sum found due.³ But if the

1. *Atlanta v. Central R. R. & B. Co.*, 53 Ga. 120; *Augusta v. Marks*, 50 Ga. 612; *Mayor of Savannah v. Hartridge*, 37 Ga. 113; *Jones v. Wills Valley R. R. Co.*, 30 Ga. 43; *Young v. Harrison*, 17 Ga. 30; *McReynolds v. Baltimore & O. Ry. Co.*, 106 Ill. 152; *Pittsburgh, Ft. W. & C. R. R. Co. v. Reich*, 101 Ill. 157; *Hyslop v. Finch*, 99 Ill. 171; *Todd v. Kankakee & I. R. R. Co.*, 78 Ill. 530; *Page v. Chicago, M. & St. P. Ry. Co.*, 70 Ill. 324; *Hayes v. Ottawa, O. & F. R. V. R. R.*, 54 Ill. 373; *Swinney v. Fort Wayne, M. & C. R. R. Co.*, 59 Ind. 205; *Newcastle & R. R. R. v. Brumback*, 5 Ind. 543; *Britton v. Des Moines Ry.*, 59 Iowa, 540; *Elizabethtown R. R. v. Helm's Heirs*, 8 Bush (Ky.), 681; *Louisville R. R. v. Glazebrook*, 1 Bush (Ky.), 325; *Sutton's Heirs v. Louisville*, 5 Dana (Ky.), 28; *Robinson v. Robinson*, 1 Duv. (Ky.) 162; *Henderson & N. R. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *New Orleans & P. Ry. Co. v. Gay*, 31 La. An. 430; *Vicksburg S. & T. R. R. Co. v. Calderwood*, 15 La. An. 481; *New Orleans, O. & G. W. R. R. v. Lagarde*, 10 La. An. 150; *Shipley v. Baltimore & P. R. R. Co.*, 34 Md. 336; *State v. Leslie*, 30 Minn. 533; *Isom v. Mississippi R. R.*, 36 Miss. 300; *Fremont, E. & M. V. R. R. Co. v. Ward*, 11 Neb. 597; *Fremont, E. & M. V. R. R. Co. v. Whalen*, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; *Wagner v. Gage Co.*, 3 Neb. 237; *State v. Miller*, 23 N. J. L. (3 Zab.) 383; *Raleigh & A. A. L. R. R. v. Wicker*, 74 N. C. 220; *Cleveland & P. R. R. Co. v. Ball*, 5 Ohio St. 568; *Memphis v. Bolton*, 9 Heisk. (Tenn.) 508; *Woodfolk v. Nashville & C. R. R.*, 2 Swan (Tenn.), 422; *Buffalo, B. & C. R. R. v. Ferris*, 26 Tex. 588; *Mitchell v. Thornton*, 21 Gratt. (Va.) 178; *James River & K. Co. v. Turner*, 9 Leigh (Va.), 313; *Railroad Co. v. Tyree*, 7 W. Va. 693; *Chapman v. Oshkosh R. R.*, 33 Wis. 629.

In Tennessee, even although the courts hold that compensation for land taken must be made in money, and not by way of benefits to the remainder of the land, it has been held that the Legislature made additional award to the owner for incidental damages for the taking, and prescribed the manner of their assessment, and may properly, as an offset against those damages, allow

incidental benefits and ameliorations. *Paducah & M. R. R. Co. v. Stovall*, 12 Heisk. (Tenn.) 1.

2. *Texas & St. L. Ry. v. Cella*, 42 Ark. 528; *Young v. Harrison*, 17 Ga. 30; *Chicago v. Palmer*, 93 Ill. 125; *Illinois & St. L. R. R. Co. v. McClintock*, 68 Ill. 296; *Cook v. Park Commissioners*, 61 Ill. 115; *Hayes v. Chicago, M. & St. P. Ry.*, 64 Iowa, 733; *Hollingsworth v. Des Moines & St. L. Ry. Co.*, 63 Iowa, 443; *Hartshorn v. Burlington C. R. & N. Ry.*, 52 Iowa, 613; *Cohen v. St. Louis, Ft. C. & W. R. R. Co.*, 34 Kans. 158; *Missouri R. F. S. & G. R. R. Co. v. Owen*, 8 Kans. 409; *Bangor & P. R. R. v. McComb*, 60 Me. 290; *Gay v. Gardiner*, 54 Me. 477; *Boles v. Boston*, 136 Mass. 398; *Old Colony R. R. v. Miller*, 125 Mass. 1; s. c., 28 Am. Rep. 194; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544; *Kidder v. Oxford*, 116 Mass. 165; *Reed v. Hanover B. R. R.*, 105 Mass. 303; *Whitman v. Boston & M. Ry. Co.*, 89 Mass. (7 Allen) 313; *Minneapolis v. Wilkin*, 30 Minn. 145; *Knauff v. St. Paul S. & T. F. R. R. Co.*, 22 Minn. 173; *Warren v. St. Paul & P. R. R. Co.*, 21 Minn. 424; s. c., 19 Am. Ry. Rep. 227; *Williams v. New Orleans, M. & T. R. R. Co.*, 60 Miss. 689; *Sioux City R. R. Co. v. Brown*, 13 Neb. 317; *Fink v. Newark*, 40 N. J. L. (11 Vr.) 11; *Metler v. Easton & A. R. R. Co.*, 37 N. J. L. (8 Vr.) 222; *New York & G. L. Ry. Co. v. Stanley's Heirs*, 35 N. J. Eq. (8 Stew.) 283; s. c., 10 Am. & Eng. R. R. Cas. 345; *Hamersley v. New York*, 56 N. Y. 533; *Detmold v. Drake*, 46 N. Y. 318; *Lawrence R. R. Co. v. Cobb*, 35 Ohio St. 94; *Atlantic & G. W. R. R. Co. v. Koblentz*, 21 Ohio St. 334; *Getz v. Philadelphia R. R. Co.*, 105 Pa. St. 547; *Delaware, L. & W. R. R. Co. v. Burson*, 61 Pa. St. 369; *Railroad v. Gesner*, 20 Pa. St. 240; *Sweeney v. United States*, 62 Wis. 396; *West v. Milwaukee, L. S. & W. R. Co.*, 56 Wis. 378; *Reed v. Chicago R.*, 25 Fed. Rep. 886. Compare *People v. LeGrange*, 2 Mich. 187.

3. *Selma, R. & D. R. R. Co. v. Gam-
mage*, 63 Ga. 604; s. c., 1 Am. & Eng. R. R. Cas. 41; *Hartshorn v. Burlington, C. R. & M. Ry. Co.*, 52 Iowa, 613; *Haverhill Bridge Co. v. County Commissioners*, 103 Mass. 120; *Whitman v. Boston & N. R. R.*

corporation has made a tender, or deposited the money in court, interest will only be given on the increase of damages allowed on appeal.¹ If the corporation obtained a diminution of the award on appeal, it is entitled to obtain from the party withdrawing the amount deposited in court, interest upon the amount of such diminution.² Accepting the amount of the award without interest, though under protest, amounts to a waiver of all rights to interest. The interest does not constitute a debt capable of a distinct claim.³

6. *Payment.*—*a. As prerequisite to Entry.*—(1) *Actual Payment.*—As a general rule, private property cannot be taken for public use until compensation is actually paid or tendered.⁴ And in some States it has been held that even pending an appeal actual payment or tender of the amount found due must be made, deposite in court being insufficient.⁵ Where, however, the con-

Co., 89 Mass. (7 Allen) 313; Warren v. St. Paul & Pac. R. R. Co., 21 Minn. 424; Sioux City & Cent. Ry. Co. v. Brown, 13 Neb. 317; s. c., 10 Am. & Eng. R. R. Cas. 406.

1. Shattuck v. Wilton R. R. Co., 23 N. H. (3 Fost.) 269; Concord R. R. Co. v. Greeley, 23 N. H. (3 Fost.) 237; West v. Milwaukee R. Co., 56 Wis. 378.

2. Watson v. Milwaukee & M. R. R., 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168.

3. Cutter v. New York, 92 N. Y. 166; s. c., 2 Am. & Eng. Corp. Cas. 487.

4. Jones v. New Orleans & S. R. R. Co., 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217; Sanborn v. Belden, 51 Cal. 266; San Mateo Water Works v. Sharpstein, 50 Cal. 284; Loomis v. Andrews, 49 Cal. 239; California Pac. R. R. Co. v. Central Pac. R. R. Co., 47 Cal. 528; Davis v. San Lorenzo Ry. Co., 47 Cal. 517; Fox v. Western Pac. R. R. Co., 31 Cal. 538; San Francisco & San J. R. R. Co. v. Mahoney, 29 Cal. 112; Gillan v. Hutchinson, 16 Cal. 153; Johnson v. Alameda County, 14 Cal. 106; Colton v. Rossi, 9 Cal. 595; Chambers v. Cincinnati & G. Ry. Co., 69 Ga. 320; People v. McRoberts, 62 Ill. 38; Cook v. South Park Commissioners, 61 Ill. 115; Cox v. Louisville, N. A. & C. R. R. Co., 48 Ind. 178; Graham v. Columbus & C. R. R. Co., 27 Ind. 260; Indianapolis & C. R. R. Co. v. Brower, 12 Ind. 374; Dronberger v. Reed, 11 Ind. 420; Peterson v. Ferrey, 30 Iowa, 327; Gear v. Dubuque & S. C. R. R. Co., 20 Iowa, 523; Richards v. Des Moines Valley R. R. Co., 18 Iowa, 259; Henry v. Dubuque & P. R. R. Co., 10 Iowa, 540; Evansville, H. & N. R. R. Co. v. Grady, 6 Bush (Ky.), 144; O'Hara v. Lexington & O. R. R. Co., 1 Dana (Ky.), 232; New Orleans, O. & G. W. R. R. Co. v. Lagarde, 10 La. An. 150; Cushman v.

Smith, 34 Me. 247; Perkins v. Boston & M. R. R. Co., 29 Me. 307; State v. Graves, 19 Md. 351; Cameron v. Supervisors of Washington Co., 47 Miss. 264; Memphis & C. R. R. Co. v. Payne, 37 Miss. 700; Stewart v. Raymond R. R. Co., 15 Miss. (7 Smed. & M.) 568; Thompson v. Grand Gulf R. R. & B. Co., 4 Miss. (3 How) 240; s. c., 34 Am. Dec. 81; Walther v. Warner, 25 Mo. 277; Ray v. Atchison R. R. Co., 4 Neb. 439; Loweree v. Newark, 38 N. J. L. (9 Vr.) 151; Redman v. Philadelphia, M. & M. Ry. Co., 33 N. J. Eq. (6 Stew.) 165; s. c., 1 Am. & Eng. R. R. Cas. 1; Mettler v. Easton & A. R. R. Co., 25 N. J. Eq. (10 C. E. Gr.) 214; Blodgett v. Utica & B. R. R. Co., 64 Barb. (N. Y.) 580; Craig v. Rochester City & B. R. R. Co., 39 Barb. (N. Y.) 494; Jamaica & B. P. Co. v. New York & M. B. Ry. Co., 25 Hun (N. Y.) 585; Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 19; Ferris v. Bramble, 5 Ohio St. 109; Oregonian Ry. Co. v. Hill, 9 Oreg. 377; McClinton v. Pittsburg, Ft. W. & C. R. R. Co., 66 Pa. St. 404; Brown v. Powell, 25 Pa. St. 229; Levering v. Philadelphia, G. & N. R. R. Co., 8 Watts & S. (Pa.) 459; Sherman v. Milwaukee, L. S. & W. R. Co., 40 Wis. 645; s. c., 13 Am. Ry. Rep. 459; Lee v. Northwestern U. Ry. Co., 33 Wis. 222; Bohlman v. Green Bay & L. P. R. R. Co., 30 Wis. 105; Kennedy v. Milwaukee & St. P. R. R. Co., 22 Wis. 581; Loop v. Chamberlain, 20 Wis. 135; Powers v. Bears, 12 Wis. 213; s. c., 78 Am. Dec. 733; Shepardson v. Milwaukee & B. R. R. Co., 6 Wis. 605; Avery v. Fox, 1 Abb. C. C. 246; Blanchard v. Kansas, 16 Fed. Rep. 444.

5. Chambers v. Cincinnati & G. R. R. Co., 69 Ga. 320; s. c., 10 Am. & Eng. R. R. Cas. 376; Mitchell v. Illinois & St. L. C. Co., 68 Ill. 286; Redman v. Philadelphia, M. & M. R. R. Co., 33 N. J. Eq. (6 Stew.)

stitution does not require in express terms that compensation should be first paid, prepayment is not requisite if the land-owner has a sufficient existing remedy.¹ Property may be entered upon for survey or other incipient proceedings, without compensation.² And prepayment for consequential injuries is not essential.³ Where the condemnation is made by the state or by a municipality, some decisions hold that payment of damages need not precede entry upon the land.⁴

(2) *Security for Payment.* — In States where there is no express constitutional provision requiring actual payment as a prerequisite to entry, a bond approved by the court is considered to be sufficient to confer upon the company the right to enter.⁵ Where an

165; s. c., 1 Am. & Eng. R. R. Cas. 1; Watson v. Pittsburgh & C. R. R. Co., 2 Pitts. (Pa.) 99. Compare Townsend v. Chicago & A. R. R. Co., 91 Ill. 545.

1. Commissioners of Lowndes Co. v. Bowie, 34 Ala. 461; Cairo & F. R. R. Co. v. Turner, 31 Ark. 494; Fox v. Western Pac. R. R. Co., 31 Cal. 538; Townsend v. Chicago & A. R. R. Co., 91 Ill. 545; Johnson v. Joliet & C. R. R. Co., 23 Ill. 202; Prather v. Western U. T. Co., 89 Ind. 501; s. c., 14 Am. & Eng. R. R. Co., 1; Prather v. Jeffersonville, M. & I. R. R. Co., 52 Ind. 16; Jeffersonville, M. & I. R. Co. v. Daugherty, 40 Ind. 33; New Albany & S. R. R. Co. v. Connelly, 7 Ind. 32; Compton v. Susquehanna R. R., 3 Bland Ch. (Md.) 386; Haverhill Bridge v. County Commissioners, 103 Mass. 120; Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155; Ray v. Atchison & N. R. Co., 4 Neb. 439; Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. (4 Stew.) 706; Bloodgood v. Mohawk & H. R. R. Co., 14 Wend. (N. Y.) 51; s. c., 18 Wend. (N. Y.) 19; McIntire v. Western & C. R. R. Co., 67 N. C. 678; Raleigh G. R. R. Co. v. Davis, 2 Dev. & B. (N. C.) L. 451; Danville, H. & W. R. R. Co. v. Com., 73 Pa. St. 29; Commonwealth v. Pittsburgh & C. R. R. Co., 58 Pa. St. 26; State v. Dawson, 3 Hill (S. C.), L. 100; Simms v. Memphis C. & L. R. R. Co., 12 Heisk. (Tenn.) 621; Hatch v. Vermont Cent. R. R. Co., 25 Vt. 49; Northern Pac. R. R. Co. v. Barnesville & M. R. R. Co., 2 McCr. C. C. 224; Northern Pac. R. R. Co. v. St. Paul, M. & M. R. Co., 1 McCr. C. C. 302; Bonaparte v. Camden & A. R. R. Co., Bald. C. C. 205.

2. Fox v. Western Pac. R. R. Co., 31 Cal. 538; Chambers v. Cincinnati & G. R. R. Co., 69 Ga. 320; s. c., 10 Am. & Eng. R. R. Cas. 376; Cushman v. Smith, 34 Me. 247; Raleigh & G. R. R. Co. v. Davis, 2 Dev. & B. (N. C.) L. 451; Levering v. Philadelphia, G. & M. R. R. Co., 8 Watts & S. (Pa.) 459.

3. Peoria & R. I. R. R. Co. v. Seritz, 84

Ill. 135; Paterson v. Chicago, D. & V. R. R. Co., 75 Ill. 588; Stetson v. Chicago & E. R. R. Co., 75 Ill. 74; Sears v. Marshall Co., 59 Iowa, 603; s. c., 20 Am. & Eng. R. R. Cas. 36; Smith v. Gould, 59 Wis. 631; s. c., 2 Am. & Eng. Corp. Cas. 424.

4. Talbot v. Hudson, 82 Mass. (16 Gray) 417; State v. Bruggeman, 31 Minn. 493; State v. Messenger, 27 Minn. 119; Walther v. Warner, 25 Mo. 277; Ash v. Cummings, 50 N. H. 591; Wheeler v. Essex Road Board, 39 N. J. L. (10 Vr.) 291; Loweree v. Newark, 38 N. J. L. (9 Vr.) 151; Zimmerman v. Canfield, 42 Ohio St. 463; Long v. Fuller, 68 Pa. St. 170; Keene v. Bristol, 26 Pa. St. 46; Yost's Report, 17 Pa. St. 524; Smith v. Gould, 59 Wis. 631; Powers v. Bears, 12 Wis. 213; s. c., 78 Am. Dec. 733; Shepardson v. Milwaukee & B. R. R. Co., 6 Wis. 605. Compare Cushman v. Smith, 34 Me. 247; Baltimore & O. R. R. Co. v. Boyd, 63 Md. 325; Connecticut River R. R. v. County Commissioners, 127 Mass. 50; s. c., 34 Am. Rep. 338; Matter of First Street, 58 Mich. 641; Woodruff v. Town of Glendale, 26 Minn. 78; Cage v. Trager, 60 Miss. 563; Redman v. Philadelphia M. & M. R. R. Co., 33 N. J. Eq. (6 Stew.) 165; Sage v. City of Brooklyn, 89 N. Y. 189; Oregonian R. v. Hill, 9 Oreg. 377.

5. Cairo & F. R. R. Co. v. Turner, 31 Ark. 494; Fox v. Western Pac. R. R. Co., 31 Cal. 538; Selma, R. & D. R. R. Co. v. Gammage, 63 Ga. 604; Carr v. Georgia R. R. Co., 1 Ga. 524; Shute v. Chicago & M. R. R. Co., 26 Ill. 436; Johnson v. Joliet & C. R. R. Co., 23 Ill. 202; Curtiss v. St. Paul, S. & T. F. R. R. Co., 21 Minn. 497; Warren v. St. Paul & Pac. R. R. Co., 18 Minn. 384; Weir v. St. Paul, S. & T. F. R. R. Co., 18 Minn. 155; Hursh v. St. Paul & P. R. R. Co., 17 Minn. 439; Gray v. St. Paul R. R. Co., 13 Minn. 315; In re New York Cent. & H. R. R. Co., 60 N. Y. 116; Fries v. Southern Pennsylvania R. R. & M. Co., 85 Pa. St. 73; Demmick

appeal is taken, the company may deposit the amount assessed in the lower court, and will thereupon be entitled to entry.¹

(3) *Judgment*. — A mere enter of an award of judgment, against the company taking land, is not compensation which will entitle the company to enter and retain possession.²

(4) *Waiver of Pre-payment*. — Entry upon lands by the consent or acquiescence of the land-owner will operate as a waiver of the right to constitute prepayment, and the land-owner cannot obtain a judgment of ejectment against the company until the damages have been assessed and default made upon the judgment therefor.³

b. To whom Payable. — (1) *Owner in Fee*. — Actual possession and use of real estate by a person are a *prima facie* evidence of title in fee to the same in him;⁴ and it has been held that the damages must be paid to him, although other parties have given notice of their ownership before payment.⁵ But if the true owners recover possession before the damages are paid, they then become payable to him, although a trespasser may have been in

v. Broadhead, 75 Pa. St. 464; *McClinton v. Pittsburg, Ft. W. & C. R. R. Co.*, 66 Pa. St. 404; *Wadhams v. Lackawanna & B. R. R. Co.*, 42 Pa. St. 303; *Harrisburg v. Crangle*, 3 Watts & S. (Pa.) 460.

1. *Lake Erie & W. R. Co. v. Kinsey*, 87 Ind. 514; s. c., 14 Am. & Eng. R. R. Cas. 309; *Norriston & Cent. T. R. R. Co. v. Burket*, 26 Ind. 53; *Indiana & Cent. R. R. Co. v. Brower*, 12 Ind. 374; *Downing v. Des Moines N. W. R. Co.*, 63 Iowa, 177; s. c., 14 Am. & Eng. R. R. Cas. 317; *Peterson v. Ferreby*, 30 Iowa, 327; *Central B. U. R. R. Co. v. Atchison Cent. R. R. Co.*, 28 Kans. 453; s. c., 10 Am. & Eng. R. R. Cas. 528; *Kansas City v. Kansas Pac. R. R. Co.*, 18 Kans. 331; *St. Joseph & D. C. R. R. Co. v. Callender*, 13 Kans. 495; *St. Louis & S. F. R. Co. v. Evans & H. F. B. Co.*, 85 Mo. 307; s. c., 22 Am. & Eng. R. R. Cas. 518; *Wagner v. New York, C. & St. L. R. Co.*, 38 Ohio St. 32; s. c., 10 Am. & Eng. R. R. Cas. 380; *In re New York Cent. & Pac. R. R. Co.*, 60 N. Y. 116; *Eidemiller v. Wyandotte City*, 2 Dill, C. C. 376; *Northern Pac. R. R. Co. v. St. Paul, M. & M. R.*, 1 McCr. C. C. 302; s. c., 3 Fed. Rep. 702.

2. *Colton v. Rossi*, 9 Cal. 595; *Enfield Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40; s. c., 42 Am. Dec. 716; *Moody v. Jacksonville, F. & K. W. R. R.*, 20 Fla. 597; s. c., 14 Am. & Eng. R. R. Cas. 53; *Southwestern R. R. v. Southern A. Tel. Co.*, 46 Ga. 43; *Powers v. Armstrong*, 19 Ga. 427; *Peoria, P. & J. R. R. v. Peoria & S. R. R. Co.*, 66 Ill. 174; *Chicago & M. R. Co. v. Bull*, 20 Ill. 218; *White v. Wabash, St. L. & P. R.*, 64 Iowa, 281; *Irish v. Burlington & S. W. R. R. Co.*, 44 Iowa, 380; *St. Louis & L. & D. R. R. Co. v. Wilder*, 17 Kans. 239;

Stewart v. Raymond R. R. Co., 15 Miss. (7 Smed. & M.) 568; *Thompson v. Grand Gulf R. R. & B. Co.*, 4 Miss. (3 How.) 240; s. c., 34 Am. Dec. 81; *Provolt v. Chicago, R. I. & P. R. R. Co.*, 57 Mo. 256; *Walther v. Warner*, 25 Mo. 277; *Ray v. Atchison & W. R. R. Co.*, 4 Neb. 439; *Petition of Mount Washington R. R. Co.*, 35 N. H. 134; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Buffalo B. & C. R. R. Co. v. Ferris*, 26 Tex. 588; *Pryzbylowicz v. Missouri R. R. R. Co.*, 3 McCr. C. C. 586; s. c., 17 Fed. Rep. 492.

3. *New Orleans & S. R. R. Co. v. Jones*, 68 Ala. 48; s. c., 2 Am. & Eng. R. R. Cas. 425; *Foot v. New Haven & N. Co.*, 23 Conn. 214; *Nelson v. Fleming*, 56 Ind. 310; *Leviston v. Junction R. Co.*, 7 Ind. 597; *Cohen v. St. Louis, F. S. & W. R. R. Co.*, 34 Kans. 158; s. c., 22 Am. & Eng. R. R. Cas. 116; 55 Am. Rep. 242; *Louisville & N. R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735; *Provolt v. Chicago, R. I. & P. R. R. Co.*, 57 Mo. 256; s. c., 9 Am. Ry. Rep. 941; *Blaisdell v. Portsmouth, G. F. & C. R. R. Co.*, 51 N. H. 483; *Selden v. Delaware & H. C. Co.*, 29 N. Y. 634; *Miller v. Auburn & S. R. R. Co.*, 6 Hill (N. Y.), 61; *Knapp v. McAulay*, 39 Vt. 275; *McAulay v. Western Vt. R. Co.*, 33 Vt. 311.

4. *Missouri R., Ft. S. & G. R. R. v. Owen*, 8 Kans. 409; *Hawkins v. County Commis.*, 84 Mass. (2 Allen) 254; *Trustees v. Worcester*, 42 Mass. (1 Metc.) 437; *Sherwood v. St. Paul & C. R. R. Co.*, 21 Minn. 127; s. c., 11 Am. Ry. Rep. 370; *St. Paul & S. C. R. R. Co. v. Matthews*, 16 Minn. 341.

5. *Sacramento Valley R. R. v. Moffatt*, 7 Cal. 577.

possession when the damages were assessed.¹ The husband may receive and dispose of compensation for the homestead without the consent of his wife.²

(2) *Vendor and Vendee.* — The vendee of lands is not entitled to claim the payment of damages for lands taken, or for injuries done before he acquired title.³ The right of the vendor is limited to such permanent depreciations in value as resulted from the first statement, and might then have been considered and estimated in condemnation proceedings. The vendor is entitled to recover for any damages to the land resulting after the acquired title to it.⁴ But if the road be surveyed before purchase, but be not located until afterwards, the conveyance will carry the right to damages.⁵ If the real owner of land holds an unrequited deed,

1. *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal. 638.

2. *Canty v. Latternar*, 31 Minn. 239; s. c., 15 Am. & Eng. R. R. Cas. 380.

3. *McLendon v. Atlanta & W. P. R. R.*, 54 Ga. 293; *Chicago & A. R. R. Co. v. Maher*, 91 Ill. 312; *Toledo, W. & W. R. R. Co. v. Morgan*, 72 Ill. 155; *Toledo, W. & W. R. R. v. Hunter*, 50 Ill. 325; *Illinois C. R. R. Co. v. Allen*, 39 Ill. 205; *Indiana, B. & W. R. v. Allen*, 100 Ind. 409; *Piper v. Union P. R. R. Co.*, 14 Kans. 568; *Sargent v. Machias*, 65 Me. 591; *New York & N. E. R. R. v. Drury*, 133 Mass. 167; s. c., 10 Am. & Eng. R. R. Cas. 518; *Haskell v. New Bedford*, 108 Mass. 209; *Dunlap v. Toledo, A. & G. T. R. Co.*, 50 Mich. 470; s. c., 10 Am. & Eng. R. R. Cas. 185; *New York & G. L. R. Co. v. Stanley*, 34 N. J. Eq. (7 Stew.) 55; *Tenbrooke v. Jahke*, 77 Pa. St. 392; *McFadden v. Johnson*, 72 Pa. St. 335; *Turnpike Road v. Brosi*, 22 Pa. St. 29; *Dobbins v. Brown*, 12 Pa. St. 75; *Schuykill & S. N. R. R. v. Decker*, 2 Watts (Pa.), 343; *Zimmerman v. Union Canal Co.*, 1 Watts & S. (Pa.) 346; *Allyn v. Providence, W. & B. R. R.*, 4 R. I. 457; *Sams v. Port Royal & A. R. R. Co.*, 15 S. C. 484; s. c., 10 Am. & Eng. R. R. Cas. 683; *Lewis v. Wilmington & M. R. R. Co.*, 11 Rich. (S. C.) L. 91; *Galveston, H. & S. A. R. R. Co. v. Pfeuffer*, 56 Tex. 66; s. c., 11 Am. & Eng. R. R. Cas. 373; *Central R. R. v. Merkel*, 32 Tex. 723; *Milwaukee & N. R. R. Co. v. Strange*, 63 Wls. 178; *Pomeroy v. Chicago M. R. R. Co.*, 25 Wis. 641; *Dickison v. Baltimore & P. R. R. Co.*, 3 McA. C. C. 361; s. c., 3 Am. & Eng. R. R. Cas. 201; *Dixon v. Baltimore & P. R. R.*, 1 Mackey (D. C.), 78.

In the case of the *Central R. Co. v. Hetfield*, 29 N. J. L. (5 Dutch.) 206, this subject is reviewed at length, the court expressing itself as follows: "Where land is thus seized unlawfully, the whole injury is done at the first seizure. The State holds the land. The owner is entitled to

the full value. It is seized, if seized at all, for the whole period it is to serve as a public user. The whole injury is to the person who is owner at the first seizure. If a person buys afterwards, he buys subject to the public user, and all his rights are subject thereto. There can be no subsequent trespass against him, and the defendant can defend himself under the general issue without notice. It could never be tolerated, that any private owner could thus, after consent given, sever the sinews of the national strength. He is entitled to his pay either from the government or its agents. If its agents enter without consent or payment, he is entitled to vindictive as well as real damages in trespass, and the whole damage is by the original seizure and to the original owner. It follows that if the defendants seized this land, without payment or consent, they are liable to the person who owned the land at the time of the seizure as for a condemnation, and not to any subsequent owner. The plaintiff and grantor, if anybody, therefore, is the one entitled to damages. The right to these damages has not been, nor could they be (being a mere *chose in action*), assigned to the plaintiff. So that whether the defendants took possession originally rightfully or wrongfully, it is manifest that the present plaintiff has no legal cause of action."

4. *Chicago & A. R. R. Co. v. Maher*, 91 Ill. 312; *Chicago & E. I. R. R. Co. v. Loeb*, 8 Ill. App. 627; *Hentz v. Long Island R. R. Co.*, 13 Barb. (N. Y.) 646; *Alexandria C. R. R. & B. Co. v. District of Columbia*, 1 Mackey (D. C.), 217; s. c., 5 Am. & Eng. Corp. Cas. 531.

5. *Paducah & M. R. R. Co. v. Stovall*, 12 Heisk. (Tenn.) 1; *Rand v. Townsend*, 26 Vt. 670.

But in *Roberts v. Williams*, 15 Ark. 43, it was held that if the purchaser acquired title at any time before the final condemnation proceedings in the county court,

and in consequence, through mistake, the damages are assessed to his grantor, he cannot have the proceeding set aside.¹

(3) *Partners and Tenants in common.* — Partners may recover damages jointly for the taking of land by which one of them holds the legal title in trust for the firm.² In the case of joint tenants, it is not essential that the jury should apportion the amount payable among the claimants.³

(4) *Married Woman for Right of Dower.* — A married woman is not entitled, by virtue of her right of dower in her husband's land, to compensation if such is taken during her husband's life.⁴ If, however, the right of dower is consummated, and the widow has entered upon land which has been apportioned to her, she is entitled to all damages for her interest therein.⁵

(5) *Mortgagee.* — There is some conflict on the question whether damages are payable to the mortgagor or to the mortgagee; the greater number of cases seem to hold that the mortgagee is entitled to payment.⁶ In Massachusetts and Pennsylvania the courts have held that the damages are payable to the mortgagor, and the mortgagee has only a personal claim against the mortgagor.⁷ Where the company has entered upon possession of the land without making compensation to the mortgagee, it has a right to redeem the lands from the lien of the mortgage on payment of a ratable proportion of the mortgage debt, which it must do to the full value of the property at the time of its appropriation, with interest if need be, irrespective of the improvements put thereon by the company.⁸ On discovering the incumbrances,

he was entitled to intervene and recover damages.

In Carli v. Stillwater & St. P. R. R. Co., 16 Minn. 260, it was said as long as the title of the railroad company was inchoate, a simple quit-claim deed of the land would pass the right to recover damages, and the title of the company was held inchoate until the time for an appeal from the report of commissioners assessing damages had expired.

1. *Brown v. County Commissioners of Essex*, 53 Mass. (12 Metc.) 208.

2. *Reed v. Hanover & B. R. R. Co.*, 105 Mass. 303.

3. *Grayville & M. R. R. Co. v. Christy*, 92 Ill. 337; *Ashby v. Eastern R. R. Co.*, 46 Mass. (5 Metc.) 368; s. c., 38 Am. Dec. 426; *Pittsburg & S. R. R. v. Hall*, 25 Pa. St. 336.

But it has been held that the damages ought to be awarded separately, if the owner's interests can be ascertained. *Reppert v. Chicago, O. & St. J. R. R. Co.*, 43 Iowa, 490; s. c., 14 Am. Ry. Rep. 470.

4. *Moore v. Mayor of New York*, 8 N. Y. 110; s. c., 59 Am. Dec. 473; *Guynne v. Cincinnati*, 3 Ohio, 24; s. c., 17 Am. Dec. 576. *Compare State v. Easton & A. R. R. Co.*, 36 N. J. L. (7 Vr.) 181.

5. *Todermier v. Aspinwall*, 43 Ill. 401; *In re William & A. St.*, 19 Wend. (N. Y.) 679.

6. *Wilson v. European & N. A. R. R. Co.*, 67 Me. 358; *South Park Commissioners v. Todd*, 112 Ill. 379; *Sherwood v. Lafayette*, 109 Ind. 411; s. c., 58 Am. Rep. 414; *Sawyer v. Landers*, 56 Iowa, 422; *Severin v. Cole*, 38 Iowa, 463; *Bright v. Platt*, 32 N. J. Eq. (5 Stew.) 362; s. c., 31 N. J. Eq. (4 Stew.) 81; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *In re John & Cherry Sts.*, 19 Wend. (N. Y.) 659; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Wade v. Hennessey*, 55 Vt. 207; *Hagar v. Brainard*, 44 Vt. 294; *Wooster v. Sugar R. Valley R. R. Co.*, 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

7. *Read v. City of Cambridge*, 126 Mass. 427; *Farnsworth v. City of Boston*, 126 Mass. 1; *Beed v. Easton R. R. Co.*, 71 Mass. (5 Gray) 470; *Meacham v. Fitchburg R. R. Co.*, 58 Mass. (4 Cush.) 291; *Schuylkill Co. v. Thoburn*, 7 Serg. & R. (Pa.) 411.

8. *North Hudson Co. R. R. Co. v. Booraem*, 28 N. J. Eq. (1 Stew.) 450; s. c., 14 Am. Ry. Rep. 202; *Dows v. Congdon*, 16 How. (N. Y.) Pr. 571; *Kennedy v. Milwaukee & St. P. R. R. Co.*, 22 Wis. 581.

the company may proceed immediately to redeem the lands, without waiting until the mortgaged premises are sold under decree of foreclosure.¹

(6) *Tenants and Lessees.* — Tenants and lessees are entitled to compensation for their interest in the leased premises.² The tenant is entitled to recover compensation for the loss occasioned through being deprived of his rights under a covenant for renewal.³

(7) *Tenants for Life and Remainder-men.* — Tenants for life and remainder-men are entitled to have damages apportioned between them.⁴

(8) *Heir or Administrator.* — If the owner of lands dies before the land has been taken for public use, his heir and not his administrator is entitled to claim damages.⁵ But if the land has been taken during the owner's life, the compensation is payable to the administrator.⁶

(9) *Payment into Court.* — If the owner is unknown, or if there are conflicting claims, the compensation may be paid into court, and the company will thereupon obtain a clear title.⁷

c. Who Liable for Damages. — Where lands have been condemned, the title does not vest in the corporation condemning until payment of compensation, and the owner may prevent the

1. *In re* New York C. R. R. Co., 20 Barb. (N. Y.) 419.

2. *Chicago & E. R. R. Co. v. Dresel*, 110 Ill. 89; *Burbridge v. New Albany & S. R. R. Co.*, 9 Ind. 546; *Baltimore & O. R. R. v. Thompson*, 10 Md. 76; *Muller v. Earle*, 35 N. Y. Super. Ct. (3 J. & S.) 461; *Coutant v. Catlin*, 2 Sandf. Ch. (N. Y.) 485; *In re William & Anthony Sts.*, 19 Wend. (N. Y.) 678; *Turner v. Williams*, 10 Wend. (N. Y.) 140; *Dyer v. Wightman*, 66 Pa. St. 425; *North Pennsylvania R. R. Co. v. Davis*, 26 Pa. St. 238; *Brown v. Powell*, 25 Pa. St. 229; *Turnpike Road v. Brosi*, 22 Pa. St. 29; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Alexandria & F. R. R. Co. v. Faunce*, 31 Gratt. (Va.) 761.

When a deduction is made from the landlord's damages, under appropriation by the sovereign for the time the lease has to run, and awarded to the lessee, it in equity belongs to the lessor, as he is deprived of recourse to the land for his rent. *Fitzpatrick v. Pennsylvania R. R. Co.*, 10 Phila. (Pa.) 107. *Compare, Ex parte Carey*, 10 L. T. 37.

3. *North Pennsylvania R. R. v. Davis*, 26 Pa. St. 238.

4. *Shelton v. Derby*, 27 Conn. 414; *Burbridge v. New Albany & N. R. R. Co.*, 9 Ind. 546; *Pittsburgh, V. & C. R. R. v. Bentley*, 88 Pa. St. 178; *Redding R. R. Co. v. Boyer*, 13 Pa. St. 497; *Crangle v. Harrisburg*, 1 Pa. St. 132; *Colcough v. Nashville & N. W. R. R. Co.*, 2 Head (Tenn.),

171; *Austin v. Rutland R. R. Co.*, 45 Vt. 215; *In re Pfleger*, L. R. 6 Eq. 426; *In re Phillips Trusts*, L. R. 6 Eq. 250.

5. *Peoria & R. I. R. R. Co. v. Rice*, 75 Ill. 329; *Satterfield v. Crow*, 8 B. Mon. (Ky.) 553; *Neal v. Knox & L. R. R. Co.*, 61 Me. 298; *Boynton v. Peterborough & S. R. R. Co.*, 88 Mass. (4 Cush.) 467; *Boonville v. Ormrod's Adm'r.*, 26 Mo. 193; *Ballou v. Ballou*, 78 N. Y. 325.

Purchase-money paid into court by a railway company under sect. 69 of the Lands Clauses Consolidation Act, 1845, for land of which an infant is absolutely seized in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heirs-at-law. *Kelland v. Fulford*, L. R. 6 Ch. Div. 491.

6. *Welles v. Cowles*, 4 Conn. 182; s. c., 10 Am. Dec. 115; *Neal v. Knox & L. R. R.*, 61 Me. 298; *Boynton v. Peterborough R. R.*, 58 Mass. (4 Cush.) 467; *Hotchkiss v. Auburn R. R. Co.*, 36 Barb. (N. Y.) 600; *Howcott's Ex'rs v. Warren*, 7 Ired. (N. C.) L. 20.

7. *San Francisco & S. J. R. R. Co. v. Mahoney*, 29 Cal. 112; *South Park Commissioners v. Todd*, 112 Ill. 379; *In re New York C. R. R. Co.*, 20 Barb. (N. Y.) 419; *Wiggin v. New York*, 9 Paige Ch. (N. Y.) 16; *Philadelphia v. Dyer*, 41 Pa. St. 463; *Haswell v. Vermont C. R. R. Co.*, 23 Vt. 228; *Wooster v. Sugar R. V. Co.*, 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

mortgagee,¹ or vendee,² from exercising any rights thereon, until payment has been made. Two railroad companies which are authorized by statute, jointly or severally, to locate, construct, and maintain a railroad, are, if they file a joint location, jointly liable for damages.³

d. How made.—The compensation to be made to the owner cannot include agreements of the conditions imposed upon the company, e.g., for the construction of crossings, bridges, or cattle-guards, but must be the award in money.⁴ Nor can the compensation be made in other lands.⁵ A statute authorizing the taking of lands for the use of a railroad, owned by the State, and of other roads, without providing for any compensation to the owners except from the earnings of the said road, is unconstitutional.⁶

e. Effect of Payment.—It is only by payment of the compensation that the corporation condemning the lands acquires a vested title in the property.⁷ But from the time the compensation is paid or deposited as required by law, the right to the property vests in the corporation, and they have a private right to enter upon and appropriate it.⁸ And the payment will be sufficient to estop the owner from making further claims for damages, which it is alleged were not considered.⁹ But the award and payment does not preclude the owner from compelling the company to fulfil any contract entered into with reference to the crossings, etc.¹⁰

f. Protection and Enforcement of Right.—(1) *By Action at Law.*—If the company alone have power to institute the ordinary statutory proceedings, or is under special obligation to carry it into effect, and is in default for not having done so in a reasonable time, the injured owner is not deprived of his remedy by action.¹¹

1. *Kendall v. Missisquoi & C. R. R. Co.*, 55 Vt. 438.

2. *Drury v. Midland R. R. Co.*, 127 Mass. 571.

3. *Grand Junction R. R. & D. Co. v. Commissioners of Middlesex*, 80 Mass. (14 Gray) 553.

4. *Chicago & A. R. R. v. Springfield & N. W. R. R.*, 67 Ill. 142; *Chicago, M. & St. P. R. R. Co., Melville*, 66 Ill. 329; *Presbrey v. Old Colony & N. R. R.*, 103 Mass. 1; *Drury v. Midland R. R.*, 127 Mass. 571; *Ham v. Salem*, 100 Mass. 350; *Central O. R. R. v. Holler*, 7 Ohio St. 220; *Pittsburgh, V. & C. R. R. v. Rose*, 74 Pa. St. 362; *Chesapeake & O. R. R. v. Halstead*, 7 W. Va. 301; *Chesapeake & O. R. R. v. Patton*, 6 W. Va. 147; *Milwaukee & N. W. R. R. v. Strange*, 63 Wis. 178; s. c., 20 Am. & Eng. R. R. Cas. 413.

5. *Van Horn v. Dooran*, 2 U. S. (2 Dall.) 304; bk. 1, L. ed. 391.

6. *Connecticut R. R. Co. v. County Commissioners*, 127 Mass. 50; s. c., 34 Am. Rep. 338.

7. *New Orleans & S. R. R. Co. v. Jones*, 68 Ala. 48; s. c., 2 Am. & Eng. R. R. Cas.

425; *Chicago v. Barbican*, 80 Ill. 482; *Mayor & C. of Baltimore R. R. Co. v. Hook*, 62 Md. 371; s. c., 7 Am. & Eng. Corp. Cas. 442.

8. *Beekman v. Saratoga & S. R. R. Co.*, 3 Paige Ch. (N. Y.) 45; *International & G. N. R. R. Co. v. Benitos*, 59 Tex. 326; s. c., 10 Am. & Eng. R. R. Cas. 122.

9. *Hitchcock v. Danbury*, 25 Conn. 516; *Baltimore & O. R. Co. v. Johnson*, 84 Ind. 420; s. c., 10 Am. & Eng. R. R. Cas. 408; *Lafayette P. Co. v. New Albany & S. R. R. Co.*, 13 Ind. 90; *Perley v. B., C. & M. R. Co.*, 57 N. H. 212; *South Side R. R. Co. v. Daniel*, 20 Gratt. (Va.) 344; *Grafton v. Baltimore & O. R. R. Co.*, 21 Fed. Rep. 309; s. c., 17 Am. & Eng. R. R. Cas. 200; *Manning v. Eastern Co. R. R. Co.*, 12 Mees. & W. 237.

10. *Jones v. Seligman*, 81 N. Y. 191; s. c., 3 Am. & Eng. R. R. Cas. 236.

11. *Stein v. Burden*, 24 Ala. 130; s. c., 60 Am. Dec. 453; *Cairo & F. R. R. Co. v. Trout*, 32 Ark. 17; *Nicholson v. New York & N. H. R. R. Co.*, 22 Conn. 74; s. c., 56 Am. Dec. 390; *Bradley v. New York & N. H. R. R. Co.*, 21 Conn. 294; *Kansas*

As where it occupies property not authorized by its charter.¹

(2) *Injunction*. — The owner of land is entitled to an injunction restraining a railroad company from constructing its road, where the company has taken possession without any valid condemnation proceedings,² or where after the assessment it has failed to make payment,³ even though it have already obtained possession,⁴ or has failed to fulfil a stipulation by which it was bound to furnish the owner with a crossing.⁵ An individual whose property is not actually taken cannot bring an injunction to restrain an appropriation of property alleged to be *ultra vires*; such action can only be brought by a state.⁶ An abutting owner is not entitled to an injunction restraining the construction of a railroad on the street by consent of the city council until damages are assessed.⁷ But where the

Pacific R. R. Co. v. Streeter, 8 Kans. 133; Blesch v. Chicago & N. W. R. R. Co., 43 Wis. 183; Bohlman v. Green Bay & L. P. R. R., 30 Wis. 105; Loop v. Chamberlain, 20 Wis. 135.

1. Eward v. Lawrenceburgh & U. M. R. R. Co., 7 Ind. 711; Eaton v. European & N. A. R. R. Co., 59 Me. 520; Hazen v. Boston & M. R. R. Co., 68 Mass. (2 Gray) 574.

2. Jones v. New Orleans & S. R. R. Co., 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217; Niemeyer v. Little Rock & J. R. R. Co., 43 Ark. 111; s. c., 20 Am. & Eng. R. R. Cas. 174; Lafayette v. Bush, 19 Ind. 326; Carpenter v. Easton & A. R. Co., 24 N. J. Eq. (9 C. E. Gr.) 249; Gardner v. Newburg, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526; Sower v. Philadelphia, 35 Pa. St. 231; Bohlman v. Green Bay & M. R. R. Co., 30 Wis. 105; s. c., 13 Am. Ry. Rep. 421; Eidemiller v. Wyandotte City, 2 Dill. C. C. 376.

3. Shute v. Chicago & M. R. R. Co., 26 Ill. 436; Irish v. Burlington & S. W. R. Co., 44 Iowa, 380; Richards v. Des Moines R. R. Co., 18 Iowa, 259; Stewart v. Raymond R. R. Co., 15 Miss. (7 Smed. & M.) 568; Provolt v. Chicago, R. I. & P. R. R. Co., 69 Mo. 633; People v. Law, 34 Barb. (N. Y.) 494; s. c., 22 How. (N. Y.) Pr. 109; Atchison v. Philadelphia & T. R. R. Co., 14 Haz. Pa. Reg. 10; White v. Nashville & N. W. R. R. Co., 7 Heisk. (Tenn.) 518; Kendall v. Missisquoi & C. R. R. Co., 55 Vt. 438; s. c., 14 Am. & Eng. R. R. Cas. 423; Ford v. Chicago & N. W. R. R. Co., 14 Wis. 609; Davis v. LaCrosse & M. R. R. Co., 12 Wis. 16; Sturtevant v. Milwaukee W. & B. R. R. Co., 11 Wis. 63; Northern Pac. R. R. Co. v. Barnesville & M. R. R. Co., 4 Fed. Rep. 298; s. c., 1 Am. & Eng. R. R. Cas. 8.

4. Gammage v. Georgia S. R. R. Co., 65 Ga. 614; s. c., 10 Am. & Eng. R. R. Cas. 371; Holbert v. St. Louis, K. C. & N. R. Co., 45 Iowa, 23; Williams v. New Orleans,

M. & T. R. R. Co., 60 Miss. 689; s. c., 20 Am. & Eng. R. R. Cas. 378; Ray v. Atchison & N. R. Co., 4 Neb. 439; Omaha & N. W. R. R. Co. v. Menk, 4 Neb. 21; Kittell v. Missisquoi R. R. Co., 56 Vt. 96; s. c., 20 Am. & Eng. R. R. Cas. 165; Fresh-Water v. Pittsburg, W. & K. R. R. Co., 6 W. Va. 503; Cosens v. Bognor R. R. Co., L. R. 1 Ch. App. 594.

5. Wheeler v. Rochester & S. R. R. Co., 12 Barb. (N. Y.) 227.

6. Natoma Water Co. v. Clarkin, 14 Cal. 544; Commonwealth v. Wilder, 127 Mass. 1; Union Nat. Bank v. Hunt, 76 Mo. 439; Kinealy v. St. Louis, K. C. & N. R. Co., 69 Mo. 663; Martindale v. Kansas City, St. J. & C. B. R. R., 60 Mo. 510; Shewalter v. Pirner, 55 Mo. 218; Land v. Coffman, 50 Mo. 243; Chambers v. St. Louis, 29 Mo. 543; Spear v. Crawford, 14 Wend. (N. Y.) 20; s. c., 28 Am. Dec. 513; Ehrman v. Union Cent. Life Ins. Co., 35 Ohio St. 324; Walsh v. Barton, 24 Ohio St. 28; Grant v. Henry Clay C. Co., 80 Pa. St. 208; Goundie v. Northampton Water Co., 7 Pa. St. 233; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Cowell v. Colorado Springs Co., 100 U. S. (10 Otto) 55; bk. 25 L. ed. 547; Jones v. Habersham, 3 Woods C. C. 443.

7. Mills v. Parlin, 106 Ill. 60; s. c., 14 Am. & Eng. R. R. Cas. 147; Patterson v. Chicago, D. & R. R. Co., 75 Ill. 588; Moses v. Pittsburgh, F. W. & C. R. R. Co., 21 Ill. 516; New Albany R. R. Co. v. O'Daily, 13 Ind. 353; Drake v. Hudson R. R. Co., 7 Barb. (N. Y.) 508; Hale v. Point Pleasant & O. R. R. Co., 23 W. Va. 454; s. c., 20 Am. & Eng. R. R. Cas. 162; Smith v. Point Pleasant & O. R. R. Co., 23 W. Va. 451; s. c., 20 Am. & Eng. R. R. Cas. 160; Campbell v. Point Pleasant & O. R. R. Co., 23 W. Va. 448; s. c., 20 Am. & Eng. R. R. Cas. 157; Spencer v. Point Pleasant & O. R. R. Co., 23 W. Va. 406; s. c., 20 Am. & Eng. R. R. Cas. 125. And some cases hold that the construction of a railroad in a street in such a manner as to

damages have been ascertained, an abutting owner has been held entitled to an injunction until payment.¹ The land-owner may have estopped from obtaining an ejectment preventing an entry upon his land, as where he has given his consent, and the company have incurred the expense in reliance thereon.²

(3) *Ejectment*. — If a railroad company enter upon land unlawfully, without a legal appropriation and assessment of damages, the land-owner may bring ejectment.³ But it has been held that execution for possession should not issue until the company has been granted a reasonable time, fixed by the court, in which to pay the assessed damages and interest thereon.⁴ Where a railroad company constructs its track through the streets of a city, and uses the same without any claim of title to or interest in the street beyond the right of way for its cars and locomotives, and the public use and enjoy the street without disturbance, it has been held that the company do not "occupy" the premises within the meaning of the term as used in the statute requiring ejectment to be brought against the "actual occupant."⁵ Where, however,

do material injury to the abutting land-owners will be restrained by injunction, until the damages have been assessed and paid. *Crowley v. Davis*, 63 Cal. 460; s. c., 20 Am. & Eng. R. R. Cas. 25; *Baltimore & O. R. R. Co. v. Strauss*, 37 Md. 237; *Harrington v. St. Paul & S. C. R. R. Co.*, 17 Minn. 215; *Scioto Valley R. R. Co. v. Lawrence*, 38 Ohio St. 41; s. c., 7 Am. & Eng. R. R. Cas. 93; 43 Am. Rep. 419.

1. *Henderson v. New York Cent. R. R. Co.*, 17 Hun (N. Y.), 345; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.) 9.

2. *Jefferson & L. P. R. R. v. New Orleans*, 31 La. An. 478; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Meredith v. Sayre*, 32 N. J. Eq. (5 Stew.) 557; *Pickert v. Ridgefield Park R. R.*, 25 N. J. Eq. (10 C. E. Gr.) 316; *Easton v. New York & L. B. R. R.*, 24 N. J. Eq. (9 C. E. Gr.) 49; *Higbee v. Camden & A. R. R.*, 20 N. J. Eq. (5 C. E. Gr.) 435; *Goodin v. Cincinnati & W. C. Co.*, 18 Ohio St. 169. *Compare* *Harrington v. St. Paul, etc., R. R. Co.*, 17 Minn. 215; *Morris & E. R. Co. v. Hudson T. R. R.*, 25 N. J. Eq. (10 C. E. Gr.) 384.

3. *Jones v. New Orleans & S. R. R. Co.*, 70 Ala. 227; *Robinson v. Pittsburg R. R.*, 57 Cal. 417; *Chicago & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *Smith v. Chicago, A. & St. L. R. R.*, 67 Ill. 191; *Chicago, B. & Q. R. R. v. Knox College*, 34 Ill. 195; *Cox v. Louisville, N. A. & C. R. R.*, 48 Ind. 178; *Graham v. Columbus & I. C. R. R.*, 27 Ind. 260; *Birge v. Chicago, M. & St. P. R. R. Co.*, 65 Iowa, 440; s. c., 20 Am. & Eng. R. R. Cas. 291; *White v. Wabash, St. L. & P. R. R. Co.*, 64 Iowa, 28; s. c., 17 Am. & Eng. R. R. Cas. 82; *Holbert v.*

St. Louis, K. C. & N. R. R., 45 Iowa, 23; *Conger v. Burlington & S. W. R. R.*, 41 Iowa, 419; *St. Joseph & D. C. R. R. v. Callender*, 13 Kans. 496; *Harrington v. St. Paul & S. C. R. R. Co.*, 17 Minn. 215; *Carpenter v. Oswego & S. R. R.*, 24 N. Y. 655; *Pittsburgh & L. E. R. R. v. Bruce*, 102 Pa. St. 23; s. c., 10 Am. & Eng. R. R. Cas. 1; *Wilmington & R. R. v. High*, 89 Pa. St. 282; *Phillips v. Dunkirk, W. & P. R. R. Co.*, 78 Pa. St. 177; *McClinton v. Pittsburgh, Ft. W. & C. R. R.*, 66 Pa. St. 404; *Levering v. Philadelphia, G. & N. R. R.*, 8 Watts & S. (Pa.) 459; *Gillison v. Savannah & C. R. R. Co.*, 7 S. C. 173; *International & G. N. R. R. Co. v. Benitos*, 59 Tex. 326; s. c., 10 Am. & Eng. R. R. Cas. 122; *Snell v. Wasatch & J. V. R. R. Co.*, 3 Utah, 192; s. c., 14 Am. & Eng. R. R. Cas. 475; *Gilman v. Sheboygan & F. R. R.*, 40 Wis. 653; *Northern Pac. R. R. v. Burlington & M. R. R.*, 2 McCr. C. C. 203; s. c., 4 Fed. Rep. 298; 1 Am. & Eng. R. R. Cas. 8. *Compare* *St. Louis, A. & T. H. R. R. v. Karnes*, 101 Ill. 402; s. c., 10 Am. & Eng. R. R. Cas. 39.

4. *Conger v. Burlington & S. W. R. R. Co.*, 41 Iowa, 419.

5. *Redfield v. Utica & S. R. R. Co.*, 25 Barb. (N. Y.) 54. *Compare* *Brown v. Gallely, Hill & Den. (N. Y.)* 308; *Wiesbrod v. Chicago & N. W. R. R. Co.*, 21 Wis. 602.

A highway was laid out over plaintiff's land, opened, and used by the public. A railway company appropriated the road, and laid its road upon it, without the assessment of damages under the general railway law. The company, under the same law, made a new road to supply its place, and

the land-owner allows the company to take possession or construct its track without making any objection thereto, he will be held to have waived his right to bring ejectment.¹

(4) *Trespass*. — If a railroad company takes possession of property, claims it by virtue of the power of eminent domain, without condemnation by statutory proceedings, and payment of compensation, the owner may bring an action of trespass.² And it is no defence that the company had commenced proceedings for condemnation of the property, and taken an appeal from the report of the commissioners.³ If, however, the company is authorized by law to enter upon lands, and to occupy the same, and it does so in the manner and form provided by the legislature, no action for trespass will lie against it;⁴ unless the law be void or unconstitutional, in which case the action may be maintained.⁵ If the company without authority appropriates materials outside of its limits, it is liable to an action of trespass;⁶ or uses land not taken for a cartway;⁷ or enters on adjoining lands to construct a drain⁸ or lawfully obstructs an easement or right of drainage,⁹ or

the old road was abandoned without a formal vacation. *Held*, that the owner of the soil of the original road might recover it in an ejectment. *Phillips v. Dunkirk, W. & P. R. R. Co.*, 78 Pa. St. 177.

1. *Cairo & F. R. R. Co. v. Turner*, 31 Ark. 494; s. c., 25 Am. Rep. 564; *Lexington & O. R. R. v. Ormsby*, 7 Dana (Ky.), 276; *Harlow v. Marquette, H. & O. R. R.*, 41 Mich. 336; *Gray v. St. Louis & S. R. Co.*, 81 Mo. 126; s. c., 22 Am. & Eng. R. R. Cas. 106; *Provolt v. Chicago, R. I. & Pac. R. R.*, 57 Mo. 256; *Omaha & N. W. R. R. Co. v. Redick*, 16 Neb. 313; s. c., 17 Am. & Eng. R. R. Cas. 107; *Pickert v. Ridgefield Park R. R. Co.*, 25 N. J. Eq. (10 C. E. Gr.) 316; *Attorney General v. New York & L. B. R. R.*, 24 N. J. Eq. (9 C. E. Gr.) 49; *Hentz v. Long Island R. R. Co.*, 13 Barb. (N. Y.) 646; *Goodin v. Cincinnati & W. C. Co.*, 18 Ohio St. 169; *Knapp v. McAulay*, 39 Vt. 275; *McAulay v. Western Vermont R. R.*, 33 Vt. 311; *Andrews v. Farmers' L. & T. Co.*, 22 Wis. 288; *Pettibone v. LaCrosse & M. R. R. Co.*, 14 Wis. 443; *Pryzbylowicz v. Missouri R. R. Co.*, 3 McCr. C. C. 596; s. c., 17 Fed. Rep. 492.

2. *Jones v. New Orleans & S. R. R. Co.*, 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217; *Little Rock & Ft. S. R. R. Co. v. Dyer*, 35 Ark. 360; s. c., 10 Am. & Eng. R. R. Cas. 33; *Hooker v. New Haven & N. Co.*, 14 Conn. 146; s. c., 36 Am. Dec. 477, 15 Conn. 312; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Doe, ex dem. v. Georgia R. R. & B. Co.*, 1 Ga. 524; *Graham v. Columbus & I. C. R. R. Co.*, 27 Ind. 260; *Evansville & C. R. R. Co. v. Dick*, 9 Ind. 433; *Donald v. St. Louis, K. C. & N. R. R. Co.*, 52 Iowa, 411; *Henry v.*

Dubuque & P. R. R., 10 Iowa, 540; *Hall v. Pickering*, 40 Me. 548; *Mayo v. City of Springfield*, 136 Mass. 10; *Murray v. Fitchburg R. R.*, 130 Mass. 99; *Mathews v. St. Paul & S. C. R. R.*, 18 Minn. 434; *Memphis & C. R. R. Co. v. Payne*, 37 Miss. 700; *Combs v. Smith*, 78 Mo. 32; s. c., 20 Am. & Eng. R. R. Cas. 209; *Eaton v. Boston, C. & M. R. R.*, 51 N. H. 504; *Smart v. Portsmouth & C. R. R.*, 20 N. H. 233; *Tinsman v. Belvidere, D. R. R.*, 26 N. J. L. (2 Dutch.) 148; *Robinson v. New York & E. R. R.*, 27 Barb. (N. Y.) 512; *Cleveland & P. R. R. Co. v. Stackhouse*, 10 Ohio St. 567; *Justice v. Nesquehoning Valley R. R.*, 87 Pa. St. 28; *Buffalo, B. & C. R. R. v. Ferris*, 26 Tex. 588; *Rush v. Milwaukee, L. S. & W. R. R.*, 54 Wis. 136; *Sherman v. Milwaukee, L. S. & W. R. R.*, 40 Wis. 645; *Loop v. Chamberlain*, 20 Wis. 135; *Pomerooy v. Chicago & C. R. R. Co.*, 16 Wis. 640.

3. *Ring v. Mississippi Riv. B. Co.*, 57 Mo. 496. See also *Coburn v. Pacific, L. & M. Co.*, 46 Cal. 31; *Missouri, K. & T. R. R. Co. v. Ward*, 10 Kans. 352.

4. *Mellen v. Western R. R. Co.*, 70 Mass. (4 Gray) 301; *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; s. c., 53 Am. Dec. 272; *Little Miami R. R. Co. v. Whitacre*, 8 Ohio St. 591.

5. *Leach v. Day*, 27 Cal. 643; *Lee v. Pembroke I. Co.*, 57 Me. 481; s. c., 2 Am. Rep. 521; *Ash v. Cummings*, 50 N. H. 591. Compare *American Print Works v. Lawrence*, 23 N. J. L. (3 Zab.) 590.

6. *Parsons v. Howe*, 41 Me. 218.

7. *Sabin v. Vermont Cent. R. R. Co.*, 25 Vt. 363.

8. *State v. Armell*, 8 Kans. 288.

9. *Proprietors of Locks and Canals v.*

diverts a stream when not permitted by its charter or by statute.¹ But trespass will not lie if begun during condemnation proceedings, which, though pronounced void subsequently, are immediately reinstated and terminate in award.² The owner of land abutting upon the city street whose title extends to the centre, subject to the right of the public, may retain an action of trespass against a company, which without authority takes possession of the street as part of its right of way.³ The statutory remedy does not include cases of trespass committed by the company before its possession became lawful: he may still recover therefor in an action at law.⁴ If the land-owner has been guilty of laches in allowing the railroad company to unlawfully enter upon and remain in possession of his land, he will be deemed to have waived his right to bring trespass.⁵ Or he will not be precluded thereby from instituting statutory proceedings for the recovery of damages.⁶

(5) *Mandatory Proceedings.* — If the officer whose duty it is to

Nashua & L. R. R. Co., 64 Mass. (10 Cush.) 385; Bell v. Midland R. Co., 10 C. B. N. S. 287.

1. Stodghill v. Chicago, B. & Q. R. R. Co., 43 Iowa, 26; Baltimore & P. R. R. Co. v. Magruder, 34 Md. 79; Johnson v. Atlantic & St. L. R. R. Co., 35 N. H. 569; Whitaker v. Delaware & H. C. Co., 87 Pa. St. 34.

2. Dunlap v. Toledo, A. A. & G. T. R. R. Co., 50 Mich. 470; s. c., 10 Am. & Eng. R. R. Cas. 185. Compare Rusch v. Milwaukee, L. S. & W. R. R. Co., 54 Wis. 136.

3. Hussner v. Brooklyn City R. R. Co., 30 Hun (N. Y.), 409; *In re* 17th Street, 1 Wend. (N. Y.) 262. See also Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41; s. c., 7 Am. & Eng. R. R. Cas. 593.

4. Selma, R. & D. R. R. Co. v. Keith, 53 Ga. 178; Lafayette, M. & B. R. R. Co. v. Murdock, 68 Ind. 137; Missouri K. & T. R. R. Co. v. Ward, 10 Kans. 352; Mathews v. St. Paul & S. R. R. Co., 18 Minn. 434; Proetz v. St. Paul Water Co., 17 Minn. 163; *In re* Townsend's Case, 39 N. Y. 171; Blodgett v. Utica & B. R. R. Co., 64 Barb. (N. Y.) 580; Oregon & C. R. R. Co. v. Barlow, 3 Ore. 311; McClinton v. Pittsburg, Ft. W. & C. R. R. Co., 66 Pa. St. 404; Pomeroy v. Chicago & M. R. R. Co., 25 Wis. 641; Davis v. LaCrosse & M. R. R. Co., 12 Wis. 16.

And where trespass is brought and damages are recovered, this is no concession of the right of the railroad company. The damages are only for the injury accruing up to the time when suit is brought. It does not include the value of the land. Anderson, L. & St. L. R. R. Co. v. Kernodle, 54 Ind. 314; Hartz v. St. Paul & S. C. R. R. Co., 21 Minn. 358; Adams v. Hastings & D. R. R. Co., 18 Minn. 260; Harrington v.

St. Paul & S. C. R. R. Co., 17 Minn. 215; Blesch v. Chicago & N. R. R. Co., 43 Wis. 183.

And where subsequent proceedings are instituted to condemn the same lands upon which a trespass has been committed, the commissioners in assessing damages cannot include remuneration for the trespass. Hursh v. St. Paul & Pac. R. Co., 17 Minn. 439; Blodgett v. Utica & B. R. R. Co., 64 Barb. (N. Y.) 580; Oregon & C. R. R. Co. v. Barlow, 3 Ore. 311. See also Jefferson, M. & I. R. R. Co. v. Esterle, 13 Bush (Ky.), 637; Soulard v. St. Louis, 36 Mo. 546; Pomeroy v. Chicago & M. R. R. Co., 25 Wis. 641.

5. Cairo & F. R. R. Co. v. Turner, 31 Ark. 494; Lexington & O. R. R. Co. v. Ormsby, 7 Dana (Ky.), 276; Hall v. Pickering, 40 Me. 548; Harlow v. Marquette, H. & O. R. R. Co., 41 Mich. 336; Provolt v. Chicago, I. R. & P. R. R. Co., 57 Mo. 256; s. c., 69 Mo. 633; Pickert v. Ridgefield Park R. R. Co., 25 N. J. Eq. (10 C. E. Gr.) 316; Attorney-General v. New York & L. B. R. Co., 24 N. J. Eq. (9 C. E. Gr.) 49; Hentz v. Long Island R. R. Co., 13 Barb. (N. Y.) 646; Goodin v. Cincinnati & W. Can. Co., 18 Ohio St. 169; Knapp v. McAulay, 39 Vt. 275; McAulay v. Western Vermont R. R. Co., 33 Vt. 311; Andrews v. Farmer's L. & T. Co., 22 Wis. 288; Pettibone v. La Crosse & M. R. R. Co., 14 Wis. 443.

6. Gay v. Maine Cent. R. R. Co., 72 Me. 95; Maxwell v. Bay City B. Co., 41 Mich. 453; Harlow v. Marquette, H. & O. R. R. Co., 41 Mich. 336; Harrington v. St. Paul & S. C. R. R. Co., 17 Minn. 215; Smart v. Portsmouth & C. R. R. Co., 20 N. H. 233; Western Pennsylvania R. R. Co. v. Johnston, 59 Pa. St. 290; Rusch v. Milwaukee, L. S. & W. R. R. Co., 54 Wis. 136.

procure an appraisal do not proceed to perform that duty, the remedy is by *mandamus*.¹

(6) *Effect of License to enter*.—A parol license to enter upon lands, and construct a railroad thereon, is revocable.² But such license will be sufficient to justify an entry and bar an action for trespass.³ On revocation of the license, the railroad company is entitled to proceed to obtain a condemnation of the premises. And the land-owner may be restrained from interfering with the company's enjoyment of the lands.⁴ On revocation of the license, the land-owner's proper course is to take proceedings for the recovery of compensation.⁵ And until an easement has been made, he will not be entitled to obtain an injunction restraining the company from using the land.⁶

7. *Lien for Damages*.—The land-owner has a lien on the land for unpaid compensation, which is good even against a vendee of the company making the entry,⁷ or against the mortgagee or lessee of such company.⁸

1. *Smith v. Helmer*, 7 Barb. (N. Y.) 416; *People v. Hayden*, 6 Hill (N. Y.), 359; *Baker v. Johnson*, 2 Hill (N. Y.), 342; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.) 9; *Rexford v. Knight*, 11 N. Y. 308; *Fotherby v. Metropolitan R. R. Co.*, L. R. 2 C. P. 188; *Reg. v. East Lancashire R. R. Co.*, 9 Ad. & E. N. S. 980; s. c., 58 Eng. C. L. 978; *Birmingham & O. J. R. Co. v. Reg.*, 15 Q. B. 634; s. c., 69 Eng. C. L. 634; 20 L. J. N. S. Q. B. 304.

2. *Foot v. New Haven & N. Co.*, 23 Conn. 214; *Cook v. Stearns*, 11 Mass. 533; *People v. Goodwin*, 5 N. Y. 568; *Eggleston v. New York & H. R. R. Co.*, 35 Barb. (N. Y.) 162; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; s. c., 30 Am. Dec. 60; *Bridges v. Purcell*, 1 Dev. & B. (N. C.) L. 492.

3. *New Orleans, J. & G. N. R. R. Co. v. Moyer*, 39 Miss. 374; *Goodin v. Cincinnati & W. C. Co.*, 18 Ohio St. 169; *Hanlin v. Chicago & N. W. R. R. Co.*, 61 Wis. 515; s. c., 20 Am. & Eng. R. R. Cas. 70.

4. *Baltimore & H. R. R. Co. v. Algire*, 65 Md. 337.

5. *Hanlin v. Chicago & N. W. R. R. Co.*, 61 Wis. 515; s. c., 20 Am. & Eng. R. R. Cas. 70.

6. *Cooper v. Chester R. R. Co.*, 19 N. J. Eq. (4 C. E. Gr.) 199; *Pettibone v. La-Crosse & M. R. R. Co.*, 14 Wis. 443. See also *Gay v. Maine C. R. R. Co.*, 72 Me. 95; *Maxwell v. Bay City B. Co.*, 41 Mich. 453; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336; *Harrington v. St. Paul & S. C. R. R. Co.*, 17 Minn. 215; *Smart v. Portsmouth & C. R. R. Co.*, 20 N. H. 233; *Western P. R. R. Co. v. Johnston*, 59 Pa. St. 290; *Rusch v. Milwaukee L. S. & W. R. R. Co.*, 54 Wis. 136; s. c., 11 N. W. Rep. 253.

In *Hamilton v. Annapolis & E. R. R. Co.*,

1 Md. Ch. 107, the court refused an injunction to restrain, where complainant forebore commencing proceedings until after the improvements were erected, but entered a decree directing compensation to be paid out of the revenue of the road.

7. *Drury v. Midland R. R. Co.*, 127 Mass. 571; *New Bedford R. R. v. Old Colony R. R.*, 120 Mass. 397; *Boston & P. R. R. v. Midland R. R.*, 67 Mass. (1 Gray) 340, 359; *Williams v. New Orleans, M. & T. R. R. Co.*, 60 Miss. 689; s. c., 20 Am. & Eng. R. R. Cas. 378; *New York & G. L. R. R. Co. v. Stanley*, 34 N. J. Eq. (7 Stew.) 55; *Philadelphia, N. & N. Y. R. R. v. Cooper*, 105 Pa. St. 239; *Adams v. St. Johnsbury & L. C. R. R. Co.*, 57 Vt. 240; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; s. c., 20 Am. & Eng. R. R. Cas. 165; *Kendall v. Missisquoi & C. R. R. Co.*, 55 Vt. 438; s. c., 14 Am. & Eng. R. R. Cas. 423; *Matthews v. Lucia*, 55 Vt. 308; *Child v. Allen*, 33 Vt. 476; *Root v. Lord*, 23 Vt. 568; *Pfeifer v. Sheboygan & F. R. R. Co.*, 18 Wis. 155; *Sedgwick v. Watford & R. R. Co.*, 36 L. J. Ch. 379; *Vyner v. Hoyalake R. Co.*, 17 W. R. 92.

8. *Helbert v. St. Louis, K. C. & N. R. R.*, 45 Iowa, 23; *Hibbs v. Chicago & S. W. R. R.*, 39 Iowa, 340; *Lycoming, G. & W. Co. v. Moyer*, 99 Pa. St. 615; *White v. Nashville & N. W. R. R.*, 7 Heisk. (Tenn.) 518; *Gilman v. Sheboygan & F. R. R.*, 40 Wis. 653.

In some cases the lien is expressly conferred by charter. *Kennedy v. Central R. R. Co.*, 28 N. J. Eq. (1 Stew.) 389; *Frelinghuysen v. Central R. R. Co.*, 28 N. J. Eq. (1 Stew.) 388. In these cases it was held that the owner had, by virtue of the case, chartered a mortgage lien for the condemnation money.

8. *Waiver of Damages.* — Land-owner's claim for damages may be effectually waived, either verbally by a statement made before the commissioners to assess damages,¹ or by written agreement.² An assent to a change in the line of highway does not imply a waiver of the right to damages already perfected in judgment.³

VIII. Consequential Damages. — Under this term as applied to eminent domain, are usually included all damages which result from injuries to land not taken. Such an extended use of the term cannot, however, be properly justified. The term is usually confined to those damages or losses which arise not from the immediate act of the party, but in consequence of such act. It might fairly be questioned whether the obstruction of a water-course, or of surface water, the annoyance from smoke and dust, and the obstruction of lights, can be fairly considered consequential. In many of the cases, where compensation has been held to be recoverable at common law on these grounds, the decisions have been based upon the fact that there had been an actual interference with an easement or servitude in favor of the land-owner,⁴ and hence the injury must be considered to be direct, and not consequential. In view

1. *Fuller v. Plymouth County Comm'rs.*, 32 Mass. (15 Pick.) 81. See also *Marble v. Whitney*, 28 N. Y. 297.

2. In *Kansas C. & O. R. R. Co. v. Hicks*, 30 Kans. 288; s. c., 14 Am. & Eng. R. R. Cas. 100, the city council have passed an ordinance authorizing the construction of a railroad along one of the streets, providing the company should first pay to the city clerk \$3,500 to be distributed among the lot-owners as compensation for their damages resulting from the construction, the amount so paid and apportioned as directed in the ordinance. After the stakes had been set in the street in front of plaintiff's lot, and after work had been commenced on the street on either side of the lot, plaintiff received from the city clerk the amount apportioned to him, and executed a receipt which recited that the same was received "in full payment and satisfaction of any claim I may or might have for damages to lots . . . against said road by reason of the construction of said road."

The road was thereafter finished in a skilful and proper manner, and though there was a file in front of the lots of five or six feet, such file was necessary to bring the track to a proper grade. It was held that in the absence of fraud, dispensation, or concealment however, the plaintiff did not understand the meaning of the stakes, and did not know that a file was necessary. He was estopped from any further claim against the railroad company for damages on account of the construction of its road, and the obstruction of access to his lots. A release from all claim for damages on account of the construction of the road

from the grantor's lien will not discharge his claim for damages resulting from the road being built over the land of another.

3. *Kent v. Wallingford*, 42 Vt. 651.

4. That the riparian owners have a right in the nature of an easement in the flow of water-courses, see *Burden v. Stein*, 27 Ala. 104; *Hendrick v. Cook*, 4 Ga. 241; *Davis v. Getchel*, 50 Me. 604; *Gould v. Boston Dock*, 79 Mass. (13 Gray) 433; *Hayes v. Waldron*, 44 N. H. 584; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. (1 McCar.) 335; *Clinton v. Myers*, 46 N. Y. 811; s. c., 7 Am. Rep. 373; *Tyler v. Wilkinson*, 4 Mason, C. C. 397; *Mason v. Hill*, 5 Barn. & Ad. 1; *Chasemore v. Richards*, 7 H. L. Cas. 349.

In those States where the rule of the civil law with reference to surface waters is adopted, there is a natural easement upon lower grounds to receive the flow from the upper. *Ogburn v. Connor*, 46 Cal. 346; *Livingston v. McDonald*, 21 Iowa, 160; *Minor v. Wright*, 16 La. An. 151; *Boyd v. Conclin*, 54 Mich. 583; *Porter v. Durham*, 74 N. C. 767; *Hayes v. Hinkleman*, 68 Pa. St. 324; *Martin v. Riddle*, 26 Pa. St. 415; *Kauffman v. Griesemer*, 26 Pa. St. 407; s. c., 67 Am. Dec. 437.

The New-York court holds that the right to recover for an obstruction of light or annoyance arising from smoke and dust must be based upon the interference with the natural easement which every land-owner has. *Drecker v. Manhattan R. R. Co.*, 106 N. Y. 157; s. c., 60 Am. Rep. 137; *Lahr v. Metropolitan E. R. R. Co.*, 104 N. Y. 268.

of these considerations, and of the fact that the decisions vary very much, it has been deemed advisable to discuss what have generally been treated as consequential damages, under another head.¹

IX. Title and Rights retained. — 1. *Fee.* — Where merely an easement or right of way over lands is condemned, the former owner of the soil still retains the fee and the right to use the land for every purpose not incompatible with the use to which it has been appropriated.² The timber situated on the land taken for the right of way remains the property of the land-owner, and the company has only the right to take and remove so much as may be necessary for the construction and repair of the road.³ The owner is also entitled to the grass grown on the right of way.⁴ And he may drive pipes under the railway for the convenience of oil, etc., such use being shown not to interfere or impair the easement of the company.⁵ But he will not be allowed to cross over or under the railroad at pleasure.⁶ Nor will he be permitted to enter upon the land with teams and remove the turf therefrom, the effect of such removal being to enhance the danger of cattle going upon the track, and to increase the dust at the time of the passage of cars.⁷

2. *Reversion in Cesser of Public Use.* — Where a mere easement is acquired, all rights in and to the land will at once terminate as soon as the particular use for which it has been appropriated is discontinued.⁸ But when a power is granted to take in fee, an absolute title is acquired, and the original owner has no reversionary interest.⁹ A right of way acquired by deed will not be prevented

1. *Supra*, VI.

2. *Henry v. Dubuque & P. R. R. Co.*, 2 Iowa, 288; *Kansas Central R. R. Co. v. Allen*, 22 Kan. 285; s. c., 31 Am. Rep. 190; *Pittsburgh & L. E. R. R. Co. v. Bruce*, 102 Pa. St. 23; s. c., 10 Am. & Eng. R. R. Cas. 1; *Lyon v. Gormley*, 53 Pa. St. 261.

3. *Preston v. Dubuque & P. R. R. Co.*, 11 Iowa, 15; *Blake v. Rich*, 34 N. H. 282.

4. *Leavenworth, T. & S. W. R. R. v. Paul*, 28 Kan. 816; s. c., 10 Am. & Eng. R. R. Cas. 490. *Compare* *Troy & B. R. R. Co. v. Potter*, 42 Vt. 265.

5. *Hasson v. Oil Creek & A. R. R. Co.*, 8 Phila. (Pa.) 556.

6. *Kansas Central R. R. Co. v. Allen*, 22 Kans. 285; s. c., 31 Am. Rep. 190.

7. *Connecticut & P. R. R. Co. v. Holton* 32 Vt. 43.

8. *Washington Cemetery v. Prospect Park & C. I. R. R. Co.*, 68 N. Y. 591; *People v. White*, 11 Barb. (N. Y.) 26; *Hooker v. Utica & M. T. Co.*, 12 Wend. (N. Y.) 371; *Malone v. Toledo*, 28 Ohio St. 643; s. c., 34 Ohio St. 541; *Pittsburgh & L. E. R. R. Co. v. Bruce*, 102 Pa. St. 23; s. c., 10 Am. & Eng. R. R. Cas. 1.

9. *Heard v. Brooklyn*, 60 N. Y. 242;

Rexford v. Knight, 11 N. Y. 308; *Heyward v. Mayor, etc.*, of N. Y., 7 N. Y. 314; *Sweet v. Buffalo, N. Y. & P. R. R.*, 13 Hun (N. Y.), 643; *Pittsburgh & L. E. R. R. v. Bruce*, 102 Pa. St. 23; s. c., 10 Am. & Eng. R. R. Cas. 1; *Haldeman v. Pennsylvania C. R. R. Co.*, 50 Pa. St. 425; *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43; *Jackson v. Rutland & B. R. R.*, 25 Vt. 150; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95. *Compare* *New Orleans P. R. v. Gay*, 32 La. An. 371; *Blake v. Rich*, 34 N. H. 285.

In *Heyward v. Mayor of New York*, 7 N. Y. 314, land was appropriated by the city of New York for an almshouse. Twenty-seven years afterward it was found necessary to remove the almshouse, whereupon the heirs of the party from whom the property was originally taken claimed that it had reverted, and sued the city for its value, the city having cut the land up into lots, and sold it.

The statutes of New York, under which the property was appropriated, appear to have intended that the city should take all the title and interest that could be owned or held by any one. The preamble to one of the acts recites that the mayor, etc., of the city were desirous of obtaining the

by mere non-user.¹ And where the deed containing the grant stipulates that on abandonment of the case the lands shall revert to the grantor, there will be no reversion in the grantor until the fact that the company has forfeited its franchises has been judicially ascertained.² A restriction on the use of land, e.g., against buildings, although abrogated by the taking of land for public use, revives upon the sale of the land for private uses.³

3. *Minerals, and Right to work Same.* — Where the fee lies in the owner, he retains his title to the minerals, and may remove them provided he does not interfere with the use to which the lands are put.⁴

X. Title and Rights acquired. — 1. *Estate acquired.* — Generally railroad companies are authorized to acquire only an easement or right of way in the lands through which their roads pass.⁵ But the legislature may, when it deems it necessary, confer a power to take in fee simple.⁶ The legislature is an exclusive judge of the

land, "with the right of converting and disposing of the said lands and premises for other purposes or otherwise, whenever they or their successors may deem the continuance" of the particular public use for which it was taken unnecessary. The acts also provide that upon the appropriation the city "should become and be seized in fee-simple" absolute of the lands and tenements.

It was *held* there was no right of reversion to the original owners or their heirs, although the almshouse had been removed, and the land sold to private parties.

1. Barlow v. Chicago, R. I. & P. R. R. Co., 29 Iowa, 276.

2. Harrison v. Lexington & F. R. Co., 9 B. Mon. (Ky.), 470.

3. Bird v. Eggleston, 29 Ch. Div. 1012; s. c., 22 Am. & Eng. R. R. Cas. 174.

4. Woodruff v. Neal, 28 Conn. 165; Smith v. Rome, 19 Ga. 89; Dubuque v. Benson, 23 Iowa, 248; West Covington v. Freking, 8 Bush (Ky.) 121; Blake v. Rich, 34 N. H. 282; Winter v. Peterson, 24 N. J. L. (4 Zab.) 524; People v. Eldredge, 3 Hun (N. Y.), 541; Fisher v. Rochester, 6 Lans. (N. Y.) 225; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; s. c., 8 Am. Dec. 263; Tucker v. Eldred, 6 R. I. 404; Bolling v. Mayor of Petersburg, 3 Rand. (Va.) 563; Barclay v. Howell's Lessee, 31 U. S. (6 Pet.) 498; bk. 8, L. ed. 477; Midland R. Co. v. Haunchwood B. & T. Co., L. R. 20 Ch. Div. 552; s. c., 6 Am. & Eng. R. R. Cas. 555; Errington v. Metropolitan District R. Co., L. R. 19 Ch. Div. 559; s. c., 6 Am. & Eng. R. R. Cas. 562.

5. Alabama & F. R. R. Co. v. Burkett, 42 Ala. 83; Henry v. Dubuque & P. R. R. Co., 2 Iowa, 288; Kansas C. R. v. Allen, 22 Kans. 285; Challiss v. Atchison, T. & S. F. R. R. Co., 16 Kans. 117; Morris v.

Schoolsville B. R. R. T. R., 6 Bush (Ky.), 671; Proprietors of Locks & Canals v. Nashua & L. R. R. Co., 104 Mass. 1; Eaton v. Boston, C. & M. R. R. Co., 51 N. H. 504; s. c., 12 Am. Rep. 147; Chapin v. Sullivan R. R., 39 N. H. 564; s. c., 75 Am. Dec. 207; Blake v. Rich, 34 N. H. 282; Taylor v. New York & L. B. R. R. Co., 38 N. J. L. (9 Vr.) 28; State v. Brown, 27 N. J. L. (3 Dutch.) 13; Heard v. Brooklyn, 60 N. Y. 242; Ellicottville & G. V. Plank Road Co. v. Buffalo & P. R. R., 20 Barb. (N. Y.) 644; Junction R. R. Co. v. Rugles, 7 Ohio St. 1; Western Pennsylvania R. R. Co. v. Johnston, 59 Pa. St. 290; Philadelphia W. & B. R. R. v. Williams, 54 Pa. St. 103; Aldrich v. Drury, 8 R. I. 554; Hill v. Western Vt. R. R., 32 Vt. 68; Williams v. Western U. R. Co., 50 Wis. 71; s. c., 5 Am. & Eng. R. R. Cas. 290.

In Oregon R. & N. Co. v. Oregon Real Estate Co., 10 Oreg. 444, it was *held* that a title that may be freed from public use cannot be acquired by a private corporation by eminent domain: land can only be taken for the particular use for which it is sought to be appropriated. See also New Orleans Pac. R. Co. v. Gay, 32 La. An. 471. Compare Sweet v. Buffalo, N. Y. & P. R. Co., 79 N. Y. 293; aff'm, 13 Hun (N. Y.), 645.

6. State v. Evans, 3 Ill. (2 Scam.) 208; Prather v. W. U. Tel. Co., 89 Ind. 501; s. c., 14 Am. & Eng. R. R. Cas. 1; Logansport v. Shirk, 88 Ind. 563; s. c., 2 Am. & Eng. Corp. Cas. 456; Indianapolis, P. & C. Ry. Co. v. Rayl, 69 Ind. 424; Nelson v. Fleming, 56 Ind. 310; Water-works Co. v. Burkhart, 41 Ind. 364; Challiss v. Atchison, T. & S. F. R. R., 16 Kans. 117; New Orleans P. R. v. Gay, 32 La. An. 471; Dingley v. Boston, 100 Mass. 544; Cotton v. Miss. & R. R. Boom Co., 22 Minn. 372;

degree and quality of interest which is proper to be taken;¹ and if they confer an estate in fee simple absolute, it must be estimated that they judged it necessary to do so to answer the public use contemplated.² The presumption is against a larger grant than an easement, where it is sufficient.³ But this easement is in perpetuity.⁴ A probation in a charter that the company shall, on taking land, be "seized and vested thereof," does not of itself confer the power to acquire a fee.⁵ The right to take lands in fee may be authorized by statute, not only expressly, but by necessary implication.⁶ If, by reason of a constitutional provision, the company is limited to an easement, a statute providing that it shall acquire an absolute estate in fee simple will not be void, but will be limited by the constitutional provision.⁷ Where the land is needed for temporary purposes only, the title of the owner is not divested, and his enjoyment is only temporarily interrupted.⁸

2. *Rights when Fee acquired.*—A corporation has no higher rights to property condemned by the judgment of a court, than to that acquired by purchase without condemnation.⁹ In England it has been held that a fee simple is acquired only for the purpose of aiding or furthering the contemplated public use, and that the power of the company over the land is limited thereby.¹⁰

3. *Rights when Easement acquired.*—Where only an easement

In re New York & H. R. R. Co. v. Kip, 46 N. Y. 546; Rexford v. Knight, 11 N. Y. 308; Sweet v. Buffalo, N. Y. & P. R. R. Co., 13 Hun (N. Y.), 643; Norfleet v. Cromwell, 70 N. C. 634; s. c., 16 Am. Rep. 787; Raleigh & G. R. R. Co. v. Davis, 2 Dev. & B. (N. C.) L. 451; Malone v. City of Toledo, 34 Ohio St. 541; Wyoming Coal & T. Co. v. Price, 81 Pa. St. 156; Robinson v. West. P. R. R. Co., 72 Pa. St. 316; Craig v. Mayor of Allegheny, 53 Pa. St. 477; Haldeman v. Pennsylvania C. R. R. Co., 50 Pa. St. 425; Commonwealth v. McAllister, 2 Watts (Pa.), 190; Burnett v. Nashville & C. R. R., 4 Sneed (Tenn.), 528; Troy & B. R. R. v. Potter, 42 Vt. 265; Mason v. Lake Erie, E. & S. R. R. Co., 9 Biss. C. C. 239; s. c., 1 Fed. Rep. 712; DeVaraigne v. Fox, 2 Blatchf. C. C. 95; Chesapeake & O. C. Co. v. Union Bank, 4 Cr. C. C. 75.

1. Challiss v. Atchison, T. & S. F. R. R., 16 Kans. 117.

2. DeVaraigne v. Fox, 2 Blatchf. C. C. 95.

3. New Orleans Pac. R. Co. v. Gay, 32 La. An. 471; Washington Cemetery v. Prospect Park & C. I. R. R., 68 N. Y. 591; State v. Rives, 5 Ired. (N. C.) L. 297; Quimby v. Vermont C. R. R., 23 Vt. 387.

4. Henry v. Dubuque & P. R. R. Co., 2 Iowa, 288.

5. Quimby v. Vermont C. R. R. Co., 23 Vt. 387.

6. Prather v. Western Union Tel. Co., 89 Ind. 501; s. c., 14 Am. & Eng. R. R. Cas. 1; Indianapolis, P. & C. R. R. Co. v. Rayl, 69 Ind. 424; New Orleans P. R. R. Co. v. Gay, 31 La. An. 430; Holt v. Somerville, 127 Mass. 408; Gardner v. Brookline, 127 Mass. 358; Dingley v. Boston, 100 Mass. 544; Washington Cemetery v. Prospect Park & C. I. R. R. Co., 68 N. Y. 591; Watson v. New York C. R. R. Co., 47 N. Y. 157; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234; s. c., 6 Am. Rep. 70; Rexford v. Knight, 11 N. Y. 308; Malone v. Toledo, 34 Ohio St. 541; Pennsylvania & N. Y. C. & R. R. Co. v. Billings, 94 Pa. St. 40; s. c., 10 Am. & Eng. R. R. Cas. 72.

7. Scott v. St. Paul & C. R. R. Co., 21 Minn. 322; s. c., 18 Am. Ry. Rep. 421.

8. Pennsylvania & N. Y. C. & R. R. Co. v. Billings, 94 Pa. St. 40; s. c., 10 Am. & Eng. R. R. Cas. 72, 76.

9. Oregon Cascade R. R. Co. v. Baily, 3 Oreg. 164.

10. In Norton v. London & N. W. R. R. Co., L. R. 9 Ch. Div. 623; s. c., 26 Moak's Eng. Rep. 394, it was held that a railway company has no right to erect hoardings to prevent prospective rights being acquired for windows looking across the line of railway, if the land condemned was subject to an easement which will still remain subject thereto in the hands of the corporation appropriating it. Cincinnati & I. R. R. Co. v. Zinn, 18 Ohio St. 417.

is condemned, the paramount right is with the corporation condemned.¹ Although the land-owner still retains the fee and may use the land for any purpose not incompatible with the rights of the appropriator, his right must be used in strict subordination to the use of the land for the purposes for which it has been taken.² But while this is so, the company cannot use the lands condemned for any purpose not connected with the public use for which they were originally taken.³ The easement acquired is not limited to the life of the charter, but is intended to be perpetual if the company or its grantees continue to occupy the land for the purpose for which it was taken.⁴ Not only are the company entitled to what trees, sand, gravel, and stone from the land for purposes of construction,⁵ but the title to the earth and minerals above the grade of the road, an excavation of which is necessary for the construction, passes to the company.⁶

XI. Contracts.—The parties to a judicial proceeding being entitled to waive any statutory or constitutional provision in their favor at pleasure, it is competent for parties to judicial proceedings to determine by agreement who shall act as commissioners for the assessment of damages, and although such agreement may not be binding to the court, yet if the court each appoint the persons named, the parties will be precluded from objecting;⁷ or

1. *Kansas C. R. R. Co. v. Allen*, 22 Kan. 285; s. c., 31 Am. Rep. 190.

2. *Leavenworth, T. & S. W. R. Co. v. Paul*, 28 Kan. 816; *Kansas C. R. R. Co. v. Allen*, 22 Kan. 285; s. c., 31 Am. Rep. 190; *Kane v. Mayor of Baltimore*, 15 Md. 240; *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174; s. c., 23 Am. & Eng. R. R. Cas. 83; *Lake Superior & M. R. R. Co. v. Greve*, 17 Minn. 322; *Clark v. Hannibal & St. J. R. R. Co.*, 36 Mo. 203.

3. *Cummins v. Des Moines & St. L. R. R. Co.*, 63 Iowa, 397; s. c., 17 Am. & Eng. R. R. Cas. 86; *West. Union T. Co. v. Rich*, 19 Kan. 517; s. c., 27 Am. Rep. 159; *Cape Girardeau & B. M. & G. R. Co. v. Renfro*, 58 Mo. 265; *Oregon Cascade R. R. Co. v. Bailly*, 3 Oreg. 164; *Lance's Appeal*, 55 Pa. St. 16.

4. *Henry v. Dubuque & P. R. R.*, 2 Iowa, 288.

5. *Preston v. Dubuque & P. R. R. Co. v. Iowa*, 15; *Parsons v. Howe*, 41 Me. 218; *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; s. c., 75 Am. Dec. 237; *Blake v. Rich*, 34 N. H. 282; *Taylor v. New York & L. B. R. R. Co.*, 38 N. J. L. (9 Vr.) 28; *Prather v. Ellison*, 10 Ohio, 396.

6. *Evans v. Haeferner*, 29 Mo. 141.

7. *In re New York L. & W. R. R. Co.*, 98 N. Y. 447. In this case the court say, "But the claim is made that the parties could not thus hamper and circumscribe the power of the court. It is undoubtedly true that the court at special term was not

bound to appoint the three commissioners named by the parties. It could have refused to appoint them, and have left the parties either to abandon their agreement or to carry it out in some other way. But the agreement of the parties bound them, and concluded the court in that proceeding, and the court was bound as between the parties to observe, enforce, and carry out the agreement. Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional, rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts. *Stedeker v. Bernard*, 93 N. Y. 589; *In re Cooper*, 93 N. Y. 507; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; *Hilton v. Fonda*, 86 N. Y. 339; *Baird v. Mayor of New York*, 74 N. Y.

they may agree that the damages shall be assessed by the commissioners, and that there shall be no right of appeal whatever.¹ But by an agreement to sell, the seller waives his constitutional right to have his damages assessed and tendered before possession can be taken;² and the seller will not be entitled to obtain an injunction against the use of the property by the company under any circumstances.³ If the company performs its part of a contract for a right of way, it may compel specific performance, and is entitled to an injunction to restrain an assessment of damages under condemnation proceedings.⁴ If, from particular circumstances, an agreement as to crossing over a railroad is not carried into effect, the land-owner cannot, upon the ground of any general rights, claim to have other crossings made according to the discretion of the court, for that would be to ask the court to substitute a new agreement, not to enforce the performance of the original.⁵ But, on the other hand, a railroad company cannot escape an obligation for the construction of crossings entered into by it as part of a contract for the right of way by condemning the right of way under the provision of the statute.⁶

Where an agreement entered into required that the company, in consideration of the withdrawal of certain claims for damages, should erect and maintain certain fences and crossings, it is a legitimate part of the record and not within the statute of frauds; and such agreement runs with the land, so as to be binding on the assignee and grantees of the railroad company.⁷

382; *Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499; s. c., 28 Am. Rep. 166; *Ogdensburg & L. C. R. R. Co. v. Vermont & C. R. R. Co.*, 63 N. Y. 176; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; *Phyfe v. Eimer*, 45 N. Y. 102; *Vose v. Cockcroft*, 44 N. Y. 415; *Allen v. Commissioner of New York*, 38 N. Y. 312; *Sherman v. McKeon*, 38 N. Y. 266; *Embury v. Conner*, 3 N. Y. 511; s. c., 53 Am. Dec. 525; *Buel v. Trustees of Lockport*, 3 N. Y. 197. If in an action not in its nature referable without the consent of the parties, they should agree upon a referee for the trial of the same, the court could not change the referee without their consent."

1. *Botkin v. Livingston*, 16 Kan. 39.

2. *Baltimore, P. & C. R. R. Co. v. Highland*, 48 Ind. 381.

3. A party owning lands entered into an agreement with a railway company by which the company was permitted to enter on his lands and build its track. It was agreed that the damages should be assessed by certain persons within sixty days, and that if payment was not made within a certain time, the land and fixtures should become the property of the party the same as if this agreement had not been made, and "said company had, without authority, and in its own wrong, entered upon such land,

and made said road through the same." The estimate was made, but the payment was not made within the time, and an injunction was asked restraining the company from using the land. It was *held*, that an injunction was properly refused, and that the party should be left to his remedy at law. *Coe v. Columbus, P. & I. R. R. Co.*, 10 Ohio St. 372; s. c., 75 Am. Dec. 518. The court said, "When a party voluntarily allows, for a stipulated consideration, such use of his property, he cannot by agreement secure a right to such extraordinary remedy as an injunction. The insertion in the agreement of a stipulation that, in the event of its non-fulfilment, the party thus using the property is to be regarded as using it wrongfully and without authority, cannot make the fact so, in view of such a remedy."

4. *Chicago & S. W. R. R. Co. v. Swinney*, 38 Iowa, 182.

5. *Earl of Darnley v. London, C. & B. Ry. Co.*, L. R. 2 Eng. & Ir. Ap. Cas. 43.

6. *Gray v. Burlington & M. R. R. Co.*, 37 Iowa, 119.

7. *Huston v. Cincinnati & Z. R. R. Co.*, 21 Ohio St. 235. Compare *Morss v. Boston & M. R. R.*, 56 Mass. (2 Cush.) 536.

In *Michigan A. L. R. R. Co. v. Barns*, 40 Mich. 383, it was *held* that a stipulation

An instrument by which a railroad company acknowledges itself bound unto certain persons, nine in number, "according to their relative and respective several interests in the penal sum of \$3,000 to this express condition, that the said railroad company shall, on the assessment of damages to be made to secure the right of way for said railroad, pay to the obligees relatively and respectively damages, which may be assessed as aforesaid, then this bond to be void," is a several obligation upon which each of the obligees may sue, but none of them has a right to relative and respective shares of the penalties.¹

XII. Transfer of Franchises.—In the absence of a provision in the charter authorizing, a transfer cannot be granted away by any act of the company, or transferred by any adverse process against it.² And where a subsequent statute is passed authorizing a transfer of the franchises of a corporation, a transfer effected by a majority only of the members of the company is void, if no power to amend was given by the charter to the majority.³ And the transfer so effected is not binding, even upon members of the corporation by whom it is made.⁴ If a railroad company fail to construct its road, the legislature may transfer the right of way to another company.⁵ Even where a company is authorized, in general terms, to sell and transfer its property, the right to have the damages for an appropriation of land to its use assessed in a particular mode is not a franchise which passes to the purchaser, such privilege being personal to the company, and not transferable.⁶ On a sale of the property of a railroad company, the purchaser is liable for payment of the compensation for property taken for the right of way.⁷ Where the land-owner has received compensation for property taken, he has no interest by virtue of which he can call in question the validity of a transfer of the right of way.⁸

XIII. Abandonment of Public Use.—The diversion of property to a use, which is inconsistent with the purposes for which the property was originally taken, will operate as an abandonment.

fixing the amount of damages is not a judicial proceeding, but an agreement between the parties.

1. *St. Louis, A. & R. I. R. Co. v. Coultas*, 33 Ill. 188.

2. *Arthur v. Commercial & R. R. Bk.*, 17 Miss. (9 Smed. & M.) 394; s. c., 48 Am. Dec. 719; *Stewart v. Jones*, 40 Mo. 140; *Susquehanna C. Co. v. Bonham*, 9 Watts & S. (Pa.) 27; s. c., 42 Am. Dec. 315.

3. *New Orleans, J. & G. N. R. R. Co. v. Harris*, 27 Miss. 517; *Stevens v. Rutland & B. R. Co.*, 1 Am. L. Reg. 154; *Ware v. Grand Junc. W. Co.*, 13 Eng. Ch. 131; s. c., 2 Russ. & M. 470.

4. *New Orleans, J. & G. N. R. R. Co. v. Harris*, 27 Miss. 517.

5. *Noll v. Dubuque, B. & M. R. R. Co.*, 32 Iowa, 66.

6. *Little Rock & F. S. R. R. Co. v. McGehee*, 41 Ark. 202; s. c., 20 Am. & Eng. R. R. Cas. 82; *State v. Morgan*, 28 La. An. 482; *Wilson v. Gaines*, 103 U. S. (13 Otto) 417; bk. 26, L. ed. 401; *East Tennessee, V. & G. R. R. Co. v. Hamblin*, 102 U. S. (12 Otto) 273; bk. 26, L. ed. 152; *Morgan v. Louisiana*, 93 U. S. (3 Otto) 217; bk. 23, L. ed. 860.

7. *Lake Erie & W. R. R. Co. v. Griffin*, 92 Ind. 487; s. c., 17 Am. & Eng. R. R. Cas. 235; *Gilman v. Sheboygan & F. R. Co.*, 37 Wis. 317; *Pfeifer v. Sheboygan & F. R. R. Co.*, 18 Wis. 155.

8. *Crolley v. Minneapolis & St. L. R. R. Co.*, 30 Minn. 541.

Thus a diversion of property taken for a railroad, to the purposes of trade and manufacture, will be sufficient, although the corporation derives advantages in its freighting business from the carriage of merchandise for its tenants.¹ A change in the line of a railroad operates as an abandonment of the land upon the line deviated from.² A plank road³ or a canal⁴ may be altered into a railroad without any abandonment. If a railroad company fails to complete its road within the time stipulated in its charter, it is considered to abandon its right of way.⁵ And being bound to operate each part of its road, if it fails in this respect it forfeits its franchise, and will be held to so abandon its right of way.⁶ But where an easement of a right of way is acquired by express grant, it is not extinguished by mere non-user.⁷ Sale of the right of way to another company is not an abandonment.⁸

XIV. Procedure. — 1. *How far Statutory Remedy exclusive.* — The special remedy provided by statute for determining the compensation for property taken is not cumulative, but is exclusive;⁹

1. *Proprietor of Locks, etc., v. Nashua & L. R. Co.*, 104 Mass. 1.

Where a building erected on land taken for the purposes of a railroad-station is used as such, but a private business is carried on by one who is the agent of the road, and receives his compensation in being allowed the use of the building in which railroad freight was stored, it is no such a diversion by the railway from the use for which the land was expropriated as to give the former owner any claim. *Hoggatt v. Vicksburg, S. & P. R. R. Co.*, 34 La. An. 624.

A railroad company erected, on a part of the land which belonged to the complainant, and which the company had caused to be condemned for railroad purposes, a house for the accommodation of passengers waiting for the arrival of cars. *Held*, that though the house was sometimes used for a tavern and store, the complainant had no claim to the house by reason of an abandonment or cessation of the use for which it was built; nor was he entitled to an injunction to restrain the use of the building as a hotel. *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553.

2. *Stacey v. Vermont C. R. R. Co.*, 27 Vt. 39. *Compare City of Columbus v. Columbus & S. R. R. Co.*, 37 Ind. 294, where it was *held* that there was no abandonment if it appeared that the company might at any time be obliged, through other arrangements, to give up the new track and revert to a right of way.

3. *Brainard v. Missisquoi R. R. Co.*, 48 Vt. 107.

4. *Hatch v. Cincinnati & I. R. R. Co.*, 18 Ohio St. 92.

5. *Noll v. Dubuque, B. & M. R. R. Co.*, 32 Iowa, 66

6. *People v. Albany & V. R. R. Co.*, 24 N. Y. 261.

7. *Logan v. Vernon, G. & R. R. R.*, 90 Ind. 552; *Noll v. Dubuque, B. & M. R. R.*, 32 Iowa, 66; *Barlow v. Chicago, R. I. & P. R. R.*, 29 Iowa, 276; *Bannon v. Angier*, 84 Mass. (2 Allen) 128; *Jennison v. Walker*, 77 Mass. (11 Gray) 425; *Arnold v. Stevens*, 41 Mass. (24 Pick.) 106; s. c., 35 Am. Dec. 305; *White v. Crawford*, 10 Mass. 183; *Smiles v. Hastings*, 24 Barb. (N. Y.) 44; *Jewett v. Jewett*, 16 Barb. (N. Y.) 150; *Platt v. Pennsylvania Co.*, 43 Ohio St. 228; s. c., 22 Am. & Eng. R. R. Cas. 129.

8. *Noll v. Dubuque, B. & M. R. R.*, 32 Iowa, 66; *Henry v. Dubuque & P. R. R.*, 2 Iowa, 288; *Harrison v. Lexington & F. R. R.*, 9 B. Mon. (Ky.) 470; *Commonwealth v. Tenth Mass. T. Co.*, 59 Mass. (5 Cush.) 509; *State v. Rives*, 5 Ired. (N. C.) L. 297; *Hatch v. Cincinnati & I. R. R.*, 18 Ohio St. 29; *Junction R. R. v. Ruggles*, 7 Ohio St. 1; *Commonwealth v. Central Pass. R. Co.*, 52 Pa. St. 506; *United States v. Little Miami, C. & X. R. R.*, 1 Fed. Rep. 700; s. c., 9 Rep. 676.

9. *Johnson v. St. Louis, I. M. & S. R. Co.*, 32 Ark. 758; *Cairo & F. R. R. Co. v. Turner*, 31 Ark. 494; s. c., 23 Am. Rep. 564; *Little Rock & F. S. R. R. Co. v. Dyer*, 35 Ark. 360; s. c., 10 Am. & Eng. R. R. Cas. 33; *Smith v. Chicago, A. & St. L. R. R. Co.*, 67 Ill. 191; *Indiana Cent. R. R. Co. v. Oakes*, 20 Ind. 9; *McCormack v. Terre Haute & R. R. Co.*, 9 Ind. 283; *Leviston v. Junction R. R. Co.*, 7 Ind. 597; *Lafayette & I. R. R. Co. v. Smith*, 6 Ind. 249; *Null v. White Water Valley Canal Co.*, 4 Ind. 431; *Kimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Birge v. Chicago, M. & St. P. R. R. Co.*, 65 Iowa, 440; s. c.,

but, where the company alone can take the initiative, the land-owner will not be deprived of his right of action at common law.¹ Where, however, the lands have already been taken or appropriated without authority, or have been injured by the construction of a public work, a statute subsequently passed which authorizes the appointment of commissioners to appraise the damages already sustained, and which makes the award and payment or tender of the sum awarded a bar to any action to recover damages, is unconstitutional and void, as depriving the owner of a right to trial by jury in a case in which it has been heretofore used.² It has been held that if the lands are entered upon without authority, or without payment of the compensation, the land-owner is not bound to resort to the statutory remedy, but may maintain an action at law, or a suit for injunction.³ And the special remedy does not include cases of

- 14 Am. & Eng. R. R. Cas. 414; Daniels v. Chicago & N. W. R. R. Co., 35 Iowa, 129; s. c., 14 Am. Rep. 490; Boothby v. Androscoggin & K. R. Co., 51 Me. 318; Gowen v. Penobscot R. R. Co., 44 Me. 140; Mason v. Kennebec & P. R. R. Co., 31 Me. 215; Spring v. Russell, 7 Me. (7 Greenl.) 273, 279; Baltimore & P. R. R. Co. v. Magruder, 34 Md. 79; s. c., 6 Am. Rep. 310; Heard v. Talbot, 73 Mass. (7 Gray) 113; Parker v. Boston & M. R. R. Co., 57 Mass. (3 Cush.) 113; s. c., 1 Am. Dec. 709; Babcock v. Western R. R. Corp., 50 Mass. (9 Metc.) 553; s. c., 43 Am. Dec. 411; Ashby v. Eastern R. R. Co., 46 Mass. (5 Metc.) 368; s. c., 38 Am. Dec. 426; Heard v. Middlesex, 46 Mass. (5 Metc.) 81; Dodge v. Essex County, 44 Mass. (3 Metc.) 380; Sudbury Meadows v. Middlesex Canal, 40 Mass. (23 Pick.) 36; Stevens v. Middlesex Canal, 12 Mass. 466; Stowell v. Flagg, 11 Mass. 364; Teick v. Carver County, 11 Minn. 292; Memphis & C. R. R. Co. v. Payne, 37 Miss. 700; Brown v. Beatty, 34 Miss. 227; s. c., 69 Am. Dec. 389; Lindell's Adm'r v. Hannibal & St. J. R. R., 36 Mo. 543; Clark v. Hannibal & St. J. R. Co., 36 Mo. 203; Perley v. Boston, C. & M. R. Co., 57 N. H. 212; Orr v. Quimby, 54 N. H. 590; Henniker v. Contoocook Valley R. R. Co., 29 N. H. 146; Dearborn v. Boston, C. & M. R. R., 24 N. H. 179; Clark v. Boston, C. & M. R. Co., 24 N. H. 114; Troy v. Cheshire R. R. Co., 23 N. H. 83; Aldrich v. Cheshire R. R. Co., 21 N. H. (1 Fost.) 339; s. c., 53 Am. Dec. 272; 1 Am. Ry. Cas. 206; Lebanon v. Olcott, 1 N. H. 339; Calking v. Baldwin, 4 Wend. (N. Y.) 667; s. c., 21 Am. Dec. 168; Holloway v. University R. R. Co., 85 N. C. 452; s. c., 10 Am. & Eng. R. R. Cas. 36; McIntire v. Western N. C. R. R. Co., 67 N. C. 278; Mumford v. Terry, 2 Car. L. Repos. (N. C.) 308; Gillet v. Jones, 1 Dev. & B. (N. C.) 339; Gilliam v. Canaday, 11 Ired. (N. C.) L. 106; Little Miami R. R. Co. v. Whitacre, 8 Ohio St. 590; Hueston v. Eaton & H. R. R. Co., 4 Ohio St. 685; Akron v. McComb, 18 Ohio, 229; s. c., 51 Am. Dec. 453; Fehr v. Schuylkill Nav. Co., 69 Pa. St. 161; Koch v. Williamsport Water Co., 65 Pa. St. 288; Cumberland Valley R. R. Co. v. McLanahan, 59 Pa. St. 23; Philadelphia W. & B. R. Co. v. Williams, 54 Pa. St. 103; McKinney v. Monongahela Nav. Co., 14 Pa. St. 65; s. c., 53 Am. Dec. 517; Knorr v. Germantown & N. R. R. Co., 5 Whart. (Pa.) 256; Fuller v. Edings, 11 Rich. (S. C.) L. 239; McLaughlin v. Charlotte & S. C. R. R. Co., 5 Rich. (S. C.) L. 583; Colcough v. Nashville & N. W. R. R. Co., 2 Head (Tenn.), 172; International & G. N. R. Co. v. Benitos, 59 Tex. 326; s. c., 10 Am. & Eng. R. R. Cas. 122; Vermont Cent. R. R. Co. v. Baxter, 22 Vt. 365; Winchester & P. R. R. Co. v. Washington, 1 Rob. (Va.) 67; Smith v. Gould, 59 Wis. 631; s. c., 2 Am. & Eng. Corp. Cas. 424; Sherman v. Milwaukee, L. S. & W. R. Co., 40 Wis. 645; Kennedy v. Milwaukee & St. P. R. R. Co., 22 Wis. 581; Pettibone v. La Crosse & M. R. R. Co., 14 Wis. 443; Great Laxe Mining Co. v. Clague, L. R. 4 App. 115; Tuohey v. Great S. & W. R. R. Co., 10 Ir. C. L. 98; Moore v. Great S. & W. R. Co., 10 Ir. C. L. 46; Little v. Dublin & D. R. Co., 7 Ir. C. L. 82. Compare Atlantic & G. R. R. Co. v. Fuller, 48 Ga. 423; s. c., 11 Am. Ry. Rep. 403; Doe ex dem. v. Georgia R. Co., 1 Ga. 524; Loosemore v. Tiverton & N. D. R. Co., L. R. 22 Ch. Div. 25.
1. Ewerd v. Lawrenceburgh & U. M. R. R. Co., 7 Ind. 711.
 2. *In re Townsend*, 39 N. Y. 171.
 3. Little Rock & F. S. R. R. Co. v. Dyer, 35 Ark. 360; s. c., 10 Am. & Eng. R. R. Cas. 33; Robinson v. Pittsburgh R. Co., 57 Cal. 417; Hooker v. New Haven & N. Co., 14 Conn. 146; s. c., 36 Am. Dec. 477; 15 Conn. 312; South Carolina R. Co. v. Steiner, 44 Ga. 546; Chicago & I. R. Co. v. Hopkins, 90 Ill. 316; Peoria & R. I. R.

trespass committed by the company before its possession became lawful, or even at other times.¹

2. *Jurisdiction.* — A federal circuit court has jurisdiction of a proceeding to acquire land for the use of the United States.² The preliminary proceedings before the commissioners are in nature of an inquest to ascertain the value of the property condemned, and are "not a suit at law, in the ordinary sense of those terms," and consequently not "a suit" within the meaning of the removal acts, but when they are transferred to the district court by appeal from the award of the commissioners, they take, under the statutes of the States, the form of a suit at law, and may be transferred on any ground which gives the right to transfer a cause from a State to a federal court.³ Corporations of the United States created by and organized under acts of Congress may remove suits brought against them on the ground that such are suits "arising under the laws of the United States;"⁴ but an abuse of the right of eminent domain

- Co. v. Seritz*, 84 Ill. 135; *Smith v. Chicago*, A. & St. L. R. Co., 67 Ill. 191; *Chicago, B. & Q. R. R. v. President of Knox College*, 34 Ill. 195; *Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137; *Cox v. Louisville, N. A. & C. R. R. Co.*, 48 Ind. 178; *Graham v. Columbus & I. R. R. Co.*, 27 Ind. 260; *Sidener v. Norristown, H. & St. L. T. Co.*, 23 Ind. 623; *Lafayette Plank Co. v. New Albany & S. R. R. Co.*, 13 Ind. 90; s. c., 74 Am. Dec. 246; *Evansville & C. R. R. Co. v. Dick*, 9 Ind. 433; *Holbert v. St. Louis, K. & N. R. R. Co.*, 45 Iowa, 23; *Conger v. Burlington & S. W. R. R. Co.*, 41 Iowa, 419; *Daniel v. Chicago & N. W. R. R. Co.*, 35 Iowa, 129; s. c., 14 Am. Rep. 490; 5 Am. Ry. Rep. 82; *Henry v. Dubuque & P. R. R. Co.*, 10 Iowa, 540; *St. Joseph & D. C. R. R. Co. v. Callender*, 13 Kans. 496; *Missouri River, F. S. & G. R. R. Co. v. Owen*, 8 Kans. 409; *Murray v. Fitchburg R. R. Co.*, 130 Mass. 99; *Blaisdell v. Winthrop*, 118 Mass. 138; *Mathews v. St. Paul & S. C. R. R. Co.*, 18 Minn. 434; *Harrington v. St. Paul & S. C. R. R. Co.*, 17 Minn. 215; *Memphis & C. R. R. Co. v. Payne*, 37 Miss. 700; *Eaton v. Boston, C. & M. R. R. Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147; *Smart v. Portsmouth & C. C. R. R. Co.*, 20 N. H. 233; *Tinsman v. Belvidere, D. R. R. Co.*, 26 N. J. L. (2 Dutch.) 148; s. c., 64 Am. Dec. 565; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655; *People v. Law*, 34 Barb. (N. Y.) 494; *Robinson v. New York & E. R. R. Co.*, 27 Barb. (N. Y.) 512; *Wilmington & R. R. Co. v. High*, 89 Pa. St. 282; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28; *McClinton v. Pittsburg, Ft. W. & C. R. R. Co.*, 66 Pa. St. 404; *Western Pa. R. R. Co. v. Johnston*, 59 Pa. St. 290; *Levering v. Philadelphia, G. & N. R. R. Co.*, 8 Watts, & S. (Pa.) 459; *Buffalo, B. B. & C. R. Co. v. Ferris*, 26 Tex. 588; *Rusch v. Milwaukee, L. S. & W. R. Co.*, 54 Wis. 136; *Gilman v. Sheboygan & F. du L. R. R. Co.*, 40 Wis. 653; *Sherman v. Milwaukee, L. S. & W. R. R. Co.*, 40 Wis. 645; *Ewing v. St. Louis*, 72 U. S. (5 Wall.) 413; bk. 18, L. ed. 657.
1. *Selma R. & D. R. R. Co. v. Keith*, 53 Ga. 178; *Stodghill v. Chicago, B. & Q. R. R. Co.*, 43 Iowa, 26; *Missouri, K. & T. R. R. Co. v. Ward*, 10 Kans. 352; *State v. Armell*, 8 Kans. 288; *Parsons v. Howe*, 41 Me. 218; *Baltimore & P. R. R. Co. v. Magruder*, 34 Md. 79; *Proprietors of Locks & Canals v. Nashua & L. R. R. Co.*, 64 Mass. (10 Cush.) 385; *Mathews v. St. Paul & S. C. R. R. Co.*, 18 Minn. 434; *Proetz v. St. Paul Water Co.*, 17 Minn. 163; *Johnson v. Atlantic & St. L. R. R. Co.*, 35 N. H. 569; *In re Townsend*, 39 N. Y. 171; *Blodgett v. Utica & B. R. R. Co.*, 64 Barb. (N. Y.) 580; *Oregon & C. R. R. Co. v. Barlow*, 3 Oreg. 311; *Whitaker v. Delaware & H. C. Co.*, 87 Pa. St. 34; *McClinton v. Pittsburgh, Ft. W. & C. R. R. Co.*, 66 Pa. St. 404; *Sabin v. Vermont C. R. R. Co.*, 25 Vt. 363; *Pomeroy v. Chicago & M. R. R. Co.*, 25 Wis. 641; *Bell v. Midland R. R. Co.*, 10 C. B. (N. S.) 287.
2. *Kohl v. United States*, 91 U. S. (1 Otto) 367; bk. 23, L. ed. 449.
3. *Union Pac. R. R. Co. v. Myers*, 115 U. S. 1; bk. 29, L. ed. 319; s. c., 20 Am. & Eng. R. R. Cas. 324; *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. (8 Otto) 403; bk. 25, L. ed. 206; *Warren v. Wisconsin Valley R. R. Co.*, 6 Biss. C. C. 425; *Patterson v. Mississippi & Rum River Boom Co.*, 3 Dill. C. C. 465; *Northwestern Pac. Terminal Co. v. Lowensburgh*, 18 Fed. Rep. 418. Compare *United States v. Rock Island Bridge Co.*, 6 McL. C. C. 517.
4. *Union Pac. R. R. Co. v. Myers*, 115

by State authorities is not a violation of a contract within the meaning of the Federal Constitution, and gives no jurisdiction to the United States Supreme Court on that ground.¹ A statute which provides that the ordinary courts of law shall have jurisdiction of claims for damages for lands taken does not mean courts where only legal as distinguished from equitable remedies are administered, but includes courts of equity.²

3. *Commencement of Proceedings.*—*a. Who may commence.*—The proceedings being entirely statutory, the statutory provisions must be strictly followed. In some States, the right to commence is given to either party.³ In others, the right to commence is only given to the party taking.⁴

b. Notice.—(1) *Necessity for.*—Generally, notice to the landowner is required before his property can be taken.⁵ The notice is sometimes directed by statute to be given to "the persons interested," and a mortgagee will be included within these terms;⁶ and also infants, who with their mother possess an estate in common, a notice to the mother alone being insufficient.⁷ It has

U. S. 1; bk. 29, L. ed. 319; s. c., 20 Am. & Eng. R. R. Cas. 324.

1. Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. (8 Otto) 403; bk. 25, L. ed. 206; Mill v. St. Clair County, 49 U. S. (8 How.) 569; bk. 12, L. ed. 1201; West River Bridge Co. v. Dix, 47 U. S. (6 How.) 507; bk. 12, L. ed. 535.

2. Austin v. Rutland R. R. Co., 17 Fed. Rep. 466.

3. Cairo & F. R. R. Co. v. Trout, 32 Ark. 17; Marion & M. R. R. Co. v. Ward, 9 Ind. 123; Republican Valley R. R. Co. v. Fink, 18 Neb. 82; Pittsburgh R. R. Co. v. Commonwealth, 101 Pa. St. 583.

4. Kansas P. R. R. Co. v. Streeter, 8 Kans. 133; Northern Pacific R. R. Co. v. Barnesville & M. R. R. Co., 2 McCr. C. C. 203; s. c., 4 Fed. Rep. 298; 1 Am. & Eng. R. R. Cas. 8; Lawrence R. R. Co. v. Williams, 35 Ohio St. 168; International & G. N. R. v. Benitos, 59 Tex. 326; Sherman v. Milwaukee, L. S. & W. R. R., 40 Wis. 645; s. c., 13 Am. Ry. Rep. 459.

5. Curran v. Shattuck, 24 Cal. 427; Bowman v. Venice & C. R. Co., 102 Ill. 459; s. c., 14 Am. & Eng. R. R. Cas. 347; Chicago & A. R. R. v. Smith, 78 Ill. 96; Peoria & R. I. R. R. v. Warner, 61 Ill. 52; s. c., 12 Am. Ry. Rep. 444; Johnson v. Joliet & C. R. R. Co., 23 Ill. 202; Junction C. & F. K. R. Co. v. Silver, 27 Kans. 741; s. c., 14 Am. & Eng. R. R. Cas. 324; Missouri R., F. S. & J. K. R. R. R. v. Shepard, 9 Kans. 647; Tracey v. Elizabethtown, L. & B. S. R. R. Co., 80 Ky. 259; s. c., 14 Am. & Eng. R. R. Cas. 407; Morgan, L. & F. R. R. Co. v. Bourdier, 1

McGloin (La.), 232; Atlantic & St. L. R. R. Co. v. County Commissioners, 51 Me. 36; Harlow v. Pike, 3 Me. 438; Baltimore v. Grand Lodge, 44 Md. 436; Morgan v. Chicago & N. E. R. R., 36 Mich. 428; Lohman v. St. Paul, S. & T. F. R. R. Co., 18 Minn. 174; New Orleans, M. & C. R. R. Co. v. Frederick, 46 Miss. 1; Whitcher v. Benton, 48 N. H. 157; State v. Orange, 32 N. J. L. (3 Vr.) 49; Stuart v. Palmer, 74 N. Y. 183; People v. Kniskern, 54 N. Y. 52; Cruger v. Hudson R. R. Co., 12 N. Y. 190; Wallkill V. R. R. Co. v. Norton, 12 Abb. (N. Y.) Pr. N. S. 317; Norton v. Wallkill Valley R. R., 63 Barb. (N. Y.) 77; People v. Tallman, 36 Barb. (N. Y.) 222; Polly v. Saratoga & W. R. R. Co., 9 Barb. (N. Y.) 449; People v. Supervisors of Allegheny Co., 36 How. (N. Y.) Pr. 544; *In re* New York L. & W. Ry. Co., 29 Hun (N. Y.), 602; People v. Lockport & B. R. R., 13 Hun (N. Y.), 211; Anderson v. Commissioners, 12 Ohio St. 635; O'Hara v. Pennsylvania R. R. Co., 25 Pa. St. 445; Warwick Inst. for Savings, v. Providence, 12 R. I. 144; Baltimore & O. R. R. Co. v. Pittsburgh, W. & K. R. R. Co., 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444; Seifert v. Brooks, 34 Wis. 443; Hood v. Finch, 3 Wis. 381; Burns v. Multnomah R. R. Co., 8 Sawy. C. C. 543; s. c., 10 Am. & Eng. R. R. Cas. 289; 15 Fed. Rep. 177; Great Falls Manuf. Co. v. Garland, Attorney-General, 25 Fed. Rep. 521; The J. W. French, 13 Fed. Rep. 916.

6. Pratt v. Bright, 29 N. J. Eq. (2 Stew.) 128; s. c., 19 Am. Ry. Rep. 95.

7. New Orleans, M. & C. R. R. Co. v. Frederick, 46 Miss. 1.

been held that third persons holding liens, by virtue of judgments recovered, ought to have notice.¹

(2) *Requisites and Sufficiency.*—In condemning land, notice must be given to the owner by name.² A notice to the agent of a land-owner for the sale of lands is not sufficient.³ It is not, however, essential that there should be a personal service of the notice.⁴ Constructive notice by publication is sufficient,⁵ but notice sent by mail to an improper address confers no jurisdiction,⁶ and if the notice name only a life-tenant who is dead, the proceeding will not be binding upon the remainder-man.⁷ A notice which states that the petitioner will make application to the judge of the circuit court at a certain time and place, and the object sought to be accomplished, precisely and plainly, and which describes the land which is the subject of the proceeding, is sufficient.⁸ The quantity and location of the land required must be set out with precision.⁹ The notice may, however, refer to a plan or map filed by the company.¹⁰ The insufficiency of the notice may be waived by the land-owner appearing and subjecting to the proceeding.¹¹ The sheriff conducting the condemnation proceedings is not a party, and may serve the notice.¹² Without a sufficient notice the court cannot acquire jurisdiction of the proceedings,¹³ but the tribunal to which application is made is, in general, the judge of the sufficiency, and its decision will not be reversed on appeal.¹⁴

4. *Parties.*—The owners of the whole tract sought to be condemned, although having separate interests in it, may be made parties in the same proceedings.¹⁵ Within the term "owners," all persons vested with the several interests, which constitute the entire estate, are included.¹⁶ Thus the owner of an estate in fee,

1. *Watson v. New York C. R. R. Co.*, 6 Abb. (N. Y.) Pr. N. S. 91.

2. *Birge v. Chicago, M. & St. P. R. R. Co.*, 65 Iowa, 440; s. c., 20 Am. & Eng. R. R. Cas. 291.

3. *Memphis, K. & C. R. R. Co. v. Parsons R. R. Co.*, 26 Kans. 503; s. c., 14 Am. & Eng. R. R. Cas. 379.

4. *Harper v. Lexington & O. R. R. Co.*, 2 Dana (Ky.), 227.

5. *Mason v. Messenger*, 17 Iowa, 261; *Missouri R., F. S. & G. R. R. v. Shepard*, 9 Kans. 647; *Salem v. Eastern R. R.*, 98 Mass. 431; *Walker v. Boston & M. R. R.*, 59 Mass. (3 Cush.) 1; *Weir v. St. Paul, S. & T. F. R. R.*, 18 Minn. 155; *Wilkin v. St. Paul & P. R. R.*, 16 Minn. 271; *New Orleans, J. & G. N. R. R. v. Hemphill*, 35 Miss. 17; *Stuart v. Palmer*, 74 N. Y. 183; *In re Empire City Bank*, 18 N. Y. 199; *Polly v. Saratoga & W. R. R.*, 9 Barb. (N. Y.) 449; *Owners, etc., v. Albany*, 15 Wend. (N. Y.) 374; *Cupp v. Seneca Co.*, 19 Ohio St. 173; *Baltimore & O. R. R. v. Pittsburgh, W. & K. R. R.*, 17 W. Va. 812.

6. *Morgan v. Chicago & N. E. R. R. Co.*, 36 Mich. 428.

7. *Chicago & A. R. R. v. Smith*, 78 Ill. 96.

8. *Quincy & P. R. Co. v. Taylor*, 43 Mo. 35.

9. *Vail v. Morris & E. R. R. Co.*, 21 N. J. L. (1 Zab.) 189; *Strang v. Beloit & M. R. R. Co.*, 16 Wis. 635.

10. *Hazen v. Boston & M. R. R. Co.*, 68 Mass. (2 Gray) 574.

11. *Williams v. Hartford & N. H. R. R. Co.*, 13 Conn. 397. In this case the appraisers gave notice in writing the day previous to the time appointed. The party interested resided within eighty rods of the place, and, instead of requesting delay, returned a written answer protesting against the appraisers' authority to act, and declared that he would not appear. The court held that the notice was sufficient in point of time.

12. *Cedar Rapids, I. F. & N. W. R. R. Co. v. Chicago, M. & St. P. R. Co.*, 60 Iowa, 35; s. c., 10 Am. & Eng. R. R. Cas. 522.

13. *In re New York & O. M. R. R. Co.*, 40 How. (N. Y.) Pr. 335; *Rheiner v. Union D. S. R. & T. Co.*, 31 Minn. 289; s. c., 14 Am. & Eng. R. R. Cas. 373.

14. *Coster v. New Jersey R. R. Co.*, 24 N. J. L. (4 Zab.) 730.

15. *Evergreen Cemetery Assoc. v. Beecher*, 53 Conn. 551; *McKee v. St. Louis*, 17 Mo. 184.

16. *Gerrard v. Omaha, N. & B. H. R. R. Co.*, 14 Neb. 270; s. c., 20 Am. & Eng. R. R. Cas. 423; *Philadelphia, W. & B.*

and a person who has given a bond for a deed, may both join in a petition;¹ and the mortgagee ought to be joined in proceeding against the mortgagor.² When lands held in common are required, it is necessary to have all of the tenants in common before the court.³ Lands purchased by partners with partnership funds, and not needed for the payment of debts, being held by the partners as tenants in common, a petition for damages should be brought in the joint names of the partners or of the surviving partner and the administrator of the partner deceased.⁴ The landlord and the tenant of a property have distinct estates, and a proceeding against one will not affect the other,⁵ nor will proceedings against the holder of contingent dower interest or a tenant-at-will, bind the owner.⁶ Where the land-owner dies during the proceedings, the revival must be had in the names of the heirs or devisees;⁷ and the guardian of minor children of a deceased land-owner is the proper person to sue for damages although the property has been sold after the damages were taken.⁸ Where proceedings are brought against an infant for the condemnation of his land, a guardian *ad litem* must be appointed to attend to his interest.⁹ The trustee, and not the *cestui que trust*, is the proper party to bring proceedings for the recovery of damages.¹⁰ When a railroad company contracts with a person to furnish the right of way, at the latter's expense, but purchased and condemned in the name of the company, the company is the only responsible party.¹¹

5. *Pleading.*—*a. Petition or Complaint.*—(1) *Necessary Averments.*—A petition for a condemnation of lands must allege that the taking is necessary for public use,¹² and set out the corporate

R. R. Co. v. Williams, 54 Pa. St. 103; Colcough v. Nashville & N. W. R. R. Co., 2 Head (Tenn.), 171.

1. Proprietors of Locks & Canals v. Nashua & L. R. R. Co., 64 Mass. (10 Cush.) 385.

2. Wilson v. European & N. A. R. R. Co., 67 Me. 358; s. c., 16 Am. Ry. Rep. 357; Michigan, A. L. R. R. Co. v. Barnes, 40 Mich. 383; Mutual Life Ins. Co. v. Easton & A. R. R. Co., 38 N. J. Eq. (11 Stew.) 132; s. c., 17 Am. & Eng. R. R. Cas. 78; Lehigh C. & N. Co. v. Central R. R. Co., 35 N. J. Eq. (8 Stew.) 379; s. c., 12 Am. & Eng. R. R. Cas. 416; Davis v. La Crosse & M. R. R. Co., 12 Wis. 16.

But the mortgagee of the franchises and easements of a railway company need not be made a party to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed, and the company is left in control of the road. Grand Rapids v. Grand Rapids & I. R. R. Co., 58 Mich. 642.

3. Grand Rapids, N. & L. S. R. R. Co. v. Alley, 34 Mich. 16, 18; Harrisburg, P. M. & L. Railroad Co. v. Bucher, 7 Watts (Pa.), 33. Compare Bowman v. Venice & C. R. R. Co., 102 Ill. 459; s. c., 14 Am. & Eng. R. R. Cas. 338, where it was held that all the

tenants in common need not be made parties, except the rights of one depend on the disposition of the case as to the others.

4. Whitman v. Boston & M. R. R. Co., 85 Mass. (3 Allen) 133.

5. Storm Lake v. Iowa Falls & S. C. R. R. Co., 62 Iowa, 218; s. c., 20 Am. & Eng. R. R. Cas. 420; Voegtly v. Pittsburgh & F. W. R. R. Co., 2 Grant Cas. (Pa.) 243.

6. Toledo, A. A. & G. T. R. R. Co. v. Dunlap, 47 Mich. 456; s. c., 5 Am. & Eng. R. R. Cas. 378.

7. Peoria & R. I. R. Co. v. Rice, 75 Ill. 329; Valley Ry. Co. v. Bohm, 29 Ohio St. 633.

8. Mumma v. Harrisburg, P. M. J. & L. R. R. Co., 1 Pears. (Pa.) 65.

9. Hotchkiss v. Auburn & R. R. R. Co., 36 Barb. (N. Y.) 600.

10. Davis v. Charles R. B. R. R. Co., 65 Mass. (11 Cush.) 506.

11. Buchanan Co. Bank v. Cedar Rapids, I. F. & N. W. R. R. Co., 62 Iowa, 494; s. c., 20 Am. & Eng. R. R. Cas. 417.

12. Smith v. Chicago & W. I. R. R., 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384; Atchison & D. R. Co. v. Lyon, 24 Kans. 744; s. c., 5 Am. & Eng. R. R. Cas. 295; Grand Rapids N. & L. S. R. R. v. Van Driele, 24 Mich. 409; Valley R. R. Co. v. Bohm, 34 Ohio St. 114; s. c., 21 Am.

existence and the right to exercise the power of eminent domain.¹ Inability to acquire the lands by purchase or voluntary grant has in many cases been held to be a jurisdictional fact which must be set out in the petition.² The complaint must be in writing,³ and should be verified,⁴ and should set out the names of the owners,⁵ and the extent of the lands intended to be condemned.⁶ And where a petition is filed to acquire title to lands used as a street, it must disclose whether the lands are intended to be appropriated as the property of the respondent, or whether they were included in a petition solely by reason of his ownership of the premises fronting on the street,⁷ or, in the case of other lands, whether the injury was occasioned by the passing through of an appropriation of the claimant's land, or the taking of timber or other material.⁸ It is not necessary that there should be a distinct allegation of the value of the lands secreted for condemnation.⁹ Where the proceedings are instituted by the heir of a party deceased, he must allege that his ancestor was the owner at the time of the answer.¹⁰

(2) *Description of Premises.*—In a petition for the condemnation of lands, it is essential that the premises intended to be taken should be so described that there can be no question as to their identity.¹¹

Ry. Rep. 30; *Shick v. Pennsylvania R. R. Co.*, 1 Pears. (Pa.) 259; *South Carolina R. R. Co. v. Blake*, 9 Rich. (S. C.) L. 228.

1. *Atkinson v. Marietta & C. R. R. Co.*, 15 Ohio St. 21.

2. *Bowman v. Venice & C. R. R. Co.*, 102 Ill. 454; s. c., 14 Am. & Eng. R. R. Cas. 338; *Booker v. Venice & C. R. R. Co.*, 101 Ill. 333; s. c., 5 Am. & Eng. R. R. Cas., 357; *Chicago & M. L. S. R. R. Co. v. Sanford*, 23 Mich. 418; *Cunningham v. Pacific R. R. Co.*, 61 Mo. 33; *Hannibal & St. J. R. R. Co. v. Muder*, 49 Mo. 165; *In re New York Cent. R. R. Co.*, 67 Barb. (N. Y.) 426; *United States v. Oregon R. & Nav. Co.*, 9 Sawy. C. C. 61; s. c., 16 Fed. Rep. 524.

3. *Church v. Grand Rapids & I. R. R. Co.*, 70 Ind. 161; s. c., 3 Am. & Eng. R. R. Cas. 198.

4. *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. St. 100.

5. *California S. R. R. Co. v. Colton, L. & W.*, 14 Am. & Eng. R. R. Cas. 194. Not reported, but affirmed on authority of *Southern Pac. R. Co. v. Kimball*, 61 Cal. 90. See 64 Cal. xix.; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

6. *Spofford v. Bucksport & B. R. R. Co.*, 66 Me. 26; *Chicago, M. & L. S. R. R. Co. v. Sanford*, 23 Mich. 418; *In re New York C. & H. R. R. Co.*, 90 N. Y. 342; s. c., 18 Am. & Eng. R. R. Cas. 542; *In re New York Cent. & H. R. R. Co.*, 70 N. Y. 191; s. c., 18 Am. & Eng. R. R. Cas. 395; *Pennsylvania R. R. Co. v. Porter*, 29 Pa. St. 165; *Ohio River R. R. Co. v. Harness*, 24 W. Va. 511.

7. *Mansfield C. & L. M. R. Co. v. Clark*, 23 Mich. 519.

8. *Martinsville & F. R. R. Co. v. Bridges*, 6 Ind. 400.

9. *United States v. Oregon R. & Nav. Co.*, 16 Fed. Rep. 524; s. c., 14 Am. & Eng. R. R. Cas. 23.

10. *Church v. Grand Rapids & I. R. R. Co.*, 70 Ind. 161; s. c., 3 Am. & Eng. R. R. Cas. 198.

11. *Toledo, A. A. & N. M. R. R. v. Munson*, 57 Mich. 42; s. c., 20 Am. & Eng. R. R. Cas. 410; *Chicago & M. L. S. R. R. Co. v. Sanford*, 23 Mich. 418; *West v. West & E. R. R. Co.*, 61 Miss. 536; s. c., 20 Am. & Eng. R. R. Cas. 402; *Pennsylvania R. R. Co. v. Porter*, 29 Pa. St. 165; *Hussner v. Brooklyn City R. R. Co.*, 96 N. Y. 18; s. c., *sub nom.* *Brooklyn City R. R. Co. v. Hussner*, 20 Am. & Eng. R. R. Cas. 265; *In re New York C. & H. R. R. Co.*, 90 N. Y. 342; *Ohio River R. R. Co. v. Harness*, 24 W. Va. 511; s. c., 20 Am. & Eng. R. R. Cas. 405.

In a proceeding by the land-owner for the assessment of damages against a railway company which had constructed its line across his farm, the application particularly described the whole tract of land, but that part of it occupied by the defendant's railway was described as "extending diagonally through said tract of land from a point near the north-east corner to a point near the south-west corner." *Held*, that such description is fatally defective on demurrer. *Indianapolis & V. R. R. Co. v. Newsom*, 54 Ind. 121.

In a proceeding by a railroad company

(3) *Joinder of Claims.* — A petition for damages or the taking of land may have joined with it a prayer for damages for previous trespasses.¹ A proceeding by one company to acquire the right to cross the track of another company may be united with a proceeding to acquire land of such other company for track and depot purposes, and proceeding to condemn two or more parcels for the purpose of the right of way may also be united.² But it has been held that a claim for damages for taking a street is a separate cause of action from a claim subsequently arising by injury to the same property.³

b. Answers. — It has been held that in the absence of a statutory provision requiring the filing of an answer, such a filing was unauthorized, and the answer, in proceedings to condemn lands, could be stricken from the files.⁴

c. Cross-Petition. — In proceedings by a railroad company to

under the Ohio Railroad Act of 1884, authorizing an appropriation of lands on which to construct a railroad, the company described the land to be appropriated as "fifty feet wide on each side of said railroad, as last surveyed through subdivision lots Nos. 1, 2, 3, and 4, fractional section of township 10 south, of range 7 east, commencing on the north bounds thereof, thence westerly and southerly on and near the boundaries thereof to a point in the west line of said No. 4 near the north-west corner; also lots Nos. 11, 12, 13, 14, and 15, of the subdivision of river-tract No. 87, in said county." It was held that said description was sufficiently certain in the appropriation proceedings. *Cleveland & Toledo R. R. Co. v. Prentice*, 13 Ohio St. 373.

In a petition and warrant for the assessment of damages occasioned by the crossing of one railroad by another, the place injured is sufficiently described as a "part of the land and bridge heretofore held and occupied by the petitioners for railroad purposes, measuring about five rods in width, and lying a little west of the draw in their bridge from Charlestown to Somerville, and nearly contiguous thereto," with a reference to the field location and actual construction of its road. *Grand Junction R. R. & D. Co. v. County of Middlesex*, 80 Mass. (14 Gray) 553.

Where condemnation notices describe the land as "a certain number of feet on each side of the centre-line of the railroad," as the same is located, staked, and marked, this description was sufficient; and if any other parts of the description differed therefrom, they must yield to the visible designation. *Lower v. Chicago, B. & Q. R. R. Co.*, 59 Iowa, 563; s. c., 10 Am. & Eng. R. R. Cas. 17.

1. *Robertson v. Central R. R. Co.*, 57 Iowa, 376; s. c., 10 Am. & Eng. R. R. Cas. 420. In this case the plaintiff prayed that the court "will order a judgment decree . . . that defendant shall pay the damages sustained by reason of said trespass and

usurpation, and for right of way over said lands, to the sum of a thousand dollars. The court held that this was a claim not merely for compensation for the taking of the right of way, but also for damages for trespass."

2. *California S. R. R. Co. v. Southern Pacific R. R. Co.*, 65 Cal. 294.

3. *Hall v. Cincinnati, H. & D. R. R. Co.*, 1 Disney (Ohio), 58.

4. *Smith v. Chicago & W. I. R. R. Co.*, 105 Ill. 511. In this case the court say: "It will be seen that, although the statute is very minute in all its details, specifically setting forth every step to be taken in the progress of a cause, from its inception to its final determination, yet it nowhere contains the slightest allusion to an answer by the defendants. Nor can we, on general principles, conceive the least necessity for such a pleading. The statute having determined specifically what facts must appear on the face of the petition, the court or judge is powerless to take any action in the premises, until a petition is filed containing the statutory requisites, for it is by the petition jurisdiction is obtained of the subject-matter of the suit.

"Every petition, properly framed, must contain all the statutory requirements, and will, therefore, of necessity, show, in every case where such petition is sufficient to confer jurisdiction, the authority of the company to take the specific land sought to be taken, and the object or purpose for which it is required; and from this state of facts it must clearly appear that the use for which it is sought to be condemned is a public one. If the right to take the land at all must affirmatively appear upon the face of the petition itself, as we hold it must, what necessity is there for an answer at all?" See also *Jefferson & P. R. R. Co. v. Hazeur*, 7 La. An. 182, where it was held that it was not necessary for the owner to raise an objection in his pleading that the company has land enough, and the condemnation of his property is unnecessary.

condemn lands, the damages must be confined to the tract named in the petition, except the owner file a cross-petition.¹

d. Amendment.—The court may, during the pendency of the proceedings to condemn land, permit the company to amend the description of the land intended to be condemned.² But where proceedings are commenced under that statute they cannot by amendment be changed into a proceeding under another act,³ a petition for the assessment of damages by the construction of a railroad, being in the nature of a civil action over which the commissioners exercised judicial power. The commissioners will hold an amendment after hearing from the parties and before issuing an award for a jury.⁴ But they cannot amend their record by inserting as parties, names not embraced in the petition.⁵

6. Practice.—Proceedings to condemn land are special; and in some States, unlike ordinary trials of law, the inquest may be conducted by commissioners or by a jury without aid of counsel.⁶ Land-owners may have the preliminary question of the necessity for the taking first tried.⁷ But the existence of the power to take private property for public use may be controverted at any stage of the proceedings.⁸ But it has been held that the property-owner cannot dispute the legality of the corporation.⁹ It is not essential that there should be a separate trial to each owner of an estate or interest in each parcel.¹⁰ And if different parties have several and distinct interests in the same tract, the court may order the damages to be assessed by the same or different jury.¹¹ The court may, in its discretion, limit the number of witnesses called upon the question of the value of the premises.¹² The courts are not unanimous on the question which of the parties shall open and close. Where the land-owner is the real actor, it has been held that he should be given the opening and closing of the argument, no matter which party has initiated the proceed-

1. *Chicago & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *Mix v. Lafayette, B. & M. R. R. Co.*, 67 Ill. 319.

An averment in answer to the petition for the condemnation of a particular lot, that this and certain other specified lots lying together constituted the owner's homestead, and that he occupied them as such, is sufficient to raise the question of injury to the contiguous lots. *Port Huron & S. W. R. Co. v. Voorheis*, 50 Mich. 506.

2. *Hunt v. New York C. & St. L. R. R. Co.*, 99 Ind. 593; s. c., 20 Am. & Eng. R. R. Cas. 436.

3. *Peoria, P. & J. R. R. Co. v. Black*, 58 Ill. 33. See also, *In re New York & W. S. R. R. Co.*, 89 N. Y. 453; reversing s. c., 27 Hun (N. Y.), 57.

4. *Grand Junction R. R. & D. Co. v. Middlesex Commrs.*, 80 Mass. (14 Gray) 553.

5. *Littlefield v. Boston & M. R. R. Co.*, 65 Me. 248; s. c., 10 Am. Ry. Rep. 104.

6. *Port Huron & S. W. R. R. Co. v. Voorheis*, 50 Mich. 506.

7. *South Carolina R. R. Co. v. Blake*, 9 Rich (S. C.), L. 228.

8. *City of Hopkins v. Kansas City, St. J. & C. B. R. R. Co.*, 79 Mo. 98; s. c., *sub nom.* *Kansas City, St. J. & C. B. R. R. Co. v. City of Hopkins*, 7 Am. & Eng. Corp. Cas. 953.

Parties joined by the company in proceedings, as having an interest in the land, may by *certiorari* dispute the right of the company to institute the proceedings, without showing that they have any interest. *State v. Hudson T. R. Co.*, 46 N. J. L. (17 Vr.) 289; s. c., 20 Am. & Eng. R. R. Cas. 294.

9. *Niemeyer v. Little Rock, J. R. R. Co.*, 43 Ark. 111; s. c., 20 Am. & Eng. R. R. Cas. 174.

10. *Kohl v. United States*, 91 U. S. (1 Otto) 367; bk. 23 L. ed. 449.

11. *Bowman v. Venice & C. R. R. Co.*, 102 Ill. 459; s. c., 14 Am. & Eng. R. R. Cas. 338.

12. *Everett v. Union Pacific R. R. Co.*, 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203, *Sheldon v. Minneapolis & St. L. R. R. Co.*, 29 Minn. 318.

ings.¹ And it has been held that the land-owner has the affirmative of the issue as to the value of the land, and ought to be allowed to open and close.² In other cases the party taking the initiative has been held entitled to open and close.³ In New York the right is within the discretion of the commissioners, and their decision is final.⁴

7. *Jury.* — *a. Right to Jury Trial.* — Proceedings in exercise of the power of eminent domain are not "suits at common law" for which "the right of trial by jury shall be preserved" as required by the constitutional provision, and hence a statute providing for the assessment of damages by a tribunal other than a jury is not unconstitutional.⁵ But the right of a trial by jury has in some States been secured by constitutional amendment.⁶ And where the constitution grants the right it is generally held to imply a jury of twelve men, who must agree unanimously upon a verdict.⁷

1. *Springfield & M. R. R. Co. v. Rhea*, 44 Ark. 258; *Indiana, B. & W. R. R. Co. v. Cook*, 102 Ind. 133.

2. *Right of Land-Owner to open and close.* — *Indiana, B. & W. R. R. Co. v. Cook*, 102 Ind. 133; *Swinney v. Ft. Wayne, M. & C. R. R. Co.*, 59 Ind. 205; *Grand Rapids & I. R. R. Co. v. Horn*, 41 Ind. 479; *Evansville & C. R. R. Co. v. Miller*, 30 Ind. 209; *McMahon v. Cincinnati & C. S. L. R. R. Co.*, 5 Ind. 413; *Burt v. Wigglesworth*, 117 Mass. 302; *Connecticut R. R. Co. v. Clapp* 55 Mass. (1 Cush.) 559; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Minnesota V. R. R. Co. v. Doran*, 17 Minn. 188; *Omaha, N. & B. H. R. R. v. Umstead*, 17 Neb. 459; *Oregon & C. R. R. v. Barlow*, 3 Oreg. 311.

3. *Right of Party taking the Initiative to open and close.* — *Harrison v. Young*, 9 Ga. 359; *McReynolds v. Burlington O. R. R. Co.*, 106 Ill. 152; s. c., 14 Am. & Eng. R. R. Cas. 172; *Charleston & S. R. R. Co. v. Blake*, 12 Rich. (S. C.) L. 634; *Baltimore & O. R. R. Co. v. Pittsburgh, W. & K. R. R. Co.*, 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444.

4. *Albany N. R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68.

5. *Assessment of Damages by a Commission.* — *Montgomery S. R. v. Sayre*, 72 Ala. 443; *Heyneman v. Blake*, 19 Cal. 579; *Koppikus v. State Capitol Commissioners*, 16 Cal. 248; *Whiteman v. Wilmington & S. R. Co.*, 2 Harr. (Del.) 514; s. c., 33 Am. Dec. 411; *Johnson v. Joliet & C. R. R.*, 23 Ill. 202; *Hymes v. Aydelott*, 26 Ind. 431; *Norristown, etc., Turnpike Co. v. Burket* 26 Ind. 53; *Dronberger v. Reed*, 11 Ind. 420; *Lake Erie, W. & St. L. R. R. v. Heath*, 9 Ind. 558; *Tharp v. Witham*, 65 Iowa, 566; *People v. Michigan S. R. R. Co.*, 3 Mich. 496; *Bruggerman v. True*, 25 Minn. 123; *Ames v. Lake Superior & M. R. R. Co.*, 21 Minn. 241; *New Orleans B. R. V. & M. R. R. Co. v. Drake*, 60 Miss. 621; *Louisiana & F. P. R. Co. v. Pickett*, 25 Mo. 535; *In re Mount Washington*, 35

N. H. 134; *Baker v. Holderness*, 26 N. H. 110; *Dalton v. North Hampton*, 19 N. H. 362; *Backus v. Lebanon*, 11 N. H. 19; s. c., 35 Am. Dec. 466; *Scudder v. Trenton D. Falls Co.*, 1 N. J. Eq. (1 Saxt.) 694; s. c., 23 Am. Dec. 756; *People v. Smith*, 21 N. Y. 595; *Beekman v. Saratoga & S. R. R. Co.*, 3 Paige Ch. (N. Y.) 45; s. c., 22 Am. Dec. 679; *Livingston v. Mayor of N. Y.*, 8 Wend. (N. Y.) 86; s. c., 22 Am. Dec. 622; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *Raleigh & G. R. R. Co. v. Davis*, 2 Dev. & Bat. (N. C.) L. 451; *Willyard v. Hamilton*, 7 Ohio, 111, pt. 2; s. c., 30 Am. Dec. 195; *Kramer v. Cleveland & P. R. R. Co.*, 5 Ohio St. 140; *Pennsylvania R. R. R. Co. v. Lutheran Congregation*, 53 Pa. St. 445; *Houston, T. & B. R. R. Co. v. Milburn*, 34 Tex. 224; *Buffalo, Bayou, B. & C. R. R. Co. v. Ferris*, 26 Tex. 588; *Gold v. Vermont C. R. R. Co.*, 19 Vt. 478; *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507; bk. 12 L. ed. 535; *Vanhorne's Lessee v. Dorrance*, 2 U. S. (2 Dall.) 304; bk. 1 L. ed. 391; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Bald. C. C. 205; *Great Falls Manuf. Co. v. Garland*, 25 Fed. Rep. 521.

6. *Assessment of Damages by Jury.* — *Right to.* — *Whitehead v. Arkansas C. R. R.*, 28 Ark. 460; *Weber v. County of Santa Clara*, 59 Cal. 265; *Mitchell v. Illinois & St. L. R. R.*, 68 Ill. 286; *People v. Roberts*, 62 Ill. 38; s. c., 7 Am. Ry. Rep. 445; *Cook v. South Park Commissioners*, 61 Ill. 115; *Rich v. Chicago*, 59 Ill. 286; *Louisville, N. A. & St. L. A. L. R. R. Co. v. Dryden*, 39 Ind. 393; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558; *Paul v. Detroit*, 32 Mich. 108; *Chicago & M. L. S. R. R. v. Sanford*, 23 Mich. 418; *Isom v. Mississippi C. R. R. Co.*, 36 Miss. 300; *In re Towanda Bridge Co.*, 91 Pa. St. 216; *Williams v. Pittsburgh*, 83 Pa. St. 71; *Pusey's Appeal*, 83 Pa. St. 67.

7. *Whitehead v. Arkansas C. R. R. Co.*, 28 Ark. 460; *Mitchell v. Illinois & St. L.*

But in New York it has been held that the legislature may constitute a jury of a less number, and authorize it to decide by a majority vote.¹

b. Selection, Qualification, and Empanelling.—Generally, the selection and qualification of jury in eminent domain proceedings are governed by the same rules as govern the qualification and selection in ordinary actions at law. In some cases, however, it is required that the jurors must be free-holders; ² and it has been that if the juror holds the title to lands under bond, conditioned that the obligor shall convey a fee title to the purchaser upon the payment of the purchase money; this is sufficient to constitute him a free-holder.³ By a Massachusetts statute, where a railroad is laid out through a town, the jurors are to be taken from "three nearest towns not interested," and this is to be interpreted to mean the three towns nearest to, and exclusive of, the town in which the land lies,⁴ without regard to the constitution of the land within that town;⁵ and when the several applications are made at the same time by owners of lands in different towns, the jurors are to be taken from the three towns nearest to the town in which the land or either of the applicants are situated; and when a single application is made by one who owns lands in different towns, the jurors are to be taken from the three towns nearest either of the towns in which the lands are situated.⁶ The notice of the drawing may be given to the owner by newspaper advertisement.⁷ A drawing required by statute to be made in the presence of the court is evidence, if not so made;⁸ and if the statute direct that a precept be issued to a sheriff to summon a jury, the sheriff cannot select a jury from a list of names prepared by his deputy.⁹ The jurors may serve in different inquisitions; and where the defendant refuses to strike off the names of jurors, the marshal may do so in his stead.¹⁰ But in filling the panel of a struck jury, the sheriff cannot take as a juror a person whose name has been stricken off.¹¹ A mere irregularity in the swearing of the jury will not warrant the setting aside of the proceedings;¹² and if the party fail to take objection to the swearing at the time, he will be deemed to have waived no irregularity.¹³ There is no

R. R. Co., 68 Ill. 286; Chicago & M. L. S. R. R. Co. v. Sanford, 23 Mich. 418; Lamb v. Lane, 4 Ohio St. 167.

1. Cruger v. Hudson R. R. Co., 12 N. Y. 190.

2. Louisville, N. A. & St. L. A. L. R. R. Co. v. Dryden, 39 Ind. 393; Peninsular R. R. Co. v. Howard, 20 Mich. 18; New Orleans, J. & G. N. R. R. Co. v. Hemphill, 35 Miss. 17.

3. New Orleans, J. & G. N. R. R. Co. v. Hemphill, 35 Miss. 17.

4. Meacham v. Fitchburg R. R. Co., 58 Mass. (4 Cush.) 291.

5. Reed v. Hanover B. R. Co., 105 Mass. 303.

6. Wyman v. Lexington & W. C. R. R. Co., 54 Mass. (13 Metc.) 316.

7. Polly v. Saratoga & W. R. R. Co., 9 Barb. (N. Y.) 449.

8. Convers v. Grand Rapids & I. R. R. Co., 18 Mich. 459.

9. Pennsylvania R. R. Co. v. Heister, 8 Pa. St. 445.

10. Dixon v. Baltimore & P. R. R. Co., 1 Mackey (D. C.), 78; s. c., 3 Am. & Eng. R. R. Cas. 201.

11. *In re* Detroit & P. R. R., 2 Doug. (Mich.) 367.

12. Grafton & G. R. Co. v. Foreman, 24 W. Va. 662; s. c., 20 Am. & Eng. R. R. Cas. 215.

13. Rockford, R. I. & St. L. R. R. Co. v. McKinley, 64 Ill. 338.

Swearing of Jury.—Objection, when taken.—The return of the sheriff that the

peremptory challenge, unless it be expressly conferred by statute, and a statute allowing peremptory challenges in "civil causes" does not apply to statutory proceedings under the right of eminent domain.¹ The officer summoning the jurors must be unbiassed, and without interest.² The jurors must be impartial, and not unduly biassed against either of the parties to the controversy.³ A stockholder of a railroad corporation is disqualified by reason of interest;⁴ and also one who has given his note to the company to aid in the construction of the road.⁵ But the mere fact that the juror is a citizen of a county interested in the suit is not sufficient to disqualify him.⁶ Any objection to the competency of the jurors will be waived by a failure to object at a proper time.⁷

c. View.—Except when it is specially directed by statute, that the jury shall view the premises, the granting of a view is within the discretion of the court.⁸ But in some cases the statute is

jury were duly impanelled and sworn according to law, to discharge their duties, "will be construed to be a statement that the jury were properly sworn, and not a recital of the substance of the oath administered." *New Orleans, J. & G. N. R. R. Co. v. Hemphill*, 35 Miss. 17.

1. *Peninsular R. R. Co. v. Howard*, 20 Mich. 18; *Convers v. Grand Rapids & I. R. R. Co.*, 18 Mich. 459. See also *Davis v. Bangor & P. R. R. Co.*, 60 Me. 303.

2. *Interest of Officer.*—Where the coroner who summoned the jury was a stockholder, the proceedings were set aside and *venire de novo* awarded. *Woodstock R. Co. v. Tupper*, 1 Hannay (N. B.), 454.

What Interest affects Proceedings.—The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct and certain, and not merely remote or contingent; and in England it has been held that the same principle must be applied to proceedings under the Lands Clauses Consolidation Act. *Queen v. Manchester, S. & L. R. Co.*, L. R. 2 Q. B. 336.

Waiver of Objection to Officer because interested.—That the sheriff is an interested party, and thereby disqualified from proceeding with the inquisition, is waived by defendant appearing and taking part in the inquisition. *Corrigal v. London & B. R. Co.*, 5 Man. & Gr. 219; s. c., 44 Eng. C. L. 123.

3. *Bias of Jurors.*—*Donner v. Palmer*, 23 Cal. 40; *Hessler v. Drainage Commissioners*, 53 Ill. 105; *Denton v. Lewis*, 15 Iowa, 301; *Ruble v. McDonald*, 7 Iowa, 90; *Inge v. Police Jury*, 14 La. An. 117; *People v. Michigan S. R. R. Co.*, 3 Mich. 496; *Ames v. Lake Superior & M. R. R. Co.*, 21 Minn. 241; *St. Martin v. Desnoyer*, 1 Minn. 156; *Kansas City, St. J. & C. B. R. R. v. Campbell*, 62 Mo. 585; *Bryant v. Glidden*, 36 Me. 36; *Thompson v. Conway*, 53 N. H. 622; *Newport Highway*, 48 N. H. 433; *Peavey v. Wolfborough*, 37 N. H. 286;

State v. Justice, 24 N. J. L. (4 Zab.) 413; *Bennet v. Camden & A. R. R.*, 14 N. J. L. (2 J. S. Gr.) 145; *Giesy v. Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St. 308; *Pennsylvania R. R. v. Lutheran Congregation*, 53 Pa. St. 445; *Forbes v. Howard*, 4 R. I. 364; *Buffalo, Bayou, B. & C. R. R. Co. v. Ferris*, 26 Tex. 588; *Powers v. Bears*, 12 Wis. 213; s. c., 78 Am. Dec. 733; *Birchard v. Booth*, 4 Wis. 67.

4. *Peninsular R. R. Co. v. Howard*, 20 Mich. 18. In this case it was held that the railroad company must disclose the fact that the juror is a stockholder, if such fact be known to it.

5. *Michigan A. L. R. Co. v. Barnes*, 40 Mich. 383.

Who disqualified by Interest.—But a subscriber to a railway aid fund, who takes no stock in the road, acquires no legal interest in another projected road from the fact, merely, that it is to be leased to the road which he has aided, and is not disqualified as a juror in proceedings for condemnation of lands for the use of the latter road. *Detroit W. T. & J. R. Co. v. Crane*, 50 Mich. 182; s. c., 10 Am. & Eng. R. R. Cas. 502.

A fund raised in Detroit by general contribution to aid in the building of a railway to Butler, Ind., was commonly known as the "Butler bonus." But in proceedings to condemn lands for a road to be leased to the Butler line, a court could hardly take judicial notice of what the "Butler bonus" was for the purpose of sustaining a challenge to a juror on the ground that he had subscribed thereto. *Detroit, W. T. & J. R. R. Co. v. Crane*, 50 Mich. 182; s. c., 10 Am. & Eng. R. R. Cas. 502.

6. *Baltimore & O. R. R. Co. v. Pittsburgh, W. & K. R. R. Co.*, 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444.

7. *Jameson v. Androscoggin R. R. Co.*, 52 Me. 412; *Mansfield, C. & L. M. R. R. Co. v. Clark*, 23 Mich. 519.

8. *View by Jury.*—*Galena & S. W. R.*

imperative, and a view of the premises must be had, even though the evidence has been closed and the arguments heard.¹ But generally the time at which the view shall be had is in the discretion of the court.² The jurors cannot of their own accord view the premises after the evidence is in.³ Where the view is ordered under the general statute relating to civil causes, its province is not to furnish testimony, but to enable the jury better to understand and comprehend the testimony of the witnesses.⁴ By statute relative to the condemnation of lands, the province of the view is often very considerably widened. Thus the functions of the jury in Michigan are in the nature of those exercised by assessors rather than of a jury in ordinary actions.⁵ In Louisiana, the jurors are in truth experts, who ought in every case to have a view of the lands, and who are supposed and intended by the legislature to have a personal knowledge of the value of real estate in the vicinage, which entitles them to rely upon their own opinion in forming their judgment.⁶ In Massachusetts and Kentucky, the purpose of the view is considered to be to furnish the jury with evidence.⁷ In Wisconsin, the jury may resort to their own knowledge of the premises obtained from a view thereof, but their assessment must be supported by the evidence, or it cannot stand.⁸

8. *Viewers and Commissioners.*—*a. Appointment and Qualification.*—Where the statute provides that the compensation shall be assessed by viewers or commissioners, it is not necessary that the land-owner should have notice of their appointment.⁹ The court may order their appointment subsequent to the hearing,¹⁰ and indeed at any time while damages remain unascertained.¹¹ And

R. Co. v. Haslam, 73 Ill. 494; *Heady v. Vevay, St. S. & V. Turnpike Co.*, 52 Ind. 117; *Evansville, I. & C. S. L. R. Co. v. Cochran*, 10 Ind. 560; *King v. Iowa M. R. Co.*, 34 Iowa, 458; *Kansas C. R. R. Co. v. Allen*, 22 Kans. 285; *Harper v. Lexington & O. R. R. Co.*, 2 Dana (Ky.), 227; *Remy v. Municipality*, 12 La. An. 500; *Snow v. Boston & M. R. R. Co.*, 65 Me. 230.

1. *Kankakee & S. R. R. Co. v. Straut*, 102 Ill. 666; s. c., 10 Am. & Eng. R. R. Cas. 440.

2. *Galena & S. W. R. R. Co. v. Haslam*, 73 Ill. 494.

3. *Ortman v. Union P. R. R. Co.*, 32 Kans. 419; s. c., 17 Am. & Eng. R. R. Cas. 136.

4. *Heady v. Vevay, St. L. & V. Turnpike Co.*, 52 Ind. 119; *Jeffersonville, M. & I. R. R. Co. v. Bowen*, 40 Ind. 545; *Harrison v. Iowa & M. R. R. Co.*, 36 Iowa, 323; *Brakken v. Minneapolis & St. L. R. R. Co.*, 29 Minn. 41.

Iowa Doctrine.—The language of the Iowa court, in *Close v. Samms*, 27 Iowa, 503, has been generally adopted, and referred to with approval. The court said, "The question then arises as to the purpose and intent of the statute. It seems to us that it was to enable the jury, by the view of the premises or of the place, to

better understand and comprehend the testimony of the witnesses respecting the same, and not to make them silent witnesses in the case, burdened with the testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error could be afforded either party."

5. In Michigan, however, the judge is allowed to "attend said jury to decide questions of law, and administer oaths to witnesses." The statute also authorizes the appointment of a commissioner for that purpose, and even permits the jury to proceed without either. *Toledo, A. A. & G. T. R. R. Co. v. Dunlap*, 47 Mich. 456; *Michigan A. L. R. R. Co. v. Barnes*, 44 Mich. 227; *Howell's Stat. Mich. sect. 3336*.

6. *Remy v. Municipality*, 12 La. An. 509.

7. *Harper v. Lexington & O. R. R. Co.*, 2 Dana (Ky.), 227; *Parks v. Boston*, 32 Mass. (15 Pick.) 198, 209.

8. *Washburn v. Milwaukee & L. W. R. R. Co.*, 59 Wis. 364.

9. *Zack v. Pennsylvania R. R. Co.*, 25 Pa. St. 394.

10. *Lehigh Valley R. R. Co. v. Dover & R. R. Co.*, 43 N. J. L. (14 Vr.) 528; s. c., 14 Am. & Eng. R. R. Cas. 87.

11. *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; s. c., 20 Am. & Eng. R. R. Cas. 165.

their appointment is not confined solely to cases where the lands of private persons are intended to be taken. They may act where rights are deserted to courts or use the tracks of other companies.¹ Where commissioners are directed by the court to make an appraisal, they can act without the necessity of a second appointment and taking oath thereunder.² The commissioners are *quasi* jurors, and should be, like them, free from all legal disability;³ they must be free from interest or affinity to the parties,⁴ and must also be unbiassed,⁵ and the provisions of the statute as to the oath to be taken must be strictly observed.⁶ Although a charter provides for a compulsory arbitration, the parties may mutually agree upon a greater or less number of persons than is provided by law.

b. Powers and Duties. — The discretion of the commissioners as to the exception and rejection of testimony is very large, and will not be overruled on appeal, unless substantial injustice is done.⁷ They may, on their own motion, take testimony in relation

1. *Boston, H. T. & W. R. R. Co. v. Troy & B. R. R. Co.*, 58 How. (N. Y.) Pr. 167; *Buffalo & L. R. R. Co. v. New York C. & H. R. R. Co.*, 15 Hun (N. Y.), 365.

2. *Low v. Galena & C. U. R. R. Co.*, 18 Ill. 324.

3. *Rock Island & A. R. R. Co. v. Lynch*, 23 Ill. 645; *Marquette H. & O. R. R. Co. v. Probate Judge*, 53 Mich. 217; s. c., 14 Am. & Eng. R. R. Cas. 355.

4. *Qualification of Commissioners to assess Damages.* — But the relation of cousin existing between the wife of one of the commissioners and a stockholder in the company is not such an affinity as to vitiate the report, no unfairness or injustice being complained of. *Albany N. R. R. Co. v. Cramer*, 7 How. (N. Y.) Pr. 164.

It is no cause for setting aside the report of commissioners appointed to assess damages, that when they were appointed and made their report, they were stockholders in the company, where the objection is urged by the company itself. *Strang v. Beloit & M. R. Co.*, 16 Wis. 635.

A Report of Viewers to assess the Damages caused by the building of a railroad will not be set aside because one of the viewers had a claim against the company for damages for altering a county road so as to pass through his land. Those persons only are disqualified from acting as viewers whose property immediately adjoins the railroad. *Newbecker v. Susquehanna R. R. Co.*, 1 Pears. (Pa.) 57.

Commissioners may agree with Company condemning Land as to Compensation, and may accept entertainment. *Lehigh Valley R. R. Co. v. Dover & R. R. Co.*, 43 N. J. L. (14 Vr.) 528; s. c., 14 Am. & Eng. R. R. Cas. 87.

The supreme court will not quash the proceedings to assess damages for the reason that the record thereof does not show affirmatively that the viewers were citizens

of the county. *Hannibal & St. J. R. R. Co. v. Morton*, 27 Mo. 317.

5. *Bias of Commissioners to assess Damages.* — But when a viewer has expressed an opinion as to a former and somewhat similar case that does not render him incompetent to serve on the view, objection to a viewer may be waived by appearing at the hearing. *Gingrich v. Harrisburgh*, P. Mt. J. & L. R. R. Co., 1 Pears. (Pa.) 74.

6. *In Wisconsin a Statute* required commissioners, before entering on the duties of their office, to take the constitutional oath prescribed for State officers to support the Constitution of the United States and of the State, and faithfully to discharge their duties to the best of their ability. Defendant's charter, under which commissioners were appointed, required of them no oath; but they took one to execute their trust reposed in them, and discharged the duties imposed upon them as enjoined in the charter, pursuant to the provisions of the charter, to the best of their ability. It was held that their proceedings were void for want of jurisdiction. *Bohlman v. Green Bay & M. R. Co.*, 40 Wis. 157; s. c., 13 Am. Ry. Rep. 421.

7. *Discussion of Commissioners.* — *Western Pacific R. R. v. Reed*, 35 Cal. 621; *Chicago & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *Evansville, I. & C. S. L. R. R. v. Cochran*, 10 Ind. 560; *Port Huron & S. W. R. R. Co. v. Voorheis*, 50 Mich. 506; *Michigan A. L. R. R. v. Barnes*, 44 Mich. 222; *Virginia & T. R. R. v. Henry*, 8 Nev. 165; *Coster v. New Jersey R. & T. Co.*, 23 N. J. L. (3 Zab.) 227; s. c., 24 N. J. L. (4 Zab.) 730; *Troy & B. R. R. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Troy & B. R. R. v. Lee*, 13 Barb. (N. Y.) 169; *In re Prospect Park & C. I. R. R.*, 20 Hun (N. Y.), 184; *In re Williams & A. Streets*, 19 Wend. (N. Y.) 678; *Winebiddle v. Pennsylvania R. R.*, 2 Grant (Pa.), 32; *Willing v. Baltimore R. R.*, 5 Whart. (Pa.) 460.

to damages,¹ and receive it at their discretion under oath.² It has been held that the commissioners cannot assess damages for injuries done to adjoining lands, where the land-owner has not filed a cross complaint asking compensation therefor.³

9. *Evidence.*—*a. Competency.*—(1) *In General.*—In proceedings under the power of eminent domain, the general laws relating to evidence govern the admission and rejection of testimony.⁴ Any evidence which tends to show the market value of the property taken, or the depreciation in value of property injured, is generally considered competent.⁵ Testimony as to the amount of the land taken, how it affects the remainder of the tract, how it divides the farm in the case of farm lands as to pasturage, water, improvements, etc., is competent.⁶ And evidence as to the danger of killing stock, and the danger of fire by reason of the construction of the road, may also be admitted.⁷ And the noise of passing trains, and the inconvenience and interruption to the use of property, may also be shown as effecting the value of the property.⁸ Proof that cars on the track block ingress and egress may be admitted.⁹ The purpose for which property was used or was reasonably adopted may be shown.¹⁰ But the annual net profits derived from the land for a particular use cannot competently be shown.¹¹ Where the claim is made by the owner of property abutting on a street, upon the ground that a railroad therein injuriously affects his property, evidence that the business of the street has fallen off and rental values have seriously decreased is admissible on the question of damages.¹² Proof of the value of the land to the railroad company is not, however, admissible.¹³ Where the whole tract is used as a farm, it has been held the questions as to the value of detached parts are

1. St. Paul & S. C. R. R. Co. v. Covell, Dak. 483.

2. Lehigh Valley R. R. Co. v. Dover & R. R. Co., 43 N. J. L. (14 Vr.) 528; s. c., 14 Am. & Eng. R. R. Cas. 87.

3. Illinois, W. Ex. R. Co. v. Mayrand, 93 Ill. 591; Albany & S. R. R. Co. v. Dayton, 10 Abb. (N. Y.) Pr. N. S. 182; Candaigua & N. F. R. R. Co. v. Payne, 16 Barb. (N. Y.) 273.

4. Central Pac. R. R. Co. v. Pearson, 35 Cal. 247; Rochester & S. R. R. Co. v. Budget, 6 How. (N. Y.) Pr. 467; Troy & B. R. R. Co. v. Northern T. Co., 16 Barb. (N. Y.) 100; Washington, C. & St. L. Co. v. Switzer, 26 Gratt. (Va.) 661.

5. Rockford, R. I. & St. L. R. Co. v. McKinley, 64 Ill. 338; King v. Minneapolis U. R. Co., 32 Minn. 224; s. c., 17 Am. & Eng. R. R. Cas. 93; Russell v. St. Paul, M. & M. R. Co., 33 Minn. 210; s. c., 20 Am. & Eng. R. R. Cas. 191.

6. Rockford, R. I. & St. L. R. R. Co. v. McKinley, 64 Ill. 338; Dreher v. I. S. W. R. R. Co., 59 Iowa, 599; Smalley v. Iowa Pac. R. Co., 36 Iowa, 571; St. Joseph & D. C. R. R. Co. v. Orr, 8 Kans. 419; Driver v. Western U. R. R. Co., 32 Wis. 69.

7. St. Louis & S. E. R. R. Co. v. Teters, 68 Ill. 144; Wooster v. Sugar R. Valley R. R. Co., 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

8. County of Blue Earth v. St. Paul & S. C. R. R. Co., 28 Minn. 503; s. c., 10 Am. & Eng. R. R. Cas. 209.

9. Union R. R. T. & S. Y. Co. v. Moore, 80 Ind. 458; s. c., 5 Am. & Eng. R. R. Cas. 346.

10. Jacksonville & S. E. R. R. Co. v. Walsh, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; Russell v. St. Paul, M. & M. R. Co., 33 Minn. 210; s. c., 20 Am. & Eng. R. R. Cas. 191.

11. Stockton & C. R. R. Co. v. Galgiani, 49 Cal. 139; s. c., 7 Am. & Eng. Ry. Rep. 263; Jacksonville & S. E. R. R. Co. v. Walsh, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245.

12. Drucker v. Manhattan R. R. Co., 106 N. Y. 157.

13. Selma, R. & D. R. R. Co. v. Keith, 53 Ga. 178. See also Union Depot, St. R. & T. Co. v. Brunswick, 31 Minn. 297; s. c., *sub nom. In re Union Depot St. R. & T. Co.*, 14 Am. & Eng. R. R. Cas. 233.

properly rejected.¹ Witnesses may, however, state the limits of damages or items that go to make up aggregate depreciation.² The price which the owner gave may be put in evidence, and the owner may show under what circumstances he purchased, and the value of the improvements he put upon it.³ Evidence that the former owner of the land had refused an offer of a certain sum therefor is inadmissible, but a railroad company or other corporation may introduce testimony as to the price for which land was actually sold after the railroad had been constructed across it, for the purpose of showing the real value at that time, and as an admission of such value on the part of the vendors.⁴ But evidence of an offer made for land is inadmissible.⁵ In the case of land containing minerals, testimony as to the profits to be made by working the minerals is not admissible.⁶ It has been held that evidence of the principal engineer of a railroad as to the plan upon which it is to be finished is admissible for the purpose of affecting the amount of damages;⁷ although evidence of the benefit to the owner's remaining property to be derived from the construction of the public improvement is admissible that such benefit must be direct and not dependent upon an unreasonable contingency.⁸

(2) *Sales of Other Lands.* — Evidence of sales of other lands is admissible to aid in estimating the value of the property it is proposed to condemn.⁹ It must be shown, however, that the lands

1. *Winklemans v. Des Moines N. W. R. Co.*, 62 Iowa, 11; s. c., 14 Am. & Eng. R. R. Cas. 186.

2. *Neilson v. Chicago, M. & N. W. R. Co.*, 58 Wis. 516; s. c., 14 Am. & Eng. R. R. Cas. 239.

3. *St. Louis & S. F. R. Co. v. Smith*, 42 Ark. 265; s. c., 20 Am. & Eng. R. R. Cas. 190; *Sexton v. North Bridgewater*, 116 Mass. 200; *Swan v. Middlesex*, 101 Mass. 177; *Edmonds v. Boston*, 108 Mass. 535; *Dickenson v. Fitchburg*, 79 Mass. (13 Gray) 546.

4. *Watson v. Milwaukee & M. R. R. Co.*, 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 186.

5. *St. Joseph & D. C. R. R. Co. v. Orr*, 8 Kans. 419.

6. *Searle v. Lackawanna & B. R. R. Co.*, 33 Pa. St. 57.

7. *March v. Portsmouth & C. R. R. Co.*, 19 N. H. 372.

8. *Benefit to Property.* — *Britton v. Des Moines, O. & S. R. R. Co.*, 59 Iowa, 540; s. c., 10 Am. & Eng. R. R. Cas. 412; *Childs v. New Haven & N. Co.*, 133 Mass. 253; *Russell v. St. Paul, M. & M. R. R. Co.*, 33 Minn. 210; s. c., 20 Am. & Eng. R. R. Cas. 191; *Pittsburgh & L. E. R. R. Co. v. Robinson*, 95 Pa. St. 428; s. c., 1 Am. & Eng. R. R. Cas. 468.

9. *Evidence of Value. — Sales of Other Lands.* — *Chicago & W. I. R. R. Co. v. Maroney*, 95 Ill. 182; *St. Louis, V. & T. H.*

R. R. Co. v. Haller, 82 Ill. 211; *Jones v. Chicago & I. R. R. Co.*, 68 Ill. 384; *Kansas C. R. R. Co. v. Allen*, 24 Kans. 33; s. c., 5 Am. & Eng. R. R. Cas. 362; *Chandler v. Jamaica Pond Co.*, 122 Mass. 305; *Edmonds v. Boston*, 108 Mass. 535; *Shattuck v. Stoneham R. R. Co.*, 88 Mass. (6 Allen) 115; *March v. Portsmouth & C. R. R. Co.*, 19 N. H. 372; *Pittsburg & L. E. R. R. Co. v. Robinson*, 95 Pa. St. 426; s. c., 1 Am. & Eng. R. R. Cas. 468; *Washburn v. Milwaukee & L. W. R. R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225; *Watson v. Milwaukee & M. R. R. Co.*, 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168. *Compare Lafayette, B. & M. R. R. Co. v. Winslow*, 66 Ill. 219; *Illinois & W. R. R. Co. v. Von Horn*, 18 Ill. 257; *Union R. R. & T. S. Y. Co. v. Moore*, 80 Ind. 458; s. c., 5 Am. & Eng. R. R. Cas. 346; *Everett v. Union Pac. R. R. Co.*, 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203; *Snow v. Boston & M. R. R. Co.*, 65 Me. 230; *Dwight v. Hampden*, 65 Mass. (11 Cush.) 201; *White v. Fitchburg R. R. Co.*, 58 Mass. (4 Cush.) 440; *Stinson v. Chicago, St. P. & M. R. R. Co.*, 27 Minn. 284; *Lehmick v. St. Paul, S. & T. F. R. R. Co.*, 19 Minn. 464; s. c., 10 Am. Ry. Rep. 296; *Pennsylvania & N. Y. R. R. & C. Co. v. Bunnell*, 81 Pa. St. 414.

Same. — Unaccepted Offer not admissible. — It is not admissible to ask a witness at what price he had offered for sale adjoining

sold were similar in locality and character to the lands sought to be condemned.¹ And the sales made must not have been too remote in point of date.² The sum paid by a corporation to the owners of adjoining estates may be shown.³

b. Declarations and Admissions.—The declarations of the owner as to the value of his land, and his offer of it at a fixed price, may competently be introduced in evidence against him.⁴ And if the land-owner dies while the proceedings are pending, his declarations and admissions are competent evidence against his trustees.⁵ But the declarations of council on the former occupancy in the course of the trial are not admissible for the purpose of proving malice on the part of the company condemning, and thus enhancing the damages.⁶ It has been held that by instituting the proceedings the company admits the title of the parties brought into court.⁷ But notwithstanding the admission as to his title, the character of his estate may be inquired into.⁸

c. Opinion Evidence.—The opinion of witnesses as to the value of land taken, the amount of the damage done to the residue of a tract, is properly received.⁹ And it is not necessary that such

property. *Montclair R. Co. v. Benson*, 36 N. J. L. (7 Vr.) 557.

1. *Cummins v. Des Moines & St. L. R. R. Co.*, 63 Iowa, 397; s. c., 17 Am. & Eng. R. R. Cas. 86; *La Mont v. St. Louis, D. M. & N. R. R. Co.*, 62 Iowa, 193; s. c., 14 Am. & Eng. R. R. Cas. 192; *King v. Iowa M. R. Co.*, 34 Iowa, 458. Evidence of what a witness had offered for other lands on the opposite side of the street has been held to be incompetent. *Davis v. Charles R. B. R. R. Co.*, 65 Mass. (11 Cush.) 506.

2. It was held that a witness might be questioned on cross-examination as to sales made in the vicinity four or five years previous. *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168. But sales of lands made ten or twelve years before the trial are too remote. *Everett v. Union Pac. R. R. Co.*, 59 Iowa, 243; s. c., 10 Am. & Eng. R. R. Cas. 203.

3. *Wyman v. Lexington & W. C. R. Co.*, 54 Mass. (13 Metc.) 316. But it will not be admissible if it appears that the sum paid was a gross sum, and included damages to the entire estate. *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1.

4. *East Brandywine & W. R. R. Co. v. Ranck*, 78 Pa. St. 454.

5. *Power v. Savannah S. & S. R. R. Co.*, 56 Ga. 471.

6. *Baltimore & O. R. R. Co. v. Boyd*, 67 Md. 32.

7. *Admission of Title by Common Consent of Action.*—*Auditor v. Crise*, 20 Ark. 540; *Crise v. Auditor*, 17 Ark. 572; *Selma R. & D. R. Co. v. Camp*, 45 Ga. 180; *South*

Park Commissioners v. Todd, 112 Ill. 379; *St. Louis & S. E. R. R. Co. v. Teters*, 68 Ill. 144; *Peoria, P. & J. R. R. Co. v. Laurie*, 63 Ill. 264; *Peoria & R. I. R. Co. v. Bryant*, 57 Ill. 473; *Norristown, etc., Turnpike Co. v. Burket*, 26 Ind. 53; *Rippe v. Chicago, D. & M. R. R. Co.*, 20 Minn. 187; *St. Paul & S. C. R. R. Co. v. Matthews*, 16 Minn. 341; *Wright v. Town of Butler*, 64 Mo. 165; *Omaha, N. & B. H. R. R. Co. v. Gerrard*, 17 Neb. 587; *Gerrard v. Omaha, N. & B. H. R. R. Co.*, 14 Neb. 270.

8. *International & G. N. R. R. Co. v. Benitos*, 59 Tex. 326; s. c., 10 Am. & Eng. R. R. Cas. 122.

9. *Opinion of Witness as to Value of Land taken, and Injury to Balance.*—*McReynolds v. Burlington & O. R. R. Co.*, 106 Ill. 152; *Lafayette, B. & M. R. R. Co. v. Winslow*, 66 Ill. 219; *Illinois & W. R. R. Co. v. Von Horn*, 18 Ill. 257; *Indianapolis, D. & S. R. R. Co. v. Fugh*, 85 Ind. 279; s. c., 10 Am. & Eng. R. R. Cas. 196; *Henry v. Dubuque & P. R. R. Co.*, 2 Iowa, 288; *Snow v. Boston & M. R. R. Co.*, 65 Me. 230; s. c., 10 Am. Ry. Rep. 27; *Sherman v. St. Paul, M. & M. R. R. Co.*, 30 Minn. 227; s. c., 10 Am. & Eng. R. R. Cas. 193; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Curtis v. St. Paul, S. & T. F. R. R. Co.*, 20 Minn. 28; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Fremont E. & M. V. R. R. Co. v. Whalen*, 11 Neb. 585; s. c., 5 Am. & Eng. R. R. Cas. 364; *Republican Valley R. R. Co. v. Arnold*, 13 Neb. 485; s. c., 10 Am. & Eng. R. R. Cas. 219; *Eastern P. R. R. Co. v. Hiester*, 40 Pa. St. 53; *Watson v. Pitts-*

witnesses should be experts; it is sufficient if they are acquainted with the value of other lands in the neighborhood.¹ And it has been held that the opinion of the owner may be received.² And an opinion as to the value of the land may be based upon the testimony of others.³ The value of opinion evidence may be impugned on the cross-examination of the witness;⁴ and for this purpose he may be required to state the ground upon which he bases his estimate.⁵ An insurance agent may competently testify as to the increase risk of fire arising from the construction of a railroad.⁶ And the opinion of an expert had been held compe-

burgh & C. R. R. Co., 37 Pa. St. 469; Bowen v. Atlantic & F. B. V. R. R. Co., 17 S. C. 574; s. c., 14 Am. & Eng. R. R. Cas. 332.

1. **Witnesses need not be Experts. — Acquaintance with Property sufficient.** — Stein v. Burden, 24 Ala. 130; s. c., 60 Am. Dec. 453; Keithsburg & E. R. R. Co. v. Henry, 79 Ill. 290; Lafayette, B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Rockford, R. I. & St. L. R. R. Co. v. McKinley, 64 Ill. 338; Jacksonville, A. & St. L. R. R. Co. v. Caldwell, 21 Ill. 75; Illinois & W. R. R. Co. v. Von Horn, 18 Ill. 257; Frankfort & K. R. R. Co. v. Windsor, 51 Ind. 238; Kansas Cent. Ry. Co. v. Allen, 24 Kans. 33; Snow v. Boston & M. R. R. Co., 65 Me. 230; Boston & M. R. R. Co. v. Montgomery, 119 Mass. 114; Swan v. Middlesex, 101 Mass. 173; Whitman v. Boston & M. R. R. Co., 89 Mass. (7 Allen) 313; Shattuck v. Stoneham, B. R. R. Co., 88 Mass. (6 Allen) 115; Brainard v. Boston & N. Y. C. R. R. Co., 78 Mass. (12 Gray) 407; West Newbury v. Chase, 71 Mass. (5 Gray) 421; Russell v. Horn Pond B. R. R. Co., 70 Mass. (4 Gray) 607; Dwight v. Hampden, 65 Mass. (11 Cush.) 201; Walker v. Boston, 62 Mass. (8 Cush.) 279; Wyman v. Lexington & W. C. R. R. Co., 54 Mass. (13 Metc.) 316; Lehmick v. St. Paul, S. & T. F. R. Co., 19 Minn. 464; Simmons v. St. Paul & C. R. R. Co., 18 Minn. 184; Burlington & M. R. Co. v. Schluntz, 14 Neb. 421; s. c., 14 Am. & Eng. R. R. Cas. 182; Republican V. R. R. Co. v. Arnold, 13 Neb. 485; s. c., 10 Am. & Eng. R. R. Cas. 219; Sioux City & P. R. R. Co. v. Weimer, 16 Neb. 272; s. c., 20 Am. & Eng. R. R. Cas. 184; Pittsburgh & L. E. R. R. Co. v. Robinson, 95 Pa. St. 426; s. c., 11 Am. & Eng. R. R. Cas. 468; Pennsylvania & N. Y. R. Co. v. Bunnell, 81 Pa. St. 414; White Deer C. Co. v. Sassaman, 67 Pa. St. 415; East Pennsylvania R. R. Co. v. Hottenstine, 47 Pa. St. 28; Brown v. Providence & S. R. R. Co., 12 R. I. 238; St. Louis A. & T. R. R. Co. v. Anderson, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; Diedrich v. Northwestern U. R. Co., 47 Wis. 662; s. c., 24

Am. Rep. 399; Snyder v. Western U. R. Co., 25 Wis. 60. *Compare* Alabama & F. R. R. Co. v. Burkett, 42 Ala. 83; Montgomery & W. P. R. R. Co. v. Varner, 19 Ala. 185; Brunswick & A. R. R. Co. v. McLaren, 47 Ga. 546; Baltimore, P. & C. R. R. Co. v. Stoner, 59 Ind. 579; Baltimore, P. & C. R. R. Co. v. Johnson, 59 Ind. 247; Evansville, I. & C. S. L. R. R. Co. v. Fitzpatrick, 10 Ind. 120; Cleveland & P. R. R. Co. v. Ball, 5 Ohio St. 569; Atlantic & G. W. R. R. Co. v. Campbell, 4 Ohio St. 583; s. c., 64 Am. Dec. 607; Buffum v. New York & B. R. R. Co., 4 R. I. 221.

2. *Sioux City & P. R. R. Co. v. Weimer*, 16 Neb. 272; s. c., 20 Am. & Eng. R. R. Cas. 184; Burlington & M. R. R. Co. v. Schluntz, 14 Neb. 421; Wooster v. Sugar R. Valley R. R. Co., 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

3. *Winklemans v. Des Moines*, N. W. R. R. Co., 62 Iowa, 11; s. c., 14 Am. & Eng. R. R. Cas. 186. *Compare* Grinnell v. Mississippi & M. R. R. Co., 18 Iowa, 570.

4. *Lafayette, B. & M. R. R. Co. v. Winslow*, 66 Ill. 219; Illinois & W. R. R. Co. v. Von Horn, 18 Ill. 257; Snow v. Boston & M. R. R. Co., 65 Me. 230; Dwight v. Hampden, 65 Mass. (11 Cush.) 201; Simmons v. St. Paul & C. R. R. Co., 18 Minn. 184; Pennsylvania & N. Y. R. R. Co. v. Bunnell, 81 Pa. St. 414; Wooster v. Sugar R. Valley R. R. Co., 57 Wis. 311; s. c., 10 Am. & Eng. R. R. Cas. 499.

5. *Smalley v. Iowa Pac. R. R. Co.*, 36 Iowa, 571.

6. **Danger from Fire. — Evidence of Insurance Agent. — Fire.** — A witness, who had been for ten years secretary of an insurance company, and as such had been in the practice of examining buildings, with reference to insurance thereof, and who had also, as county commissioner, frequently estimated damages caused to estates by the laying out of highways and railroads, was held to have been rightly permitted, on a hearing before the jury empanelled to appraise damages sustained by a party by the laying out of a railroad over his lands and near to his buildings, to give his opinion that the passage of locomotive engines within

tent evidence as to the value of the reversion of land over which a railroad had been constructed.¹

d. Documentary Evidence.—The special charter under which a company claims to have organized is sufficient evidence to authorize the proceeding when accompanied by evidence of the usury of the franchise granted thereby.² And the plans and estimates of the company for the apportionment of the road in question are also admissible.³ Where the land is adapted for building purposes, a plan with prospective streets laid down thereon and showing the peculiar damage done by the railroad may be admitted for the purpose of effecting the measure of the recovery.⁴ The sworn valuation rendered by the land-owner for the purpose of taxation is incompetent as independent evidence of the value of the property, but it may be admitted for the purpose of impeaching his statements.⁵ Parley evidence thereof is not admissible.⁶ A printed transcript of the assessors' valuation is not admissible evidence.⁷

e. Burden of Proof.—Where the proceeding is instituted by the land-owner for the purpose of recovering damages, he must prove his title.⁸ Where the amount of land to be required by the railroad company, except the necessity for taking a greater quantity be shown, the burden is on the railroad company to show such necessity.⁹ Where the land-owner claims damages for the embankment and excavation of a street in front of his property, the burden is upon the company to show that there was an established grade to which it conformed.¹⁰

10. *Verdict, Award, and Judgment.*—*a. Verdict.*—(1) *Requisites and Validity.*—It is essential that there should be a finding in the verdict that the land taken is necessary for a public use, and also that the work itself is one of public importance.¹¹ It is

one hundred feet of a building would diminish the rate of insurance thereof against fire. It was *held*, also, that he was rightly permitted to testify that the directors of the insurance, of which he was secretary, upon his consulting them as to an application for insurance on a building in the vicinity of the buildings of the party then before the jury, had declined to take the risk at any rate. *Webber v. Eastern R. R. Co.*, 43 Mass. (2 Metc.) 147.

1. *Boston & W. R. R. Co. v. Old Colony, F. R. R. Co.*, 85 Mass. (3 Allen) 142.

2. *Peoria & P. U. R. Co. v. Peoria & F. R. Co.*, 105 Ill. 110; s. c., 10 Am. & Eng. R. R. Cas. 129.

3. *Jackson & S. R. R. Co. v. Kidder*, 21 Ill. 131; *Missouri Pac. R. Co. v. Hays*, 15 Neb. 224; s. c., 14 Am. & Eng. R. R. Cas. 177.

4. *Cincinnati & S. R. R. Co. v. Longworth*, 30 Ohio St. 109. Compare *Scott v. Indianapolis & V. R. R. Co. (Ind.)*; s. c., 10 Am. & Eng. R. R. Cas. 189.

5. *Virginia & T. R. R. Co. v. Henry*, 8 Nev. 165.

6. *Oregon C. R. R. Co. v. Bailey*, 3 Oreg. 164.

7. *Brown v. Providence, W. & B. R. R. Co.*, 71 Mass. (5 Gray) 35.

8. *International & G. W. R. Co. v. Benitos*, 59 Tex. 326; s. c., 10 Am. & Eng. R. R. Cas. 122.

9. *Wisconsin Cent. R. R. Co. v. Cornell University*, 52 Wis. 537; s. c., 10 Am. & Eng. R. R. Cas. 108.

10. *Pittsburgh, V. & C. R. R. Co. v. Rose*, 74 Pa. St. 362; s. c., 6 Am. Ry. Rep. 343.

11. *Grand Rapids, N. & L. S. R. R. Co. v. Van Driele*, 24 Mich. 479; *Mansfield & L. M. R. R. Co. v. Clark*, 23 Mich. 519; *Chicago & M. L. S. R. R. Co. v. Sanford*, 23 Mich. 418.

A Finding by the Jury that they "did ascertain and determine that it was necessary for said company to take said real estate for public use; to wit, for the purpose of said company's incorporation as

generally held that a verdict for a specified sum is sufficient without stating the items included therein.¹ The jury cannot, as part of the compensation, direct by their verdict that the company shall do certain work for the benefit of the land-owner.² A verdict in the absence of a statutory provision to the contrary must be unanimous.³ An irregularity occasioned through the fault of one of the party cannot be taken advantage of by that party.⁴ If an amendment is made in the description of the premises condemned during the proceedings, the jury will be presumed to have taken this amendment into consideration in making their award.⁵ When instruction is to award value of lot at time of taking and nothing more, it will not be presumed that jury included interest in their verdict.⁶

(2) *Setting aside.* — A motion to set aside the verdict of a jury assessing damages must be addressed to, and adjudicated upon, by the court to which the verdict is returned.⁷ Usually any merely technical irregularity will not be considered sufficient: it must be shown that one of the parties has been prejudiced thereby.⁸

and for right of way," is a sufficient finding that the land was necessary and requisite for the public use. *East Saginaw & St. C. R. R. Co. v. Benham*, 28 Mich. 459; s. c., 12 Am. Ry. Rep. 356.

1. *Michigan A. L. R. R. Co. v. Barnes*, 44 Mich. 222; s. c., 6 Am. & Eng. R. R. Cas. 608; *Oregon R. Co. v. Bridwell*, 11 Oreg. 282; s. c., 17 Am. & Eng. R. R. Cas. 130; *Delaware, L. & W. R. R. Co. v. Burson*, 61 Pa. St. 369.

Jury to assess Damages. — Sufficiency of Verdict. — A verdict which finds that the land-owner "is entitled as compensation to the sum of \$420, and as damages the sum of \$411.25, a total sum of \$831.25," is sufficiently certain. *Illinois W. E. R. R. Co. v. Mayrand*, 93 Ill. 591.

Where an act required the assessment to state the value of the land taken and the other damages separately, but neither the company nor the land-owner required the verdict to be thus separately returned, and the jury returned a general verdict only, the court refused to summon a jury for a new assessment, the demand for a new assessment being made by the company. *In re London & G. R. Co.*, 2 Ad. & El. 678; s. c., 29 Eng. C. L. 176.

Joint Interests. — Individual Award. — Where the interest of two owners in the lands sought to be taken is treated as joint by the petition, and they appear jointly, and demand a jury, it is not improper for the jury to award an individual sum to the two; their own action precludes them from insisting that their interests should have been separately regarded. *East Saginaw & St. C. R. R. Co. v. Benham*, 28 Mich. 459; s. c., 12 Am. Ry. Rep. 356.

An award was sustained where it expressed the gross sum allowed to all the joint claimants, and specified how much of it was for each of those interested as mortgagees. *Michigan A. L. R. Co. v. Barnes*, 44 Mich. 222.

2. *New Orleans P. R. R. Co. v. Murrell*, 34 La. An. 536.

3. *Chicago & M. L. S. R. R. Co. v. Sanford*, 23 Mich. 418.

4. **Suppression of Verdict.** — When the railroad company induces the messenger to whom verdict has been intrusted to deposit in proper custody, to suppress the same, it cannot insist that an actual return of the verdict was essential to give it validity. *West v. West & E. R. R. Co.*, 61 Miss. 536; s. c., 20 Am. & Eng. R. R. Cas. 402.

5. *Hunt v. New York C. & St. L. R. R. Co.*, 99 Ind. 593; s. c., 20 Am. & Eng. R. R. Cas. 436.

In an inquisition of damages the schedule mentioned a dwelling. *Held*, that this description included the yard and garden. *Taylor v. Clemson*, 2 Ad. & El. (N. S.) 978; s. c., 42 Eng. C. L. 1005.

6. *Hollingsworth v. Des Moines & St. L. R. R. Co.*, 63 Iowa, 443; s. c., 17 Am. & Eng. R. R. Cas. 113.

7. *Burr v. Bucksport & B. R. R. Co.*, 64 Me. 130.

8. *Detroit, W. T. & J. R. R. Co. v. Crane*, 50 Mich. 182; s. c., 10 Am. & Eng. R. R. Cas. 502; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456; s. c., 5 Am. & Eng. R. R. Cas. 378; *Oswold v. Minneapolis & N. W. R. R. Co.*, 29 Minn. 5.

Consent to View. — The land-owner expressly waived the right to produce and

When there is no evidence of misconduct on the part of the jury, the court will not set aside the verdict on the ground that it is excessive, unless the amount awarded is manifestly wrong,¹ even on the certificate of one of the jury that the verdict is too high.²

b. Award.—(1) *Form and Requisites.*—In arriving at the amount of the compensation, the commissioners may average the sums which each of them considers to be the proper amount.³ The presumption is in favor of the regularity of the action of the commissioners; and the report need not set out affirmatively that the parties were present at the time of the view.⁴ It is essential, however, that the report should find that the appropriation is necessary.⁵ The award will be sustained, providing the intention of the commissioners clearly appears.⁶ It is not essential that all the commissioners should act and sign the report: a majority of

examine witnesses, and consented with the counsel for the railroad company that the commissioners might act upon a view of the premises, which they proceeded to do and make their award. On motion to set aside the award it appeared from the affidavit of the land-owner that in declining to produce witnesses he acted upon a misapprehension as to his legal rights, founded upon erroneous information derived by him from another person, to the effect that he would be entitled to re-hearing, as a matter of right, before other commissioners, and that on such re-hearing he could examine witnesses. It was *held*, that the land-owner is entitled to the relief asked for by him, on the ground that he was misled to his prejudice by erroneous information as to his legal rights. *In re* New York, L. & W. R. Co., 63 How. (N. Y.) Pr. 265.

1. *In re* Beale St., 39 Cal. 495; *Tonica & P. R. R. Co. v. Unsicker*, 22 Ill. 221; *Illinois & W. R. R. v. Van Horn*, 18 Ill. 257; *Peoria & F. R. R. Co. v. Barnum*, 107 Ill. 160; s. c., 14 Am. & Eng. R. R. Cas. 331; *Bangor & P. R. R. Co. v. McComb*, 60 Me. 290; *Kansas C., St. J. & C. B. R. R. Co. v. Campbell*, 62 Mo. 585; *Coster v. New Jersey R. R.*, 24 N. L. J. (4 Zab.) 730; *New Jersey R. R. v. Suydam*, 17 N. J. L. (2 Harr.) 25; *In re Williams & Anthony Sts.*, 19 Wend. (N. Y.) 678; *Philadelphia, W. & B. R. R. v. Gesner*, 20 Pa. St. 240.

Making up Verdict.—**Considering Items separately.**—A sheriff's jury, in making up their verdict, may, if they think proper, consider each item or charge of damages separately, and state in their verdict what items they allow, and the amounts thereof, severally, and what they reject; and where the verdict is returned in this form, any item of damage, which, in point of law, is objectionable may be remitted or deducted

without setting aside the verdict. *Fitchburg R. R. Co. v. Boston & M. R. R. Co.*, 57 Mass. (3 Cush.) 58.

2. *Carrollton R. R. Co. v. Avart*, 11 La. 190.

3. *Marquette, H. & O. R. R. Co. v. Probate Judge*, 53 Mich. 217; s. c., 14 Am. & Eng. R. R. Cas. 355.

4. *Pennsylvania R. R. Co. v. Porter*, 29 Pa. St. 165.

5. *Shick v. Pennsylvania R. R. Co.*, 1 Pears. (Pa.) 259.

A finding "that the taking of said strip or parcel of land was required and necessary for the constructing and operating of said railroad, and a necessary public use thereof," was *held* sufficient under sect. 22 of art. xviii. of the Michigan constitution. *Morgan v. Chicago & N. E. R. R. Co.*, 39 Mich. 675.

6. Report of Commissioners.—**Numerals to represent Dollars.**—Where the commissioners in their report use numerals only, where it is evident from the report that the commissioners intended that such numerals should represent dollars and cents, the report is not void because the commissioners omitted to use either the dollar-mark, or the words "dollars" and "cents," or some abbreviation of the same. *Hunt v. Smith*, 9 Kans. 137.

Award void for Uncertainty.—An award which requires a railroad company to pay four hundred dollars for right of way, and to build fences, the money to be paid at any time fixed upon by the company, by giving the land-owner three days' notice of the time and place of payment, and requires the land-owner, at the same time, to deliver to the company a deed for the right of way, is void for uncertainty as to the time for the payment of the money and the delivery of the deed. *Alfred v. Kankakee & S. W. R. R. Co.*, 92 Ill. 609.

them may validly make the assessment.¹ While the report should not make separate awards for the same tract,² it is essential that the several tracts belonging to the different owners should be separately assessed.³ The compensation awarded must be in money,⁴ and not by way of easements upon or across the land taken.⁵ The award must state the quantity and quality of the lands or materials taken, with their value.⁶ And it has been held that it is essential that it should state the advantages and disadvantages to the owners.⁷ A separate sum ought not to be awarded to each tenant in common.⁸ Whatever rights would naturally result to any rights of the plaintiff, appurtenant to the land taken, or injuriously affected, is supposed to have been foreseen and included in the judgment of the appraisers.⁹ The award presumptively embraces all damages of every kind, naturally to the owner, resulting from the taking of his property.¹⁰

(2) *Exceptions and Confirmation.*—No vested right can be acquired by either party until an order of the court has been

1. *Quayle v. Missouri*, K. & T. R. R. Co., 63 Mo. 465; s. c., 21 Am. Ry. Rep. 220.

Signing of Report.—Although the report must be signed by a majority of the commissioners, it is not necessary that they should all be together at the signing; nor is there any rule of law or principle of public policy requiring it. *Rochester & G. V. R. R. Co. v. Beckwith*, 10 How. (N. Y.) Pr. 168.

2. *Weyer v. Milwaukee & L. W. R. R. Co.*, 57 Wis. 329; s. c., 10 Am. & Eng. R. R. Cas. 508.

Provisions of Charter.—Effect of.—The provision of defendant's charter in regard to proceedings for condemnation, in accordance with which the commissioners are to make an appraisalment and award "in each case separately," does not require them (or the court or jury in case of an appeal) to make a separate appraisalment and award as to each of several town lots appropriated, when such lots together form a compact body of land, and are used and occupied as an entirety. *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 122; s. c., 11 Am. Ry. Rep. 364.

3. *Rusch v. Milwaukee, L. S. & W. R. R. Co.*, 54 Wis. 136; s. c., 6 Am. & Eng. R. R. Cas. 609.

4. *Chesapeake & O. R. R. Co. v. Patton*, 6 W. Va. 147.

5. *Chesapeake & O. R. R. Co. v. Halstead*, 7 W. Va. 301. Compare *Omaha & N. W. R. R. Co. v. Menk*, 4 Neb. 21, where it was held that a provision that the party owning the premises, part of which were taken for a right of way, might move back his house therefrom, was valid.

6. *O'Hara v. Pennsylvania R. R. Co.*, 25 Pa. St. 445; *Zack v. Pennsylvania R. R. Co.*, 25 Pa. St. 394; *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis. 478.

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The Quality is sufficiently described where it appears from the report that the land was in the town of C., and that it was used as a lumber-yard, etc. *Pennsylvania R. R. Co. v. Bruner*, 55 Pa. St. 318.

Sufficiency of Report.—A report, setting out the adjointers and boundaries, with a draft showing the length, breadth, courses, and distances of the ground taken, without calculation of the contents, sufficiently sets forth the quantity of land taken. *Pennsylvania R. R. v. Bruner*, 55 Pa. St. 318.

A description in an award allowed a strip thirty feet wide on each side of a given line across the entire premises, except that, in crossing a specific tract, a strip only twenty-five feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former, and by giving the courses and distances. *Held*, sufficient. *Michigan A. L. R. Co. v. Barnes*, 44 Mich. 222.

7. *Philadelphia & E. R. R. Co. v. Cake*, 95 Pa. St. 139; s. c., 14 Am. & Eng. R. R. Cas. 211; *O'Hara v. Pennsylvania R. R. Co.*, 25 Pa. St. 445; *Reitenbough v. Chester V. R. R. Co.*, 21 Pa. St. 100.

8. *Watson v. Milwaukee & M. R. R. Co.*, 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168.

9. *Furniss v. Hudson R. R. R. Co.*, 5 Sandf. (N. Y.) 551.

10. *Chesapeake & O. C. Co. v. Grove*, 11 Gill & J. (Md.) 398; *Seiden v. Delaware & H. C. Co.*, 29 N. Y. 634; s. c., 24 Barb. N. Y. 362; *Radcliff's Exrs. v. Mayor of Brooklyn*, 4 N. Y. 195; s. c., 53 Am. Dec. 357; In matter of Prospect Park & C. I. R. R. Co., 13 Hun (N. Y.), 345; s. c., 16 Hun (N. Y.), 261.

made confirming the report.¹ When the report has been filed objections may be taken thereto by way of exceptions,² and a motion to set aside the report, the facts may be brought before the court by affidavit or parol evidence as the court directs.³ Where it can be shown that the award was made upon illegal evidence, or based upon erroneous principles, or where the jury have been guilty of misconduct, or where the damages are grossly inadequate or excessive, the award may be set aside.⁴ Where the report by the viewers is set aside, the judge, in ordering a new view, may appoint a new set of viewers.⁵ An omission to set out the benefits and damages separately may be corrected by amendment to the report.⁶

(3) *Conclusiveness and Effect.* — The final award by the special tribunal is a judicial act, and unless set aside by proper proceedings is like a judgment, *res adjudicata*, and cannot be impeached collaterally.⁷

1. *In re* Syracuse, B. & N. Y. R. R. Co., 4 Hun (N. Y.), 311; Hudson R. R. Co. v. Outwater, 3 Sandf. (N. Y.) 689; Wagner v. New York C. & St. L. R. Co., 38 Ohio St. 32; s. c., 10 Am. & Eng. R. R. Cas. 380.

2. Mississippi R. B. Co. v. Ring, 58 Mo. 491; Camp v. Cold Creek & W. G. R. R. Co., 11 Lea (Tenn.), 705; Baltimore & O. R. R. Co. v. Pittsburg, W. & K. R. R. Co., 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444.

Confirmation of Report. — Where it appears that the commissioners have been regular in their proceedings, and due notice of the motion for confirmation has been given, it is a matter of course under the statutes to confirm the report. New York & E. R. R. Co. v. Corey, 5 How. (N. Y.) Pr. 177.

Statements made by way of bill of exceptions, after the report is made, should be considered as an amendment to the report. Central Pac. R. R. Co. v. Pearson, 35 Cal. 247.

Where, upon a hearing before commissioners, the owner makes default, the supreme court, on motion to confirm the report of the commissioners, has power, the default being excused, to open it, to set aside the report, and order a new hearing. *In re* New York, L. & W. R. Co., 93 N. Y. 385.

3. Central Pac. R. R. Co. v. Pearson, 35 Cal. 247; Marquette, H. & O. R. R. Co. v. Probate Judge, 53 Mich. 217; s. c., 14 Am. & Eng. R. R. Cas. 355.

4. **When Award may be set aside.** — Central Pac. R. R. Co. v. Pearson, 35 Cal. 247; Piper's Appeal, 32 Cal. 530; Pueblo & A. V. R. R. Co. v. Rudd, 5 Colo. 270; s. c., 10 Am. & Eng. R. R. Cas. 404; Marquette, H. & O. R. R. Co. v. Probate Judge, 53 Mich. 217; s. c., 14 Am. & Eng. R. R.

Cas. 355; Kansas C., St. J. & C. B. R. R. v. Campbell, 62 Mo. 585; Lee v. Tebo & N. R. R., 53 Mo. 178; Hannibal & St. J. R. R. v. Muder, 49 Mo. 165; St. Louis & St. J. R. R. v. Richardson, 45 Mo. 466; Virginia & T. R. R. v. Henry, 8 Nev. 165; Virginia & T. R. R. v. Elliott, 5 Nev. 358; Eastern R. R. v. Concord & P. R. R., 47 N. H. 108; Troy & B. R. R. v. Lee, 13 Barb. (N. Y.) 169; *In re* Rondout & O. R. R., 38 How. (N. Y.) Pr. 187; *In re* Prospect Park & C. I. R. R. Co., 13 Hun (N. Y.), 345; s. c., 16 Hun (N. Y.), 261; Pearl St. Case, 19 Wend. (N. Y.) 651; Philadelphia & E. R. Co. v. Cake, 95 Pa. St. 139; Pennsylvania R. R. v. Lutheran Congregation, 53 Pa. St. 445; Patton v. Susquehanna R. R. Co., 1 Pears. (Pa.) 48.

5. Hannibal & St. J. R. R. Co. v. Rowland, 29 Mo. 327.

6. Greenville & C. R. R. Co. v. Nunnamaker, 4 Rich. (S. C.) L. 107.

7. **Conclusiveness and Effect of Award.** — Townsend v. Chicago & A. R. R., 91 Ill. 545; Chicago & A. R. v. Springfield & N. W. R., 67 Ill. 142; Port Huron & S. W. R. R. Co. v. Voorheis, 50 Mich. 506; s. c., 14 Am. & Eng. R. R. Cas. 227; Evans v. Haefner, 29 Mo. 141; *In re* Prospect Park & C. I. R. Co., 24 Hun (N. Y.), 199; Butman v. Vermont C. R. R., 27 Vt. 500; Crawford v. Valley R. Co., 25 Gratt. (Va.) 467; Secombe v. Milwaukee & St. P. R., 90 U. S. (23 Wall.) 108; bk. 23 L. ed. 67.

Award Vacated for Irregularity or Fraud. — In proceeding to ascertain the compensation to be made to the owner of property taken for public use, a State may vacate any inquest taken by its direction, and order a new inquest, where the proceeding has been irregularly or fraudulently conducted, or where error has intervened.

c. Judgment. — (1) *Entry and Requisites.* — A railroad company may, even after the confirmation of the commissioner's report, abandon the proceedings, and no judgment appropriating the land to them can in that case be entered.¹ The proper judgment is that appropriating the right of way to the company's use after payment of the damages authorized by the jury to the land-owner.² And it would seem that no judgment *in personam* should be rendered.³ But in some cases a personal judgment is authorized by statute.⁴ The judgment rendered must be unconditional.⁵ The title acquired vests in the corporation condemning, when the statutory requirements have all been filed, and it is not essential in rendering a judgment to provide that a deed shall be executed.⁶

(2) *Conclusiveness and Effect.* — A judgment of condemnation is conclusive, and cannot be collaterally impeached.⁷

d. Interest. — A mere assessment of damages does not of itself give a right to interest; the date from which interest and such damages have been computed is the time of taking possession of the land.⁸

II. *Appeal and Review.* — *a. When Appeal lies.* — In some cases the right of appeal is guaranteed by the constitution.⁹ The consolidation of two distinct suits between the same parties, in each of which the matter in dispute is less than the jurisdictional amount, will not give the appellate court jurisdiction.¹⁰ It has

Until the property is actually taken and the compensation is made or provided, the power of the State over the matter is not ended. *Garrison v. New York City*, 88 U. S. (21 Wall.) 196; bk. 22 L. ed. 612.

1. *State v. Cincinnati & I. R. Co.*, 17 Ohio St. 103; s. c., *Hayes v. Cincinnati R. Co.*, 17 Ohio St. 107.

2. *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kans. 239; *Oregonian R. Co. v. Hill*, 9 Ore. 377; *Oregon R. Co. v. Bridwell*, 11 Ore. 282; s. c., 17 Am. & Eng. R. R. Cas. 130; *Chesapeake & O. R. Co. v. Pack*, 6 W. Va. 397; *Chesapeake & O. R. Co. v. Bradford*, 6 W. Va. 220.

The Proceedings under the Statute for the Condemnation of Lands simply fix the price at which, upon payment, the company may take the right of way. The judgment assessing the damages passes no title to the company before payment, and does not bind it to accept the lands, and pay the amount assessed. *Gear v. Dubuque & S. C. R. R. Co.*, 20 Iowa, 523.

3. *Oregon R. Co. v. Bridwell*, 11 Ore. 282; s. c., 17 Am. & Eng. R. R. Cas. 130; *Oregonian R. Co. v. Hill*, 9 Ore. 377. See also *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kans. 239.

It has been held that an action does not lie on an award of the sheriff's jury unless the right of way has been entered upon and appropriated by the company. *Dem-*

mick v. Council Bluffs & St. L. R. Co., 62 Iowa, 409; s. c., 10 Am. & Eng. R. R. Cas. 105.

4. *Robbins v. St. Paul, S. & T. F. R. R. Co.*, 24 Minn. 191.

5. *Award in the Alternative.* — A judgment cannot be rendered for a certain sum if the railway company shall permit the passage of water at a certain point, and for an additional sum upon the refusal to permit such passage of water. *Winchester & P. R. R. Co. v. Washington*, 1 Rob. (Va.) 67.

6. *Indianapolis & St. L. R. R. Co. v. Smyth*, 45 Ind. 322.

7. *Hays v. Chicago, M. & St. P. R. Co.*, 63 Iowa, 562; s. c., 17 Am. & Eng. R. R. Cas. 110; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261; s. c., 10 Am. & Eng. R. R. Cas. 429; *Evans v. Haefner*, 29 Mo. 141; *Butman v. Vermont C. R. R. Co.*, 27 Vt. 500; *Secombe v. Milwaukee & St. P. R. R. Co.*, 90 U. S. (23 Wall.) 108; bk. 23, L. ed. 67; s. c., 11 Am. Ry. Rep. 355.

8. *Hays v. Chicago, M. & St. P. R. R. Co.*, 63 Iowa, 562; s. c., 17 Am. & Eng. R. R. Cas. 110. Compare *East Tennessee Va. & G. R. R. Co. v. Burnett*, 11 Lea (Tenn.), 525; s. c., 14 Am. & Eng. R. R. Cas. 370.

9. *St. Louis & S. E. R. R. Co. v. Lux*, 63 Ill. 523.

10. *Louisiana W. R. Co. v. Hopkins*, 33 La. An. 806.

been held that the final order from which an appeal lies is made where the court has denied a motion to vacate an award,¹ or where it has made an order having an award,² or rendered a judgment confirming the verdict.³ An appeal will always lie from an order of judgment condemning land and fixing the amount of the damages.⁴ And it has been held that an order appointing commissioners in condemnation proceeding is appealable.⁵

b. Who may appeal.—One not a party to the original condemnation proceedings cannot appeal.⁶ Thus, a person who has purchased the land after the proceedings instituted, but who has not been made a party, cannot appeal.⁷ But where a vendor is, by virtue of an agreement for the sale of land in equity, trustee for the vendee, and the lands are condemned by the railroad company under its charter, if the vendee desires to appeal from the award, he may do so in the name of the vendor.⁸ One of several parties to an award may appeal without joining other parties.⁹ But where the damages for the right of way are assessed jointly to two persons, an appeal can only be prosecuted by one of them by making the other a party thereto by notice or otherwise.¹⁰ A mortgagor may prosecute an appeal without announcing the mortgagee as a party.¹¹ And the mortgagee on his part may also appeal.¹² The owner of several lands or parcels taken for a railroad, for which damages have been awarded separately, may take a single appeal from the whole award.¹³ A railroad company cannot appeal from a judgment distributing the gross amount of the award among the owners of different estates in the land.¹⁴

But a report which in form made separate awards as to two parcels which together constitute one tract, is in effect a single award as to the whole tract. *Weyer v. Milwaukee & L. W. R. Co.*, 57 Wis. 329; s. c., 10 Am. & Eng. R. R. Cas. 508.

1. *Denver & N. O. R. Co. v. Jackson*, 6 Colo. 340; s. c., 10 Am. & Eng. R. R. Cas. 497; *Wisconsin Cent. R. Co. v. Cornell University*, 52 Wis. 537; s. c., 10 Am. & Eng. R. R. Cas. 108. *Compare In re Prospect Park & C. I. R. Co.*, 85 N. Y. 489; s. c., 14 Am. & Eng. R. R. Cas. 362.

2. *In re New York, W. S. & B. R. R. Co.*, 94 N. Y. 287; s. c., 17 Am. & Eng. R. R. Cas. 145.

3. *Tracy v. Elizabethtown, L. & B. S. R. Co.*, 78 Ky. 309; s. c., 14 Am. & Eng. R. R. Cas. 328.

4. *Austin v. Belleville & I. R. R. Co.*, 19 Ill. 310; *Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64 Iowa, 694; s. c., 20 Am. & Eng. R. R. Cas. 395; *Roberts v. Central P. R. R. Co.*, 1 Brewst. (Pa.) 538; *Wisconsin Cent. R. R. Co. v. Cornell University*, 49 Wis. 162.

5. *In re St. Paul & N. P. R. R. Co.*, 34 Minn. 227; s. c., 22 Am. & Eng. R. R. Cas.

94. *Compare Camp v. Cole, C. & W. G. R. R. Co.*, 11 Lea (Tenn.), 705; s. c., 14 Am. & Eng. R. R. Cas. 372.

6. *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. R. Co.*, 60 Iowa, 35; s. c., 10 Am. & Eng. R. R. Cas. 522.

7. *Connable v. Chicago, M. & St. P. R. R. Co.*, 60 Iowa, 27; s. c., 10 Am. & Eng. R. R. Cas. 520.

8. *McIntyre v. Easton & A. R. R. Co.*, 26 N. J. Eq. (11 C. E. Gr.) 425.

9. *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225.

10. *Chicago & R. I. P. R. R. Co. v. Hurst*, 30 Iowa, 73.

11. *Lance v. Chicago, M. & St. P. R. R. Co.*, 57 Iowa, 636; s. c., 5 Am. & Eng. R. R. Cas. 617.

12. *Michigan A. L. R. R. Co. v. Barnes*, 40 Mich. 383.

13. *Larson v. Superior S. L. R. R. Co.*, 64 Wis. 59; s. c., *sub nom.* *Superior S. L. R. R. Co. v. Larson*, 22 Am. & Eng. R. R. Cas. 165.

14. *Spaulding v. Milwaukee, L. S. & W. R. R. Co.*, 57 Wis. 304; s. c., 10 Am. & Eng. R. R. Cas. 401.

c. Notice of Appeal.—Generally the statutes require that notice of the appeal should be given. And it has been held that such an appeal is an action, and that the notice may be signed by the attorney of the appellant.¹ The notice may be served upon the attorney of the railroad company.² Where two separate awards have been made to the owner of separate parcels of land, one notice of appeal from both awards is sufficient.³ So, too, a single notice that several persons whose lands have been taken for a railroad, appeal each severally and each for himself from the award of damages made to each, is valid.⁴ Notice to parties interested is waived by voluntarily appealing the case.⁵

d. Entry on Lands pending an Appeal.—(1) *Security required.*—Where an assessment of damages has been made, and the amount thereof has not been paid or deposited, the railroad company has no right to enter pending an appeal;⁶ and the land-owner may in such case obtain an injunction to restrain the entry of the company on the land pending the appeal, until payment of the award is made on the amount deposited.⁷ This he may even do though he is himself the appellant, and no damages have been awarded him by the commissioners.⁸ Where the amount assessed is paid by the company, the mere pendency of the appeal does not debar it of its right of entry.⁹ It is frequently provided by statute that, as soon as an assessment of damages is made, the company may, upon making a deposit of the award, enter upon the land and begin the construction of its road, notwithstanding the pending of the appeal.¹⁰ But the mere rendering of a verdict assessing damages does not warrant the making of a deposit: there must first be a judgment confirming the verdict of the jury.¹¹

1. *Weyer v. Milwaukee & L. W. R. R. Co.*, 57 Wis. 329; s. c., 10 Am. & Eng. R. R. Cas. 508.

2. *Hartman v. Belville & O. F. R. R. Co.*, 64 Ill. 24.

3. *Neff v. Chicago & N. W. R. R. Co.*, 14 Wis. 370.

4. *Larson v. Superior S. L. R. R. Co.*, 64 Wis. 59; s. c., 22 Am. & Eng. R. R. Cas. 165.

5. *East Saginaw & St. C. R. R. Co. v. Benham*, 28 Mich. 459; s. c., 12 Am. Ry. Rep. 356.

6. *Chambers v. Cincinnati & Ga. R. R. Co.*, 69 Ga. 320; s. c., 10 Am. & Eng. R. R. Cas. 376.

7. *Kansas City v. Kansas Pac. R. R. Co.*, 18 Kans. 331; *Wagner v. Railway Co.*, 38 Ohio St. 32; s. c., 10 Am. & Eng. R. R. Cas. 380; *Eidemiller v. Wyandotte City*, 2 Dill. C. C. 376.

8. *Trustees of Iowa College v. City of Davenport*, 7 Iowa, 213.

9. *Mercer & S. R. R. Co. v. Delaware & B. B. R. Co.*, 26 N. J. Eq. (11 C. E. Gr.) 464.

10. *When Company may enter and construct Road.—Pendency of Appeal.*—*Chambers v. Cincinnati & Ga. R. R. Co.*, 69 Ga. 320; s. c., 10 Am. & Eng. R. R. Cas. 378; *Central B. U. P. Co. v. Atchison, T. & S. F. R. R. Co.*, 28 Kans. 453; s. c., 10 Am. & Eng. R. R. Cas. 528; *St. Joseph & D. C. R. R. Co. v. Callender*, 13 Kans. 496; *Norristown, etc., T. Co. v. Burket*, 26 Ind. 53; *Indianapolis & C. R. R. Co. v. Brower*, 12 Ind. 374; *Colvill v. Langdon*, 22 Minn. 565; *Doughty v. Somerville & E. R. R. Co.*, 21 N. J. L. (1 Zab.) 442; *Mettler v. Easton & A. R. R. Co.*, 25 N. J. Eq. (10 C. E. Gr.) 214; *In re New York Cent. & H. R. R. R. Co.*, 60 N. Y. 116; *Wagner v. New York Cent. R. R. Co.*, 38 Ohio, 32; s. c., 10 Am. & Eng. R. R. Cas. 380; *Weyer v. Milwaukee & L. W. R. R. Co.*, 57 Wis. 329; s. c., 10 Am. & Eng. R. R. Cas. 508.

11. *Wagner v. New York Cent. R. R. Co.*, 38 Ohio St. 32; s. c., 10 Am. & Eng. R. R. Cas. 380.

(2) *Withdrawal of Deposit.*—Where a railroad company has deposited the amount of the award, and taken possession of the lands, the owner, on giving the requisite bond, may withdraw the amount so deposited without prejudice to an appeal.¹ And a party thus withdrawing the deposit is afterwards estopped to deny that he was a party to the proceedings; and the railroad company is entitled to recover interest upon the amount by which the award is decreased, from the date of the withdrawal.²

e. Practice.—When two appeals are taken from the one award they may be consolidated and tried together, although taken by opposing parties.³ But when the appeals are taken by parties having separate interests, e.g., owner and lessee, they cannot be cancelled when the parties object.⁴ An appeal taken by the land-owner from the award of the commissioners is an entry of appearance, and waives all questions as to the sufficiency of the notice of the jurisdiction of the person.⁵ And by taking the appeal the owners assume the position of plaintiff.⁶ The right to open and close the argument on appeal is in the discretion of the court;⁷ but in the event of the court making no order, the land-owner will have the right.⁸

f. What considered an Appeal.—In some States an appeal is substantially the same thing as a *certiorari*, which simply brings up the record, the appellate tribunal being able to review only such irregularities as appear upon its face with regard to the way in which the proceedings have been carried on.⁹ If the record show that the proceedings are substantially correct, the court will not reverse on account of mere irregularity;¹⁰ and it must appear that the objection was taken in the lower court.¹¹ Where the evi-

1. *Meily v. Zurmehly*, 23 Ohio St. 627; *Weyer v. Milwaukee & L. W. R. R. Co.*, 57 Wis. 329; s. c., 10 Am. & Eng. R. R. Cas. 508.

2. *Watson v. Milwaukee & M. R. R. Co.*, 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168.

3. *Washburn v. Milwaukee, L. W. R. R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225.

4. *Ortman v. Union Pac. R. R. Co.*, 32 Kans. 419; s. c., 10 Am. & Eng. R. R. Cas. 196.

5. *Atchison, T. & S. F. R. R. Co. v. Patch*, 28 Kans. 470.

6. *Minnesota V. R. R. Co. v. Doran*, 17 Minn. 188.

7. *Charleston & S. R. R. Co. v. Blake*, 12 Rich. (S. C.) L. 634.

8. *Charleston & S. R. R. Co. v. Blake*, 12 Rich. (S. C.) L. 634. See also *Omaha & R. V. R. R. Co. v. Walker*, 17 Neb. 432; s. c., 20 Am. & Eng. R. R. Cas. 396. *Compare* *Montgomery S. R. R. Co. v. Sayre*, 72 Ala. 443; s. c., 20 Am. & Eng. R. R. Cas. 203.

9. *Kroop v. Forman*, 31 Mich. 144; *New*

Jersey R. R. v. Suydam, 17 N. J. L. (2 Har.) 25; *People v. Town of Seward*, 27 Barb. (N. Y.) 94; *People v. Canal Board*, 7 Lans. (N. Y.) 220; *Reitenbaugh v. Chester V. R. R.*, 21 Pa. St. 100.

10. *Irregularity in Proceedings.—Reversal of Award.*—*Louisville, N. A. & C. R. R. Co. v. Wunderlich*, 81 Ind. 105; s. c., 10 Am. & Eng. R. R. Cas. 410; *Chicago & W. I. R. R. Co. v. Dooling*, 95 Ill. 202. *In re* *Inhabitants of Vassalborough*, 19 Me. 338; *Cambridge v. Comm'r's of Middlesex*, 117 Mass. 79; *New Haven & N. Co. v. Northampton*, 102 Mass. 116; *In re Tucker's Petition*, 27 N. H. 405; *Lehigh V. R. R. Co. v. Dover R. R. Co.*, 43 N. J. L. (14 Vr.) 528; s. c., 14 Am. & Eng. R. R. Cas. 82; *State v. Smith*, 21 N. L. J. (1 Zab.) 91; *Troy & B. R. R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Road Comm'r's v. Fickinger*, 51 Pa. St. 48; *Winebiddle v. Pennsylvania R. R. Co.*, 2 Grant's Cas. (Pa.) 32; *Bowen v. Atlantic F. B. V. R. R. Co.*, 17 S. C. 574; s. c., 14 Am. & Eng. R. R. Cas. 332.

11. *Booker v. Venice & C. R. R. Co.*, 101

dence is conflicting, the judgment appealed from will not be interfered with.¹ Where the railroad company has condemned land as the property of the defendant, it cannot on appeal deny his ownership without tendering an issue to that effect.²

g. Judgment on Appeal. — The court may, on appeal, amend an error in the judgment to the court below.³ The deposit of the original award entitles the company in possession until the termination of the appeal;⁴ but the mere reversal of judgment condemning land for right of way does not render the possession unlawful and authorize ejectment.⁵ But if, on appeal, the damages are increased and are allowed to lie unpaid, the land-owner is entitled to recover back possession.⁶ If the amount deposited on taking the land is withdrawn, and subsequently on appeal the award is diminished, the company may recover the diminution and interest.⁷ As a general rule, interest and the damages will be held pending an appeal.⁸ And it has been held, that even when the compensation is reduced on appeal, interest from the date when the land was taken may be allowed, though a deposit was made pending an appeal.⁹

h. Certiorari. — An unwarranted invasion of an owner's rights, where the proceedings are otherwise valid, and also the constitutionality of the law itself, may be inquired into on *certiorari*.¹⁰ But *certiorari* will not lie when an appeal is provided by the statute.¹¹

Ill. 333; s. c., 5 Am. & Eng. R. R. Cas. 357; Detroit, W. T. & J. R. R. Co. v. Crane, 50 Mich. 182; s. c., 10 Am. & Eng. R. R. Cas. 602; Republican Valley R. R. v. Hayes, 13 Neb. 489; s. c., 10 Am. & Eng. R. R. Cas. 217; Chesapeake & O. R. R. Co. v. Patton, 9 W. Va. 648.

1. Smith v. Chicago & W. I. R. Co., 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384; Louisville & N. A. & C. R. R. v. Wunderlich, 81 Ind. 105; s. c., 10 Am. & Eng. R. R. Cas. 410.

2. Gerrard v. Omaha, N. & B. H. R. R. Co., 14 Neb. 270; s. c., 10 Am. & Eng. R. R. Cas. 506; Dietrichs v. Lincoln & N. R. R. Co., 14 Neb. 355; s. c., 10 Am. & Eng. R. R. Cas. 119; Republican Valley R. R. Co. v. Hayes, 13 Neb. 489; s. c., 10 Am. & Eng. R. R. Cas. 217.

3. Ohio R. R. Co. v. Harness, 24 W. Va. 511; s. c., 20 Am. & Eng. R. R. Cas. 405.

4. Lake Erie & W. R. R. Co. v. Kinsey, 87 Ind. 514.

5. St. Louis A. & T. H. R. R. Co. v. Karnes, 101 Ill. 402; s. c., 10 Am. & Eng. R. R. Cas. 39.

6. Lake Erie & W. R. R. Co. v. Kinsey, 87 Ind. 514.

7. Watson v. Milwaukee & M. R. R. Co., 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168.

8. Selma R. & D. R. R. Co. v. Gammage,

63 Ga. 604; s. c., 1 Am. & Eng. R. R. Cas. 41; Whitacre v. St. Paul & S. C. R. R. Co., 24 Minn. 311; Warren v. St. Paul & P. R. R. Co., 21 Minn. 424; s. c., 19 Am. Rep. 227; Sioux City, etc., R. R. Co. v. Brown, 13 Neb. 317; s. c., 10 Am. & Eng. R. R. Cas. 406; Mettler v. Easton & A. R. R. Co., 37 N. J. L. (8 Vr.) 222; Ohio R. R. Co. v. Harness, 24 W. Va. 511; s. c., 20 Am. & Eng. R. R. Cas. 405. Compare Reisner v. Atchison U. D. & R. R. Co., 27 Kans. 382; s. c., 10 Am. & Eng. R. R. Cas. 155.

9. Noble v. Des Moines & St. L. R. R. Co., 61 Iowa, 637; s. c., 14 Am. & Eng. R. R. Cas. 208.

10. California P. R. R. Co. v. Central Pac. R. R. Co., 47 Cal. 528; State, Morris, & E. R. R. Co. v. Hudson Tunnel R. Co., 38 N. J. L. (9 Vr.) 548; State, Mayor, etc., of Jersey City v. Montclair R. Co., 35 N. J. L. (6 Vr.) 328; Doughty v. Somerville & E. R. R. Co., 21 N. J. L. (1 Zab.) 442; Vail v. Morris & E. R. R. Co., 21 N. J. L. (1 Zab.) 189; Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. (4 Stew.) 492; Van Steenbergh v. Bigelow, 3 Wend. (N. Y.) 42.

11. Detroit, W. T. & J. R. R. Co. v. Backus, 48 Mich. 582; s. c., 14 Am. & Eng. R. R. Cas. 404; Detroit & B. C. R. R. Co. v. Graham, 46 Mich. 642; s. c., 14 Am. & Eng. R. R. Cas. 327.

Irregularity in the usual proceedings to assess damages may be brought up by *certiorari*.¹

12. *Costs*. — It has been held that the costs in eminent domain proceedings are not recoverable unless given by the statute which provides the remedy.² It has also been laid down that the company is the losing party within the meaning of the statute, if damages be awarded against it, notwithstanding the amount may have been decreased on appeal.³ But the general rule is to impose on the appellant the costs of an appeal shown to be useless by a failure to obtain a modification in favor of the appellant.⁴ When, on an appeal by the railroad company, the order confirming the award is reversed and new commissioners are appointed, the railroad company, although successful, must pay the costs.⁵ Costs as well as damages must be paid before the company can acquire any right to enter upon the premises.⁶ Where on appeal the railroad company abandons proceedings, the costs must be taxed to it.⁷

1 Delaware, L. & W. R. v. Burson, 61 Pa. St. 369. See also Reg. v. Manchester & L. R. Co., 8 Ad. & El. 415; s. c., 35 Eng. C. L. 415.

2 Metler v. Easton & A. R. R. Co., 37 N. J. L. (8 Vr.) 222; Herbein v. Philadelphia & R. R. Co., 9 Watts (Pa.), 272.

3 Goodwin v. Boston & M. R. R. Co., 63 Me. 363.

4. *Costs of Appeal*. — When on Appellant. — Leak v. Selma, R. & D. R. R., 47 Ga. 345; People v. McRoberts, 62 Ill. 38; Noble v. Des Moines & St. L. R. R. Co., 61 Iowa, 637; s. c., 14 Am. & Eng. R. R. Cas. 208; Harrison v. Iowa M. R. R., 36 Iowa, 323; Helm v. Short, 7 Bush (Ky.) 623; New Orleans P. R. R. Co. v. Gay, 31 La. An. 430; Vicksburg, S. & T. R. R. v. Calderwood, 15 La. An. 481; Childs v. New Haven & N. Co., 135 Mass. 570; s. c., 17 Am. & Eng. R. R. Cas. 139; Kidder v. Oxford, 116 Mass. 165; Harvard B. R. R. Co. v. Rand, 62 Mass. (8 Cush.) 218; *In re* Morse, 35 Mass. (18 Pick.) 443; Metler v. Easton & A. R. R., 37 N. J. L. (8 Vr.) 222; People v. Van Alstyne, 3 Keyes (N. Y.), 35; Schuylkill Nav. Co. v. Kittera, 2 Rawle (Pa.) 438; White v. Coleman, 6 Gratt. (Va.) 138; Eppes v. Cralle, 1 Munf. (Va.) 258; Washburn v. Milwaukee & L. W. R. R. Co., 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225. Compare People v. McRoberts, 62 Ill. 38; s. c., 7 Am. Ry. Rep. 445.

5. *In re* New York, W. S. & B. R. R. Co., 94 N. Y. 287.

When Appellant Company, though Successful, to pay Costs. — In this case the court said, "We are of opinion that the general term had no power to award these costs. If the appeal to the general term had been taken by the land-owners, and they had been defeated, it may be that the

court could, in its discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the land-owners, and to acquire their land against their will. In such a case, to compel the land-owners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the land-owners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it."

6. Chicago & M. R. R. Co. v. Bull, 20 Ill. 218. Compare Evansville & C. S. R. R. v. Fitzpatrick, 10 Ind. 120.

7. Leisse v. St. Louis & I. Mt. R. R. Co., 72 Mo. 561; s. c., 2 Mo. App. 105; North Missouri R. R. Co. v. Raynal, 25 Mo. 534.

Appeal by Railroad Company. — Abandonment of Appeal. — Costs. — In St. Louis, F. S. & W. R. R. Co. v. Martin, 29 Kans. 750; s. c., 10 Am. & Eng. R. R. Cas. 514, the company argued that the appeal having been taken by the land-owner from the assessment of the damages, and as he occupied the position of party plaintiff, the costs could not be taxed against it. The court however held that the company was liable. "In the proceeding as it was originally instituted, the railroad company was substantially the plaintiff and Martin substantially

13. *Limitations.*—Where land is entered upon by a railroad company, the legislature may properly limit the time within which actions may be brought, and, on a failure to bring the action within a reasonable time, the land-owner will be presumed to have waived his damages.¹ It has been held that, in the absence of an express statutory provision, the railroad company cannot acquire a title by adverse possession which will bar the right to have an inquisition of damages.² But other States hold that such right may be acquired by possession for the party required by the general statute of limitations.³

a defendant. The railroad company proceeded in the case until it procured in legal contemplation a right to the perpetual use of a portion of the plaintiff's land for a right of way for its railroad. Nothing further was to be done on its part to secure its object, except to pay the amount of damages awarded by the board of commissioners. But Martin was not satisfied with the damages awarded to him, and hence he appealed to the district court. His appeal, however, did not disturb any of the other proceedings. His appeal enabled him merely to litigate the question as to the amount of damages which he should recover, and nothing else; and it did not and could not disturb the company's right of way across his land. If that right were to be disturbed or in any manner impaired, it could be so done only with the consent of the railroad company itself. As the railroad company had already obtained all that it sought to obtain by virtue of the condemnation proceedings, it properly ceased to be the plaintiff, and Martin, who was seeking for a greater amount of damages, and who took the appeal to the district court, very properly became the plaintiff in that court. After the condemnation proceedings were taken on appeal to the district court, the railroad company chose to abandon all its rights, obtained by virtue of such proceedings, and to surrender them back to Martin. It virtually chose to dismiss the condemnation proceedings which it had previously instituted, and virtually to accept a nonsuit. The abandonment of all the rights and interests which he had obtained by virtue of the condemnation proceedings is, in effect, very similar to the dismissal of an ordinary action. It is true, that with respect to the damages, and after the case was appealed to the district court, Martin would seem to be the plaintiff and the railroad company the defendant; but with respect to the entire proceedings from the commencement to the conclusion (the whole of the condemnation proceedings), the railroad company would seem more properly to answer to the description and definition of a plaintiff, and Martin to the

description and definition of the defendant, and hence the abandonment by the railroad company, of every thing connected with the condemnation proceedings, would more properly seem to be a dismissal or abandonment of the case by the railroad company than by Martin. A dismissal or abandonment by Martin would simply be a dismissal or abandonment of his appeal, leaving the railroad company to enjoy all its rights and privileges obtained under the condemnation proceedings. Martin had nothing else than his appeal to dismiss or abandon. But he did not dismiss or abandon his appeal. He prosecuted it to the end, and until the railroad company agreed on its part to virtually abandon the whole of the condemnation proceedings, and all the right which it had obtained under such proceedings. But if the railroad company, after instituting condemnation proceedings, and after prosecuting the same until it had obtained interests in the property, should then say to the owner of the property, 'We do not want your land; we do not choose to use it for railroad purposes, or for any other purpose, but return it to you;' and if the owner should not wish to prosecute the case any further for the damages already committed by the railroad company, we would think that it would be proper for the court to render a judgment in favor of the owner of the land, and against the railroad company for costs."

1. *Harper v. Richardson*, 22 Cal. 251; *Tileston v. Brookline*, 134 Mass. 438; *Davis v. New Bedford*, 133 Mass. 549; *Welsh v. Chicago B., etc., R.*, 19 Mo. App. 127; *Carolina C. R. v. McCaskill*, 94 N. C. 746; *Reckner v. Warner*, 22 Ohio St. 275; *Anness v. Providence*, 13 R. I. 17; *McLaughlin v. Charlotte & S. C. R. R.*, 5 Rich (S. C.), L. 583.

2. *Delaware R. R. Co. v. Burson*, 61 Pa. St. 369; *Dixon v. B. & P. R. R. Co.*, 1 Mackey (D. C.), 78; s. c., 3 Am. & Eng. R. R. Cas. 201.

3. *Oliphant v. Comms. of Atchison Co.*, 18 Kans. 386; *Gowen v. Penobscot R. R. Co.*, 44 Me. 140; *Bumpus v. Miller*, 4 Mich. 159; *McClinton v. Pittsburg, F. W. & C.*

14. *Abandonment.* — Until actual payment of the compensation, or until the company has entered into possession of the lands, the land-owner acquires no vested interest in the damages assessed; and hence it has been generally held that the company may abandon it any time prior thereto.¹ Hence it has been held that an appeal from an award, and the overruling of a motion to set the same aside, does not deprive the party seeking to condemn the land from abandoning the proceedings after the proceedings of the Supreme Court.² But the right to abandon is lost if the company have reduced the land to possession, and constructed the public improvement thereon,³ or private rights have attached which would be prejudiced by the abandonment.⁴

15. *Arbitration.* — The question of the compensation to be made may be submitted to arbitration by officers of the railway company, who were intrusted with the power of making purchases, and, without express authority from the company, were in the habit of agreeing upon a price by a submission to arbitration.⁵ The award of the arbitrators need not specify separately the respective sums for the value of the land and for the damages: all that is required is that the whole shall be considered.⁶ Even where the question of damages is submitted to arbitration the railroad company cannot, if the time of payment is not agreed upon, acquire any title to the land until payment has been made.⁷ An objection taken in statutory proceedings that they are barred by an agreement to submit the matters in dispute between the parties to arbitration will be waived, if not urged before the commissioners for the assessment of damages.⁸

R. R. Co., 66 Pa. St. 404; *Hannum v. West Chester*, 63 Pa. St. 475; *Houston & T. C. R. R. Co. v. Chaffin*, 60 Tex. 553; *Kendall v. Missisquoi & C. R. R. Co.*, 55 Vt. 438; s. c., 14 Am. & Eng. R. R. Cas. 423.

1. *Abandonment. — Right of.* — *Denver & N. O. R. R. Co. v. Lamborn*, 8 Colo. 380; s. c., 23 Am. & Eng. R. R. Cas. 115; *Peoria & R. I. R. Co. v. Rice*, 75 Ill. 329; *Burlington & M. R. R. v. Sater*, 1 Iowa, 421; *Black v. Mayor of Baltimore*, 50 Md. 235; *Norris v. Mayor, etc.*, 44 Md. 598; *Graff v. Mayor of Baltimore*, 10 Md. 544; *Northern Missouri R. R. v. Lackland*, 25 Mo. 515; *Leisse v. St. Louis & I. Mt. R. R.*, 2 Mo. App. 105; *In re Waverly Water Works Co.*, 85 N. Y. 478; *Matter of Comms. of Washington Park*, 56 N. Y. 144; *Martin v. Mayor of Brooklyn*, 1 Hull (N. Y.), 545; *Matter of Anthony St.*, 20 Wend. (N. Y.) 618; *State v. Cincinnati & I. R. R.*, 17 Ohio St. 103; *Dayton & W. R. R. v. Marshall*, 11 Ohio St. 497; *Stacey v. Vermont C. R. R. Co.*, 27 Vt. 39; *Stiles v. Middlesex*, 8 Vt. 436; *Reg. v. Comms. of Rochdale Improvement Act*, 2 Jur. N. S. (Q. B.) 861.

2. *Compare Drath v. Burlington & M. R. R. Co.*, 15 Neb. 367; s. c., 20 Am. & Eng. R. R. Cas. 385.

3. *Gray v. St. Louis & S. F. R. R. Co.*, 81 Mo. 126; s. c., 22 Am. & Eng. R. R. Cas. 106.

4. *Lafayette v. Shultz*, 44 Ind. 97; *Duncan v. Louisville*, 8 Bush (Ky.), 98; *Jones v. Oxford Co.*, 45 Me. 419; *Farnsworth v. Boston*, 121 Mass. 173; *Pinkerton v. Boston & A. R. R. Co.*, 109 Mass. 327; *Harrington v. Comms. of Berkshire Co.*, 39 Mass. (22 Pick.) 263; *Pollard v. Moore*, 51 N. H. 188; *O'Neill v. Hudson Co.*, 41 N. J. L. (12 Vr.) 161; *Crowner v. Watertown & R. R. Co.*, 9 How. (N. Y.) Pr. 457; *In re Dover St.*, 18 Johns. (N. Y.) 506; *People v. Brooklyn*, 1 Wend. (N. Y.) 319; *Garrison v. New York*, 88 U. S. (21 Wall.) 196; bk. 22 L. ed. 612.

5. *Wood v. Auburn & R. R. R. Co.*, 8 N. Y. 160.

6. *Wood v. Auburn & R. R. R. Co.*, 8 N. Y. 160.

7. *Stewart v. Raymond R. R. Co.*, 15 Miss. (7 Smed. & M.) 568.

8. *Field v. Vermont & M. R. R. Co.*, 58 Mass. (4 Cush.) 150.

EMOLUMENT. — The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites; advantage; gain, public or private.¹

EMPANEL. (See *JURY*.) — The writing the names of a jury on a schedule by the sheriff or other officer lawfully authorized.²

EMPLOY. — To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs.³ When used passively, it

1. Webster's Dict., adopted by the court in *Apple v. Crawford Co.*, 105 Pa. St. 300; s. c., 51 Am. Rep. 205. In this case it was held that where it is the official duty of a sheriff to board the prisoners in the county jail, the sum secured to him by law as a compensation for this service is an emolument, within the meaning of the Constitution of Pennsylvania, Art. III. sec. 13, which provides that no law shall increase or diminish any public officer's "salary or emolument" after his election or appointment. "We think," said *Green, J.*, "the word imports more than the word 'salary' or 'fees,' and because it is contained in the constitution in addition to the word 'salary,' we ought to give it the meaning which it bears in ordinary acceptance. By the definition above given [see text], it imports any perquisite, advantage, profit, or gain arising from the possession of an office." See also *Peeling v. York Co.*, 113 Pa. St. 108; s. c., 8 East. Rep. 261; *Fox v. Lebanon Co.*, 4 Pa. Co. Ct. Rep. 393.

The English Telegraph Act of 31 & 32 Vict. c. 110, enables the Postmaster-General to purchase the undertakings of telegraph companies. By s. 8, sub-s. 7, every officer and clerk of any company, the undertaking of which may be so purchased, who has been a certain time in the service of the company, and who is in receipt of a certain salary, is entitled, if he receive no offer of an appointment by the Postmaster-General in the telegraphic department, to receive an annuity, which, under certain circumstances, shall be equal to two-thirds of the "annual emolument" derived by him from his office on a certain date. Under this act, S., an officer of a telegraph company that had been purchased, claimed as a part of his "annual emolument" the travelling expenses allowed him by the company, by reason of which he saved a large part of the money which he would otherwise have expended at home for board and lodging. It was held by the court of appeal, affirming the judgment of the Queen's Bench Division, that any thing which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation.

Says *Brett, L. J.*, "That annual emolument is the value of his appointment. If a person only receives a salary, what is the value of his appointment? If there is nothing to be added to the salary, or deducted from it, the value of the appointment is the salary; but if the salary is subject to his finding certain materials, it would be impossible to say that the salary is the proper measure of the value of the appointment or of his emolument. The emolument would be the amount of the salary, less the cost of the materials he had to supply. Then, if he receives a salary and something additional by way of remuneration, the value of the appointment or of the emolument must be the salary and any thing which he gains by the remuneration."

2. *Bouv. Law Dict.*, adopted in *Lyman v. People*, 7 Bradw. (Ill.) 345, and *Porter v. Cass*, 7 How. Pr. (N. Y.) 441; *Co. Litt.* 158 b.

The act of empanelling has nothing to do with that of drawing, selecting, or swearing those who are to serve as jurors, but simply with making the list of those who have been selected. *Porter v. Cass*, 7 How. Pr. (N. Y.) 441. Swearing is not a part of the empanelling. *State v. Potter*, 18 Conn. 175. Nor can it be inferred from the use of the word "empanelled," that the jurors were sworn. *Lyman v. People*, 7 Bradw. (Ill.) 345.

3. *McCluskey v. Cromwell*, 11 N. Y. 593. The word, "when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and has but this one meaning when used in the ordinary affairs and business of life." Laborers employed by a sub-contractor were held in this case not to be laborers employed by the chief contractor himself, within the meaning of a bond to pay the compensation of such laborers; *Ruggles, J.*, dissenting.

The use of the word implies the relationship of master and servant. *State v. Emerson*, 72 Me. 455. Says *Crompton, J.*, in *Emmens v. Elderton*, 4 H. L. Cas. 624,

sometimes has a reflexive meaning, signifying only to be engaged in.¹

"The words 'retain and employ,' as used in the present case, are a mere amplification of the preceding contract of hiring and service. These words are used in the precedents continually as meaning a hiring, engaging, and keeping a person in a service, and do not necessarily imply that the master is bound to supply the servant with any particular work whilst the relation subsists." In this case a contract between a corporation and an attorney by which he was to accept a salary in lieu of rendering an annual bill of costs, and advise and act for the company on all occasions in all matters connected therewith, was held sufficient to support an allegation that the corporation had promised to retain and employ him as attorney. In the Exchequer Chamber, *Parke, B.*, said, "Does it also imply a promise to employ? It depends on the meaning of this word 'employ.' If it means that the company shall be bound to supply him with business as an attorney and solicitor at all events, or to require his advice or use his services as attorney or solicitor whenever they have occasion for the advice or services of an attorney or solicitor, we think it clear that there is no such promise on their part. To hold that there was a promise to the former effect would be to hold that the company must be bound to incur litigation as well as create occasions for legal advice. . .

"But if the word 'employ' means only 'to engage in his service,'—one of the meanings of that term,—then there appears to us to be a promise to that effect. Many cases of employment may be suggested, in different capacities, where the use of the actual service is optional or conditional, and yet the employment may properly be said to take place or continue." *Elderton v. Emmens*, 6 C. B. 160.

"Employed" is defined in an act to prevent the employing of children to mean "occupied in any handicraft, whether for wages or not, under a master or servant." A child who was sent to a man to learn to read and to make straw plait, who worked under his superintendence, making from straw furnished by its mother the plait, which it took home to her, and for whose tuition the mother paid, was held to be employed under the act. *Bladon v. Parrott*, L. R. 8 Q. B. 718.

Where an act required a clerk to have been employed in the business of an attorney for five years before he could be admitted as an attorney, an absence of eleven months on a sea-voyage for his health could not be estimated as a part of the time of his clerkship. *Ex parte Moses*, L. R. 9 Q. B. 1.

But a ship is in the employ of her freighter where she is hauled off for repairs during the voyage, within the meaning of a charter party wherein he agreed to pay so much for six months and in proportion for any longer time she might be employed by him; and the owner agreed to keep her in repair. *Ripley v. Scaife*, 5 B. & C. 167.

A vessel intended for the slave trade, on its outward voyage, before any slaves are taken on board, is "employed, or made use of, in the transportation or carrying of slaves from one foreign country to another," within the meaning of an act prohibiting the same. "To be employed in any thing means not only the act of doing it, but also to be engaged to do it, or to be under contract to do it." *United States v. Morris*, 14 Pet. (U. S.) 464; *United States v. Schooner Catherine*, 2 Paine (C. C.), 721. The vessel is employed in the trade from the time it is fitted out for it. The brig *Alexander*, 3 Mason (C. C.), 175. Buildings in course of erection for the custody of arms are employed for public service, within the meaning of a building act, although not completed. *The Queen v. Jay*, 8 E. & B. 469.

A more restricted meaning was put upon the word in *School District v. Dilman*, 22 Ohio St. 194. Where, under an act providing that no one should be employed as a teacher unless he had first obtained the certificate required by law, it was held that the employment began, not at the time of the contract, but at the time of entering upon the performance of the duties of the position. If the certificate was obtained in the interval, the contract was valid.

A stipulation in a contract of hiring a slave, that he is not to be employed on water, is not broken by sending him to water horses, with instructions not to ride into deep water. *Madre v. Saunders*, 3 Jones (N. Car.), 1.

A general order in bankruptcy allowing the assignee fees for an attorney-at-law, where "necessarily employed by the assignee," does not authorize such fees where the assignee is himself an attorney. *In re Muldaur*, 8 Ben. (C. C.) 65.

1. One may be employed about his own business. In a statutory definition of vagrancy, one "employed as a beer-carrier," may include the proprietor of a saloon, as well as his employees. *State v. Canton*, 43 Mo. 48. Cf. meaning of employment.

"Persons who are employed, or about to engage, in the cultivation of the soil," in an act providing for the creation of agricultural liens by such, has reference only to the cultivator of the soil on his own

EMPLOY OR EMPLOYMENT—EMPLOYEE.

To select; to designate.¹

EMPLOY OR EMPLOYMENT. (See BUSINESS; EMBEZZLEMENT; FELLOW-SERVANT; MASTER AND SERVANT.)—Occupation; business; object of industry; engagement; a vocation; calling or profession;² service of another.³

EMPLOYEE. (See EMBEZZLEMENT; FELLOW-SERVANT; GARNISHMENT; MASTER AND SERVANT.)—One who is employed.⁴

account; i.e., the proprietor, either as land-owner or tenant, and as such owner of the crop to be made. The phrase does not include a mere laborer for wages, engaged as a farm-hand in cultivating the soil. *Carpenter v. Strickland*, 20 S. Car. 1.

1. Petition of Wm. B. Astor, 50 N. Y. 363. Used of selection of newspapers for advertising by municipalities.

2. *State v. Canton*, 43 Mo. 48.

A cadetship is an "office, commission, place, or employment" within the meaning of an act making it a misdemeanor to receive money in exchange for such. *The Queen v. Charretie*, 13 Q. B. 447.

The word does not necessarily mean "a case in which a man is set to work for money by another person. A man may so employ himself in order to earn money as to be said to carry on an employment." The occupation of a bookmaker, who attends horse-races, and bets upon them, is a vocation or employment within the meaning of an income tax act. *Partridge v. Malandaine*, 56 L. J. R. Q. B. D. 251; s. c., 56 L. T. N. S. 204.

"In order to constitute the sale of liquor one's business or employment within the meaning of a license act, it is necessary that more than one sale should be made; employment being that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. *Moore v. State*, 16 Ala. 411; *Harris v. State*, 50 Ala. 127; *Lawson v. State*, 55 Ala. 118; *United States v. Jackson*, 1 Hughes (C. C.), 531; *Bishop on Staty. Cr.* § 1016.

"Professional Employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially." A real-estate agent is not engaged in professional employment. *Pennock v. Fuller*, 41 Mich. 153.

3. In this sense, to which *employ*, when used as a noun, is confined, the word involves the relationship of master and servant. A contractor who is his own master, and employs men who are under his direction and control, is not "in the employ" of his contractee. *State v. Emerson*, 72 Me. 455.

4. Webster, adopted in *Ritter v. State*, 111 Ind. 324; s. c., 12 N. Eastn. Rep. 581; 9 W. Rep. 820, and *Stone v. United States*, 3 Ct. of Clms. Reps. 360.

An employee is one who renders labor or service to another. A drayman who rendered his entire service to a manufacturing company is an employee in its regular employ, within the meaning of a statute giving preference to wages claims. *Watson v. Watson Manfg. Co.*, 30 N. J. Eq. 588.

An act of Congress increasing the salaries of "civil officers and temporary and all other clerks and employees in the office" of the commissioner of public buildings, includes in its terms a member of the Capitol police—*Mallory v. United States*, 3 Ct. of Clms. Rep. 257—and a laborer on public grounds. *Stone v. United States*, 3 Ct. of Clms. Rep. 260. In the latter case *Peck, J.*, said, "Webster in his dictionary says an employee 'is one who is employed,' which is the only definition given by him. Worcester says an employee 'is one who is employed: an official, a clerk, a servant.' Johnson's dictionary does not define the word. It seems to be a word recently adopted into our language from the French, and applies equally to a person within or without the office, whether he be a servant or clerk. . . . A person who is engaged in the performance of the proper duties of an office is an 'employee in the office,' whether his particular duties are carried on within or without the walls of the building in which the chief officer generally transacts his business. . . . The word 'employee' signifies any one in place, or having charge, or using a function, as well as one in office."

An order directing the receiver of a railroad to pay debts "owing to the laborers and employees" of the company "for labor and services actually done in connection with the company's railways," includes a claim for services as counsel. "It is manifest that literally and lexically the claimant was an employee of the company; that is, he was employed by, and rendered important services for, them. . . . This is a word of more comprehensive signification than laborers and operatives" (*Church, C. J.*).

"The term 'employee' is the correlative

EMPOWER—EMPTY—ENAGENACION—ENCLOSURE.

EMPOWER.¹

EMPTY.²

ENAGENACION. (In Mexican conveyances.)—Alienation.³

ENCLOSED LANDS.—Lands surrounded by a fence.⁴

ENCLOSURE.—A tract of land surrounded by a fence; and the fence around the tract.⁵

of 'employer,' and neither term has either technically or in general use a restricted meaning by which any particular employment or service is indicated. The terms are as applicable to attorney and client, physician and patient, as to master and servant, a farmer and day-laborer, or a master-mechanic and his workman. To employ is to engage or use another as an agent or substitute in transacting business or the performance of some service: it may be skilled labor, or the service of the scientist or professional man as well as servile or unskilled manual labor" (*Allen, J.*). *Gurney v. A. & G. W. Ry. Co.*, 58 N. Y. 358.

But where an act regulating the foreclosure of railroads provided that the purchaser should pay "all sums due or owing . . . to any servant or employee," these terms were held not to include the secretary of the company. They include only "operatives of the grade of servants, who have not a different, proper, and distinctive appellation, such as officers and agents of the company." "The officers of the company are its agents, and, it may be said, are the official masters who direct and control the servants and employees. The former are appointed and elected, and are trustees: the latter are hired, and are the subordinates of the former." *Wells v. S. M. Ry. Co.*, 1 McCrary (C. C.), 18; s. c., 1 Fed. Rep. 270.

The president of a railroad is not an employee within the meaning of a statutory provision excepting wages from garnishment. *S. & N. A. R. R. Co. v. Falkner*, 49 Ala. 115.

1. An act providing for relief against illegal taxation, by the terms of which boards of supervisors are "authorized and empowered," upon application of any aggrieved party, to hear and determine claims for taxes improperly collected, is mandatory, and does not make it discretionary with the board whether they will hear a claim. *People v. Board of Supervisors of Herkimer Co.*, 56 Barb. (N. Y.) 452. But an act "empowering" a judge of probate to take an administration bond in a special case, in a mode different from that prescribed by the general law, was held not to be imperative in *Piquet's App.* 5 Pick. (Mass.) 65. And see *Binney v. C. & O. Canal Co.*, 8 Pet. (U. S.) 201. See MAY.

"License and empower" were held to import a grant in a deed creating a right to construct and use fifty patented machines. *Washburn v. Gould*, 3 Story (C. C.), 162.

2. "Empty boat or vessel" in an act granting and regulating tolls means without cargo, not without passengers. *Perrine v. C. & O. Canal Co.*, 9 How. (U. S.) 189.

3. "According to Escriche, 'enagenacion' means, 'The act by which the property in a thing, by lucrative title, is transferred, as a donation; or by onerous title, as by sale or barter.'

"This word, taken in a more extended sense, comprises also the *enfiteusis* (lease), the pledge, the mortgage, and even the creation of a *servidumbre* (servitude) on an estate.' . . .

"Now, what is the plain sense of this definition of the word 'enagenacion'? Obviously, that in its ordinary use it means a transfer of the title, the fee; but taken in its more comprehensive and enlarged sense, it may mean something more than is usually understood by it, and include the six other contracts mentioned. The word as used in the instrument under consideration, has been rendered in all the translations in the record by the English word 'alienation'; and it is manifest from the definition given by Escriche in its most comprehensive sense, that the meaning of the two words 'enagenacion' and 'alienation' are as nearly identical as the significations of any two words in different languages are ordinarily found to be." When no limiting term is used, the use of the term indicates an intention to convey the fee. *Mulford v. Le Franc*, 26 Cal. 88.

4. *Tapsell v. Crosskey*, 7 M. & W. 441.

Where a statute required railroad companies to fence their tracks along "enclosed or cultivated fields," it is not necessary, that, in order to be entitled to this protection, the enclosure of the fields should be by lawful fences. *Biggerstaff v. St. L. K. C. & N. Ry. Co.*, 60 Mo. 567.

5. This meaning was adopted in *Taylor v. Welbey*, 36 Wis. 42, where the word was construed as used in a statute limiting the right of distraining beasts *damage feasant*, within the enclosure of the distrainer. See *Bouv. Law Dict.*

In the interpretation of a similar act, it

ENCOURAGE—ENCROACHMENT—ENDOW, ETC.

ENCOURAGE.—To intimate; to incite to any thing; to give courage to; to inspirit; to embolden; to raise confidence; to make confident.¹

ENCROACHMENT.—See OBSTRUCTION.

ENCUMBRANCE. (See COVENANTS OF TITLE.)—Any thing which constitutes a burden upon the title.²
Obstruction.³

END.—See AT; CURRENT; WILLS.⁴

The action *en declaration de simulation* is, in the law of Louisiana, an action to have a contract declared judicially a simulation and a nullity, to remove a cloud from the title, and to bring back, for any legal purpose, the thing sold to the estate of the true owner. It is essentially one in revendication, and never of condition.⁵

ENDOW, ENDOWMENT.—Wealth applied to any person or thing.⁶

was said, "The word enclosure imports land enclosed with something more than the imaginary boundary-line; that there should be some visible or tangible obstruction, such as a fence, hedge, ditch, or something equivalent, for the protection of the premises against encroachment by cattle." *Close* is a more extensive word including cases where land is enclosed by only imaginary boundary-lines. Its use in pleading under these statutes instead of enclosure is bad. *Porter v. Aldrich*, 39 Vt. 326.

A potato-patch is not within the meaning of an act forbidding the laying out of roads or streets through yards or enclosures necessary to the use and enjoyment of any dwelling-house or manufacturing establishment to which it is appurtenant. *Lansing v. Caswell*, 4 Paige (N. Y.), 519.

1. *Huddleston, B.*, in *The Queen v. Most*, 7 Q. B. D. 258. And see *Rex v. Royce*, 4 Burr. 2073.

2. *Post v. Campan*, 42 Mich. 90. "Every right to, or interest in, the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance." *Prescott v. Trueman*, 4 Mass. 627.

Webster's definition, "a burden or charge upon property; a legal claim or lien upon an estate," is adopted in *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 293; s. c., 37 Am. Rep. 830, where it was decided that a mechanic's lien is an encumbrance within the meaning of a warranty against encumbrances in an insurance policy.

3. *Fox v. City of Winona*, 23 Minn. 10. The power to prevent the encumbrance of its streets by a municipal corporation, includes the power to remove a wooden awning, which is an obstruction.

4. An entry by the plaintiff of "ended and debt and costs paid" in the docket of

a suit, is equivalent to an entry of satisfaction, and may be pleaded in bar of a new suit for the same cause of action. *Phillips v. Israel*, 10 S. & R. (Pa.) 391.

Where A. shipped on board B.'s fishing-vessel, under an agreement that he should have a certain proportion of the fish taken, and drew an order on B. requesting him to pay C. a certain sum at the end of the voyage, if he should make enough, which was accepted by B., the end of the voyage meant, not the arrival of the vessel at port, but a point of time after the sale of the fish. *Bradford v. Drew*, 5 Metc. (Mass.) 188.

End on.—Under a regulation, that, if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, "sailing ships are meeting end on when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins;" and "nearly end on" includes "cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision." *The Nichols*, 7 Wall. (U. S.) 656.

5. *Edwards v. Ballard*, 20 La. Ann. 170. It is to be distinguished from the revocatory action, the object of which is to avoid serious but fraudulent contracts, while that *en declaration de simulation* aims at declaring simulated, acts which are contrary to truth. *Erwin v. Bank of Ky.*, 5 La. Ann. 1.

6. *Whar. Law Lex.*; *Rapalje & L. Law Dict.*

"The word 'endow' means giving a benefit to some existing thing: it supposes

ENEMY.¹

something to exist, either at the time when the gift is made, or when the endowment is to take place." *Edwards v. Hall*, 6 DeG. M. & G. 83.

A taxation act, after exempting certain lands and chattels, among others, buildings erected and used for religious worship, and the furniture thereof, and personal property used therein, exempted the "endowment or fund" of any religious society. "These words 'endowment or fund' are *ejusdem generis*, and intended to comprehend a class of property different from the other two, not real estate or chattels. The only difference between the words is, that *the fund* is a general term including the *endowment*; while the *endowment* is that particular fund, or part of the fund, of the institution, bestowed for its more permanent uses, and usually kept sacred for the purposes intended." Endowment does not include real estate, and consequently a parsonage is not exempt from taxation. *First Ref. Dutch Ch. v. Lyon*, 32 N. J. L. 360. Nor are lots, part of the church property, situated apart from the church edifice. *State v. Nevin*, 38 N. J. L. 323.

1. Indians at peace with the United States are, in no received sense of the word, an enemy, and cannot be judicially considered as embraced within it. *Claim of Col. Thomas*, 4 Op. Atty-Gen'l, 81.

An Enemy under the Rule of Law that permits the Seizure of an Enemy's Property.—If a citizen during the late civil war resided within the lines of the Confederate army, he might have, *prima facie*, been considered an enemy to the United States, and his property enemy's property, and liable to seizure; and likewise, if he resided within what were only the temporary lines of the Union army. *Taylor v. Jenkins*, 24 Ark. 337.

An Enemy under the Statute of 25 Ed. III.—By this statute it is declared to be high treason "if a man be adherent to the enemies of our lord the king, in the realm, giving to them aid or comfort in his realm or elsewhere." The word "enemies," in this clause, is not confined to the subjects of a state in amity with the king; for if any of the subjects of state in amity with the king have commenced, or have made preparations for the commencing of, hostilities against the king, these are his enemies. If any subjects of a State in amity with the king are in the service of a state at war with the king, the giving aid or comfort to these is adhering to the king's enemies; for they are to be considered by all states, except that of which they are subjects, as the subjects of the state in whose service they are. It has been holden, that, adhering to the subjects of a state at war

with the king, against the king's allies, is an adhering to the king's enemies. *Bacon's Abr. "Treason," G.*; *Vaughan's Case*, 5 Salk. 634.

An Enemy under Art. III. Sec. 3, Cl. 1 of the Constitution of the United States.—This clause, which declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," was borrowed from the statute of 25 Ed. III. Rebels, being citizens, are not enemies within its meaning; and hence, a conviction for treason in promoting a rebellion cannot be sustained under it. "The term enemies," says *Field, J.*, "as used in the second clause, according to its settled meaning at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power, who owes no allegiance to our government or country." *United States v. Greathouse*, 1 Abb. (U.S.) 364; s. c., 4 Sawy. (U.S.) 457.

An Enemy under the Rule of Law that exempts Bailees from Liability for Losses occasioned by the Public Enemy.—The defendant was the owner of a steamboat, upon which certain merchandise belonging to the plaintiff was shipped from New Orleans. By the bill of lading, the defendant engaged to deliver it at Louisville, Kentucky, "the dangers of navigation and fire alone excepted." At Memphis, on May 20, 1861, before Tennessee had seceded from the Union, the boat was boarded by a number of armed men, under the command of an officer, and the goods seized. On the trial of the cause, the court, as stated in the opinion of the Supreme Court, charged the jury in substance as follows: "If they find from the evidence, that, at the time and before the seizure of said goods, the citizens of the State of Tennessee were laboring under great excitement; that large numbers of the inhabitants had armed, and organized themselves into military companies and regiments, and that others were rapidly arming and organizing; that the chief offices of the State were in the hands of these organizations, or of persons affiliating or operating with them; that forts were being built, and the United States property being seized by them; that all these things were in open and avowed hostility to the Federal Government, for the purpose of opposing an armed resistance to execution of the laws, or for the purpose of making common cause with the insurgents of the other Southern States; and that these insurrectionary proceedings

ENFEOFF.—To make a gift of any corporeal hereditaments to another.¹ See FEOFFMENT.

ENFORCE.²

had been pushed to such an extent within the State of Tennessee, that her power was in fact in the hands and under the control of these conspirators, and the government in their hands, her soil in their possession, the regular course of justice interrupted, so that loyal courts could not be kept open, nor protection given to loyal men without the interference of military power, and that the Federal Government was marshalling her forces for the purpose of asserting the national sovereignty,—if these insurrectionary combinations existed in the State of Tennessee, a civil war was then pending between the General Government and such unlawful combination; and if the jury find such armed force [as] took the goods out of the possession of the defendant was a recognized part of such unlawful combination, that such force will be regarded as public enemies, and they will find for the defendant." The jury found for the defendant. On an appeal to the Supreme Court, this was *held* to be a just exposition of the law. *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368. Tramps, thieves, and robbers are not public enemies within the meaning of this rule. *State v. Moore*, 74 Mo. 413. A bill of lading for goods shipped in a Russian port, on board a Mecklenburgh ship, for a port in England, contained an exception of "the king's enemies." It was *held* that "the king's enemies" meant, or at all events included, the enemies of the sovereign of the person who made the bill of lading, viz., the Duke of Mecklenburgh; and, consequently, that the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburgh. *Russell v. Niemann*, 17 C. B. (N. S.) 164.

An Enemy under an Insurance Policy.—A steamboat insured against perils by "enemies, pirates, and assailing thieves," and "all such losses which shall come to the damage of said steamer according to the true intent and meaning of the policy," was captured by an armed force acting under the authority of the so-called Confederate States of America. In an action on the policy it was *held* that the loss was without doubt within the general words, "all such losses." It was, however, said by the court, that, if this phrase had been omitted, a recovery might probably have been had under the word "enemies" in the policy. Said *Thompson, J.*, "The term 'enemies,' as used in the policy, means public 'enemies,' and is defined by writers on national law to be 'where the whole body of the

nation is at war with another.' Bouv. L. Dic. Vattel says, 'An enemy is he with whom a nation is at war.' Law of Nations, 387. Adhering strictly to these definitions, the loss here would hardly be covered by an insurance against 'enemies.' But this is too narrow a ground to take. Indemnity is the object of all insurance; and in marine policies the rule seems to be, that, where the loss is of a *like nature* with the specified peril, or in other words, substantially within its meaning, to sustain the liability of underwriters. . . . I am inclined, therefore, to think that the loss in this case might have been covered by the peril 'enemies,' even if placed alone on that ground by the pleadings, which was not the case here." *Monongahela Ins. Co. v. Chester*, 43 Pa. St. 491.

An Enemy under the Act of Congress of March 2, 1799.—By this act it is declared "That for the ships or goods belonging to the citizens of the United States, or to the citizens, or subjects, of any nation in amity with the United States, if retaken from the enemy" within a certain time, the owners are to allow a certain part for salvage. In March, 1799, Congress had raised an army, stopped all intercourse with France, dissolved our treaty, built and equipped ships of war, and commissioned private armed ships, enjoining the former and authorizing the latter to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession. It was *held* that this constituted a public qualified war between France and the United States, and that the French were an enemy within the act. "As there may be a public general war, and a public qualified war, so there may upon correspondent principles be a general enemy and a partial enemy. The designation of 'enemy' extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of war. If Congress had chosen to declare a general war, France would have been a general enemy: having chosen to wage a partial one, France was, at the time of the capture, only a partial enemy. But still she was an enemy." *Chase, J.*, *Bas v. Tingy*, 4 Dall. (U. S.) 37.

1. Bouv. L. Dic.

Enfeoff was the technical and proper operative word of a feoffment, so long as a feoffment was in use. 1 Davidson's Conv. 68; *Perry v. Price*, 1 Mo. 553.

2. A statute of Illinois made it the duty

ENGAGE.¹

of State's attorneys of the several judicial districts to enforce the collection of all fines, etc., imposed or incurred in the courts of record in their several counties. It was *held* that the power thus conferred necessarily included the right to receive all fines, etc., and give receipts therefor that should operate as a full discharge to the party paying the same, as well as the right to receive the amount of any judgment that might have been rendered for any such fine, etc., and to execute an acquittance therefor. *The People v. Christerson*, 59 Ill. 157.

1. A father signed and delivered to his son therein named, a paper expressed in the following terms: "This [is] to certify that I engage to my son Isaac the farm [on] which he now lives." This was *held* to be an agreement to convey the farm to his son. "One definition of the word 'engage' is, 'to bind my appointment or contract;' and in common parlance it is often used as synonymous with the word 'promise.' I engage to do, or omit to do, an act, is nothing more than a promise to do or omit it." *Rue v. Rue*, 21 N. J. L. 379.

To Engage in Business.—The English Trademarks Act provides, "The court may, on the application of any person aggrieved, remove any trademark from the register, on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not engaged in any business concerned in the goods within the same class as the goods with respect to which a trademark is registered." The owner of a patent for a washing-machine applied to it the name of "The Home Washer," and registered that name as his trademark in respect of it. He did not manufacture the machines, or any other goods in the same class, but granted an exclusive license to a manufacturing firm, who paid him royalties. After the expiration of the patent (six years from the registration of the trademark), this firm continued to manufacture the machines, and to describe them by the old name, but paid no royalties. The former owner of the patent, and the registered proprietor of the name, had not, after a year and nine months from the expiration of the patent, begun to manufacture, though he had been in negotiation with manufacturers, to get them to do so in conjunction with him. It was *held* that one year and nine months was sufficient cesser to bring the registered proprietor of the mark within the description of a "registered proprietor not engaged in any business concerned in the goods within the same class as the goods with respect to which

a trademark is registered," notwithstanding the pending negotiations. It seems that a patentee is "engaged in any business," etc., so long as he receives royalties under his patent, even though he does not himself manufacture. *In re Ralph's Trademark*, L. J. R. Ch. 188.

When it is said that a corporation is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating the service of process on foreign corporations, reference is plainly had to business operations carried on within the state, through the medium of agents appointed for that purpose, *that are continuous, or at least of some duration*, and to business transactions that are merely casual,—such as an occasional purchase of goods or material within the foreign state. *St. Louis Wire-mill Co. v. Con. Barb-wire Co.*, 32 Fed. Rep. 802.

See CARRY, note, *Carrying on Business*.

To engage in Shooting.—Under an act which imposed a fine upon any person "who engages in shooting" on Sunday, it was *held*, that, "to engage in shooting does not imply that the shooting should be repeated. One act is enough." *Smith v. State*, 50 Ala. 159.

Engaged in an Unlawful Act.—Where a person who is insured deserts from the army, and is shot by a sheriff who is attempting to arrest him, as alleged, in self-defence, it cannot be *held*, as matter of law, that he was engaged in an unlawful act, within the meaning of a policy of accident insurance, providing that no claim shall be made "when the death or injury may have happened . . . while engaged in, or in consequence of, an unlawful act." *Utter v. Travellers' Ins. Co.*, 26 Am. L. Reg. 477.

Actually engaged.—An act of Congress of the Confederate States exempted persons engaged in certain occupations from military service in the armies of the Confederate States. There was a *proviso* that declared "that the exemptions granted under this act shall only continue whilst the persons exempted are actually engaged in their respective pursuits or occupations." It was contended that this must be construed to mean, "that all those persons who are exempted shall continually employ their own personal skill and labor in and about the pursuits or occupations on account of which they are exempted;" so that they are also impliedly exempted from State militia service. But the court took a different view of the matter, saying, "When we say, in common parlance, of a man, that he is 'actually engaged' in farming, or planting, does it necessarily imply that

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he must give his constant personal supervision to his farm or plantation? Does it mean any thing more than that such a man has a farm or plantation in active operation, on his own account, whether he conducts its daily affairs through an overseer, or in person? The words embrace both cases. And so of many, if not most, other pursuits and occupations. The words 'actually engaged,' in common parlance, mean 'really, or truly engaged,'—engaged 'in fact;' and, according to the same law of common use, are the opposite or antithesis of 'seemingly,' or 'pretendedly,' or 'feignedly engaged.' In the common acceptance of the words, the same man may be 'actually engaged' in two or more pursuits, or occupations, at the same time." *State in re Strawbridge & Mays*, 39 Ala. 383.

1. In *English Practice* an engagement is an agreement entered into by a married woman, with the intention of binding her separate estate, that would be a contract, if it were not for the incompetency of a married woman to become a party to a contract. "On principle," says *Pollock*, "it should seem that a married woman's engagement with respect to her separate estate, while not bound by any peculiar forms, is, on the other hand, bound in every case by the ordinary forms of contract; in other words, that no instrument or transaction can take effect as an engagement binding separate estate which could not take effect as a contract if the party were *sui juris*. That is to say, the creditor must first produce evidence appropriate to the nature of the transaction which would establish a legal debt against a party *sui juris*, and then must show, by proof or presumption, as explained above, an intention to make the separate estate the debtor." *Poll. Cont.* (4th ed.) App. 651.

General engagements are defined in *Rap. & Law's Dic.* as follows: "The promises or debts of a married woman which are not expressly charged by her on her separate estate, are sometimes called her 'general engagements,' and do not bind her separate estate unless made with reference to and upon the faith and credit of that estate." In *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 593, *James, L. J.*, said, "The term 'general' engagement is an ambiguous and misleading one. If it is meant to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, e.g., for buying or selling, or letting or hiring, a house, do not necessarily impose a liability to be satisfied out of the separate

estate which she may happen to have, in that sense, and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate." See also *Johnson v. Gallagher*, 3 DeG. F. & J. 494; *Shattuck v. Shattuck*, L. R. 2 Eq. 182; *Poll. Cont.* (4th ed.) 647 *et seq.*

An Engagement is not a Bank Note.—A charter of an insurance company contained the following provisions: "Any policy or engagement signed by the president, and attested by the secretary, when done conformably to any by-laws of the directors, shall be valid against, and effectually bind, the said corporation, without the presence of a board of directors, and as effectually as if under the seal of the said corporation; provided, however, that no policies or engagements whatsoever, which shall, as aforesaid, be entered into, by this corporation, with any individual, body corporate or politic, either without the seal of this corporation or otherwise, shall be transferable, negotiable, or assignable, so as to give to such second holder or assignee a claim on the said corporation, either in his own name or the name of the person originally concerned, unless the consent of this corporation shall have been previously obtained, and indorsed in writing on such instrument, or unless such a privilege form a part of the original agreement, and be expressly granted by this corporation." Under these provisions, it was contended that the insurance company had a right to issue bank notes. Said the court, "It is a very strained construction of the term 'engagement' to suppose it means a bank note. This is not the usual and ordinary acceptance of the term. . . . The word 'engagement,' as used in the act, may very fairly be considered as synonymous with policy. Yet a more enlarged sense might be given it, and still limit it to contracts in and about the business of insurance, and the transactions expressly authorized by the charter."

2. In *Hornblower v. Boulton*, 8 Term, 95, which was an action for the infringement of a patent, in which the question of the validity of the patent arose, *Lawrence, J.*, held that the word "engine," in the act of Parliament extending the term of the patent, signified a contrivance or device. "Some of the difficulties in the case," said he, "have arisen from considering the word 'engine' in its popular sense, namely, some mechanical contrivance to effect that to which human strength, without such assistance, is unequal; but it may also signify 'device;' and that Watt meant to use it in

that sense, and that the legislature so understood it, is evident from the words 'engine' and 'method' being used as convertible terms."

The statute 52 G. III. c. 130, makes it a capital offence "if any person . . . shall unlawfully, and with force, demolish or pull down, or begin to demolish or pull down, any erection and building or engine which shall be used . . . in the carrying on . . . of any trade or manufactory;" and provides that the injured person shall be entitled to recover damages from the hundred in which the property may be situated. In an action for damages, under this statute, against a hundred, it was held that movable frames for the manufacture of framework lace are not an engine within the meaning of the act. Said *Lord Ellenborough*, "The word 'engine,' as it is found in this act, does not apply to all the utensils and tools which afford the means of carrying on the trade, such as are the tools and utensils mentioned in the 52 G. III. c. 16, but is to be accepted in a much more limited sense. . . . The word 'engine' is indeed used in both these acts, and perhaps it is owing to this equivocal use of it that we are engaged with this argument to-day. In the act for the protection of the trade [52 G. III. c. 16], it means the utensil by which the trade is carried on. In the 52 G. III. c. 130, the act with which we are at present concerned, the word 'engine' is also used; but it seems to me to demand a different interpretation from that which it bears in the other act, as much as if it had been a different word. . . . This act [52 G. III. c. 130] constitutes it a felony to demolish or pull down, or begin to demolish or pull down, any erection, building, or engine, which must mean engine *ejusdem generis*; and there is no remedy against the hundred for damages to engines unless where it is an engine analogous to an erection or building. These frames are, indeed, in some degree, connected with the building; but they are not so necessarily, and only so for a temporary purpose; they are movables, like a bed, although of too large dimensions to be moved away without taking them down; they are not, in their nature, fixed, and therefore not of that description for which this remedy will lie." *Orgill v. Smith*, 6 M. & S. 1182.

Engine to kill game. — A gun is not necessarily an engine to kill game. In an action of *trover* for a gun taken by the defendants from the plaintiff, the defendants, in their plea, alleged that the plaintiff kept the gun to kill game, without being qualified; and they justified the taking on the ground that they were the gamekeeper and servants of J. S., the lord of the manor. But the plea did not state that the plaintiff

was out sporting with the gun, nor where it was taken. The court held, sustaining a demurrer to this plea, that "a gun is not necessarily to be taken to be an engine to kill game, as it does not appear upon this record that the plaintiff killed game with it; he might use it to shoot crows, or destroy vermin; and it is not like nets and pointers, which can only be kept for killing the game." *Wingfield v. Stratford*, 1 Wils. 315.

By 1 & 2 Wm. IV. c. 32, "If any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument of destruction for the purpose of killing or taking any game on a Sunday," he shall, on conviction, be liable to a penalty. It was held that a snare was an engine or instrument within the meaning of the act, and that putting down a snare on a day before Sunday for the purpose of killing game, and keeping it set on Sunday, was using an engine or instrument on Sunday. "The word engine, derived from *ingenium*, includes a snare, which is a device or contrivance — an engine — for killing game." *Allen v. Thompson*, L. R. 5 Q. B. 336.

Fixed Engine. — The Salmon Fishery Act, 24 & 25 Vict. c. 109, enacts, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; . . . and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine." Three nets were set twelve yards apart, and extended to near the middle of a river: they were fixed at one end to a large stone on the bank, and at the other end they were kept up by corks with lead attached to keep them down. It did not appear whether or not the nets reached to the bottom of the river. Whenever a salmon touched a net, it gave way, gathered together, and entangled and so caught the salmon. It was held that they were not a fixed engine within the act. "It is impossible to say that a net moored at one end of it to a great weight, but so that part of the apparatus gives way when a fish comes to it, is a fixed engine within the statute." *Thomas v. Jones*, 5 B. & S. 916.

By the 28 & 29 Vict. c. 121, s. 39, it is further provided that "a 'fixed engine' shall include any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing milldam." Under this section it was held that a "stop net" is not a "fixed engine." A "stop-net" is used as follows: "The fisherman fixes his boat athwart the current of the river, by lashing it at each end to a pole driven in the bed of the river. The net, which is thirty feet wide at the mouth, and tapers to a point, is stretched by two poles twenty-

ENGINEERING PURPOSES—ENGRAVING, ETC.

ENGINEERING PURPOSES.¹

ENGLISH.²

ENGRAVING.³

ENHANCED.⁴

two feet long, which are tied together at the upper end, and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net is lowered overboard until the two poles rest at about eight feet from the upper end on the side of the boat. The net and poles are thus nearly on the balance, and the fisherman presses slightly on the upper end, and so keeps the net steady at about an angle of twelve degrees; he also holds a string attached to the bottom of the net, and when he feels a fish, he presses down the upper end of the poles with both hands, using the edge of the boat as a fulcrum, and so raises the net out of the water, and catches the fish." *Gore v. Commissioners*, L. R. 6 Q. B. 561.

1. The legislature of Minnesota granted certain franchises to a railroad company on condition that it would construct a certain portion of its road on its present located line, "except so far as it may be necessary to change the same for engineering purposes." Under this act, it was *held* that an engineering purpose "can only mean a purpose of constructing the road on that route on which it can be built, operated, or kept in repair, in the best, cheapest, and safest manner." *McRoberts v. S. M. R. R. Co.*, 18 Minn. 108.

2. **English Bill.** — Formerly an ordinary suit in chancery was called a suit by English bill, by way of distinction from suits on the common-law side of that court, which were conducted in Norman-French or Latin. *Rap. & Law*, L. D.

An English Education is an education acquired through the medium of the English language. It is the language employed as a medium of instruction that gives distinctive character to the education, and not the particular branches of learning studied, even though a foreign language be one of the branches. *Powell v. Board of Education*, 97 Ill. 380.

English Information. — A proceeding in the court of exchequer in matters of revenue. See 28 and 29 Vict. c. 104. *Rap. & Law*, L. D.

English Language. — The mark commonly used to denote dollars, viz., \$, is not part of the English language within the meaning of the statute of the State of Vermont, that requires declarations and other pleadings to be drawn in the English language. *Clark v. Stoughton*, 18 Vt. 50. Neither are the signs of degrees and

minutes, viz., °'. *State v. Jericho*, 40 Vt. 121; s. c., 94 Am. Dec. 387. But the words *Anno Domini* are English within the statute. *State v. Gilbert*, 13 Vt. 647.

English Marriage. — The phrase "an English marriage" may refer to the place where the marriage was solemnized, or it may refer to the nationality and domicile of the parties between whom it was solemnized, the place where the union so created was to have been enjoyed. *Harvey v. Farnie*, L. R. P. D. 51.

3. A picture on paper, made by the art of photography from a glass "negative," is not an engraving within sect. 1 of the Copyright Act of Feb. 3, 1831, which provides that "any person . . . who shall . . . invent, design, etch, engrave, work, or cause to be engraved, etched, or worked, from his own design, any print or engraving, shall have the sole right of printing, reprinting, publishing, and vending such . . . print, cut, or engraving," etc. The word "engraving," as used in the act, means an engraved plate, or an impression from an engraved plate. *Wood v. Abbott*, 5 Blatchf. (U. S.) 325.

"In *Campbell v. Pickford*, Guthrie's Sel. Cas. in Sheriffs' Courts, 124, it was said *obiter* that chromo-lithographs of designs for architecture or decoration are not 'pictures' or 'engravings' within the Carriers' Act of William IV. The court said, 'They can hardly be held engravings, because they are not produced by cutting with sharp tools into a metallic or other plate, and taking impressions from it, but are obtained by a different process altogether, — from stone, on which the design is in the first instance laid down. And, accordingly, engraving and lithography are recognized as different arts. . . .' But the decision was put on the ground that a collection of such lithographs, bound in a volume with letterpress descriptions, such as Jones' 'Grammar of Ornament,' is not an 'engraving' or 'picture.'" *Browne's Jud. Interp.* 338.

4. By an act of the legislature of Oregon, a widow is entitled to dower in "all the lands whereof her husband was seized of an estate of inheritance at any time during marriage." But if the husband aliens such lands, and they "shall have been enhanced in value after the alienation," the same "shall be estimated in setting forth the widow's dower according to their value at the time they were so aliened." Under these provisions of the act, it was *held*, that,

ENJOIN.—To command; to require; as private individuals are not only permitted, but enjoined, by law, to arrest an offender when present at the time a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrongdoer escape through their negligence; . . . to command or order a defendant in equity to do or not to do a particular thing by writ of injunction.¹ (See INJUNCTION.)

ENJOYMENT.—The exercise of a right. It is to a right what possession is to a corporeal thing, and is therefore divisible, like possession, into simple, rightful, permissive, adverse, etc. Adverse enjoyment is more commonly known in the English books as "enjoyment as of right," and occurs where a person exercises a right which does not belong to him in the same manner as if he were entitled to it, and without the permission of the owner.² Enjoyment which is open, peaceable, continuous, and of right, resembles adverse possession in being a mode of acquiring by

in estimating the value of a widow's dower, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed on the land. Said the court, "It may be admitted that the word 'enhanced,' taken in an unqualified sense, is equivalent to 'increased,' and comprehends any increase in value however caused or arising; but under the circumstances it ought to be construed to include only the value caused by the improvements put upon the land by the tenant, or those under whom he claims, and not that which arises fortuitously, or from what may be called natural causes." *Thornburn v. Doscher*, 32 Fed. Rep. 810.

1. Bouv. Law Dict.

The Use of the Word "Enjoin" in a Will does not necessarily create a Precatory Trust.—A bequest was as follows: "I give to my brother, in trust for my sisters, M., C., and H., 4,000/., . . . on condition that they will support M. M.; at the demise of either or any of the above, the survivors or survivor to receive the increased income produced thereby. They are hereby enjoined to take care of my nephew, J., as may seem best in the future." It was held that the sisters took absolutely as joint tenants, and that there was no precatory or other trust in favor of the nephew. Said the court, "Is the word 'enjoin' sufficient to create a precatory trust? It is obvious on the face of the will that the testator drew a distinction between the *quasi* obligation which he wished to commend to his sisters to take care of the nephew, and the positive obligation which he made a condition in the case of M. M. The nephew was not placed on the same footing as M. M. Coupling that in-

dication of his meaning with the vague words 'as may seem best in the future,' I do not think that a precatory trust has been sufficiently imposed upon these legatees to enable the nephew to bring an action to have it carried into effect." *Moore v. Roche*, L. J. R. 55, Ch. Div. 418.

A testator, after having made his daughter, S. C., his residuary devisee and legatee, continued as follows: "I commit my granddaughter, A. L., . . . to the charge and guardianship of my daughter, S. C. . . . I enjoin upon her to make such provision for said grandchild out of my residuary estate now in her hands, in such manner, at such times, and in such amounts, as she may judge to be expedient and conducive to the welfare of my said grandchild, and her own sense of justice and Christian duty shall dictate." It was held that the daughter, S. C., took an absolute title to the residuary estate, and that it was wholly discretionary with her as to what provision should be made for the granddaughter. *Lawrence v. Cooke*, 10 East. Rep. 429; s. c., 7 Cent. Rep. 101.

2. The phrases "enjoyed by any person claiming right," and "enjoyment as of right," applied to easements in the statute 2 & 3 W. IV. c. 71, in sections 2 and 5 respectively, mean "an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a tres-

lapse of time the right so enjoyed.¹ (See also ADVERSE POSSESSION; EASEMENTS.)

ENLARGE.²

pass." *Tickle v. Brown*, 4 Ad. & El. 369.

1. Rap. & Law. L. D.

The State constitution of Florida provides that a homestead of a certain size shall be exempt from forced sale under any process of law, with certain specified exceptions; and that "this exemption shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption." Under this clause it was *held* that "any one who has owned and occupied with his family the limited amount of land and improvements mentioned, has 'enjoyed' it as exempt from forced sale, whether he has or has not been threatened with executions or other process, because the enjoyment of a homestead consists in the use and occupation of it with his family according to the clear intent and purpose of the provision." *Baker v. State*, 17 Fla. 408.

The Beneficial Enjoyment mentioned in section 21 of the succession duty act of 16 & 17 Vict. c. 51, means no more than the enjoyment of the possessor in his own right, and for his own benefit, not as trustee for another. *Atty.-Gen. v. Sefton*, 11 H. L. Cas. 256.

To be enjoyed with and to go with the Title. — A testatrix bequeathed a leasehold house to the sixth Earl of Essex "and to his successors, to be enjoyed with and to go with the title." It was *held* that the earl was absolutely entitled to the leasehold house, the words "to be enjoyed with and to go with the title" not being sufficient to create an executed or executory trust, or to cut down his interest therein to a life estate. *In re Johnson*, L. J. 53 Ch. 645.

Enjoyment of an Office. — By the corporation act, 13 Car. II. st. 2, c. 1, s. 12, one who had not taken the sacrament according to the rites of the Church of England within a year before his election, in fact, to a corporate office, was disqualified from being elected; and, if the electors had been notified of such disqualification at the time of the election, votes afterwards given to such person were then thrown away; and any candidate having the most legal votes, though in fact inferior in number to those of the disqualified candidate, was duly elected, and entitled to be sworn in. By the annual indemnity act, 50 G. III. c. 4, it was provided that disqualified persons might qualify themselves within a certain time, and that the said qualification of such

persons should be as effectual as if such persons had qualified under the previous acts. It was, however, further provided that the act should not extend "to restore or entitle any person to any office, etc., . . . already legally filled up and enjoyed by any other person." Under these acts it was *held* that the office of a common councilman of the town of H. W. was not "legally filled up and enjoyed" by a candidate who had received the greatest number of legal though not of actual votes, but who had not been sworn in. Said *L. Ellenborough, C. J.*, "There can be no legal enjoyment of an office, unless there be an enjoyment of it *de facto*." *King v. Parry*, 14 East, 549.

2. To enlarge an Estate is to increase the tenant's interest; as where the tenant in remainder conveys to the tenant of the first estate, thus increasing his estate to a fee. *Abb. L. D.*; 2 Bl. Com. 324.

To enlarge a Prisoner is to set him at large or at liberty. *Abb. L. D.*

To enlarge a Rule or Order of Court, as used in the old books, is to extend the time within which it is returnable. *Rap. & Law. L. D.*; *Reid v. Fryatt*, 1 Man. & Sel. 1.

An Enlarging Statute is one that enlarges or extends the common law as opposed to a restraining statute. For example, "clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient by statute 5 Eliz. c. 11, to make it high treason, which it was not at the common law, so that this was an enlarging statute. At common law also, spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. . . . this was, therefore, a restraining statute." 1 Bl. Com. 87. "This statute against clipping the coin hardly corresponds with the general notion, either of a remedial or an enlarging statute. . . . An enlarging or an enabling statute is one which increases, not restrains, the power of action; as the 32 Hen. VIII. c. 28, which gave bishops and all other sole ecclesiastical corporations, except parsons and vicars, a power of making leases, which they did not possess before, is always called an enabling statute. The 13 Eliz. c. 10, which afterwards limited that power, is, on the contrary, styled a restraining or disabling statute." *Christian's Note*; 1 Bl. Com. 87.

ENLIST.—To make a contract¹ to serve the government in a subordinate capacity,² either in the army or navy.³

ENLISTMENT.—See MILITARY LAW.

ENTER, ENTRY. (See BURGLARY; ENTRY, WRIT OF; JUDGMENT; RE-ENTRY.)—1. To go upon.⁴ Entry is the taking possession of lands by the legal owner.⁵ It is a remedy for the wrongful

1. Under the act of Congress of 1855, c. 136, s. 11, punishing the enticing of any seaman "who may have enlisted into the naval service of the United States" to desert therefrom, a seaman who has passed the examination at the naval rendezvous merely, but who has not been examined and passed on the receiving-ship, in accordance with the regulations of the navy, is not enlisted. "Enlistment," said the court, "must be deemed to be a contract between the party and the government. . . . Now, if the seaman, on signing the papers, and passing the rendezvous, was not entitled to any thing, then the contract for service on the one hand, and pay on the other, had not been completed; the seaman had not enlisted, and so was not a deserter." *United States v. Thompson*, 2 Sprague (U. S.), 103. See also *Barker v. Chesterfield*, 102 Mass. 130. In *Tyler v. Pomeroy*, 8 Allen (Mass.), 485, it was said, "The words enlist and enlistment in the law, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end."

Does an enlistment resemble a contract in being necessarily a voluntary act? In *Babbitt v. U. S.*, 16 C. of Cl. 213, *Davis, J.*, said in a *dictum*, "Enlistment is a technical word, derived from Great Britain, with a technical meaning. In the English Cyclopaedia it is defined to be 'a voluntary engagement to serve as a private soldier for a certain number of years.' Chambers defines it as 'the mode by which the English army is supplied with troops as distinguished from the conscription prevailing in many other countries.' Littré, the best French authority, defines conscription as an 'appel au service militaire, par voie du tirage au sort;' and he defines *enrolé*, which is the equivalent of an 'enlisted man,' as an 'enrolé volontaire.' True to this distinction between a voluntary engagement as distinguished from a conscription or draft, the statutes of the United States allow only persons who are able to contract to enter the army by enlistment (Rev. Stat. §§ 1116, 1117, 1118), and require the contract to be made for a term of years." But it has been held in Massachusetts, that a statute giving to men that had "been duly enlisted, and mustered into the military or naval service of the United States, as part of

the quota of any city or town in this Commonwealth," during the civil war, under certain circumstances, a settlement in such city or town, applied to drafted men, as well as to volunteers. "By the primary meaning of the word," said the court, "a person is 'enlisted' whose name is duly entered upon the military rolls; and it applies to those who are drafted, as well as to those who volunteer." *Sheffield v. Ohio*, 107 Mass. 282.

2. Neither in military nor in popular usage is the term "enlist," or "enlistment," ever used to signify the engagement of a commissioned officer in the military service. It is always limited to the rank and file. *Hilliard v. Stewartstown*, 48 N. H. 280.

A West Point cadet is not an enlisted man within the statutes of the United States. "The statutes employ the term 'enlist' only with reference to contracts with persons who enter the army as privates, and to certain other classes of men,—like Indian scouts and hospital stewards, who rank like soldiers, and voluntarily put themselves under military law." Rev. Stat. §§ 1099, 1100, 1101, 1102, 1103, 1104, 1107, 1108, 1111, 1112, 1115, 1155, 1162, 1180). *Babbitt v. U. S.*, 16 Ct. of Cl. 214.

3. Bouv. Law Dict., approved in *Erickson v. Beach*, 40 Conn. 286.

Officers and Enlisted Men in the Navy.—It seems to be generally understood the words *officers and enlisted men* include the whole *personnel* of the navy, regarding as enlisted men all those who sign articles of agreement called "shipping articles;" and as officers, all others who take the oath of office prescribed by the Revised Statutes, § 1757, to be taken by all persons elected or appointed to any office of honor or trust under the Government of the United States. *Monat v. U. S.*, 22 Ct. of Cl. 298.

4. Under an act prescribing a penalty for entering upon the lands of another for purposes of hunting, a man does not incur the penalty who enters with the owner's consent which is subsequently withdrawn. "The unlawful entry upon the land, which calls down the penalty of the law, is the first crossing of the owner's line. This is one entire and single act. It cannot be divided or multiplied, and it constitutes a complete offence." *Kellogg v. Robinson*, 32 Conn. 335.

5. Bouv. Law Dict.; *Guion v. Anderson*, 8 Humph. (Tenn.) 306.

dispossession of lands.¹ Entry also "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land-offices, under the acts of the United States."²

2. To set down in writing.³

3. For other meanings of the word, see note 4.

1. 3 Bl. Com. 174.

2. Chotard v. Pope, 12 Wheat. (U. S.) 588.

3. Bissell v. Beckwith, 32 Conn. 517.

To enter is to make a record of, and not merely to announce. When spoken of a judgment, the word is never synonymous with render. Under a statute authorizing a change without a rehearing of a judgment erroneously entered, the inquiry is confined to whether the judgment as rendered was actually entered, and must not extend to whether the judgment rendered was a correct judgment. *Blatchford v. Newberry*, 100 Ill. 484. And see *McLaughlin v. Doherty*, 54 Cal. 519. To enter on a docket, is to write upon or in the docket. Where a statute required an undertaking of replevin bail to be entered on the docket in order to be valid, it is not entered and is void if written upon a separate piece of paper and pinned to the docket. *Lockwood v. Dills*, 74 Ind. 59.

An action is entered within a statutory provision that a rule for reference to arbitration may be taken at any time after entry, from the time it is placed on the prothonotary's docket. *Hertzog v. Ellis*, 3 Binn. (Pa.) 209.

Where, in a condition in a policy of insurance that it should be void if the title to the insured property were changed, it was provided that "the entry of a foreclosure of mortgage" should be deemed an alienation; the meaning of this clause is that something short of an actual and complete foreclosure should be considered as a transfer or change of title, and that an entry for foreclosure, or an act which of itself and without any further formality or process on the part of the mortgagee, will deprive the assured of all right and title in the property, unless they pay the debt, shall be deemed sufficient to terminate the risk. *McIntire v. Norwich, F. Ins. Co.* 102 Mass. 230.

Entering short, or Short Entry. — "It would seem that in London it was a custom (*Giles et al. v. Perkins et als.*, 9 East, 12, and counsel *arguendo* in *Ex parte Thompson*, 1 Mont. & Mac. 102, 110) for bankers to receive bills for collection, and to enter them immediately in their customers' ac-

counts, but never to carry out the proceeds in the column to their credit until actually collected; and this was called a 'short entry,' or 'entering short.' And such bills always continued the property of the customer, unless the contrary was to be inferred from some course of dealing, whereas country bankers in England generally credited to their customers at once all bills considered good, and generally allowed drafts upon the proceeds." *Blaine v. Bourne*, 11 R. L. 119.

4. In construing the word as used in an act of Congress, providing for a forfeiture where an importer makes or attempts to make an entry by a false or fraudulent paper or practice, *Hoffman, J.*, said, "The term entry in the acts of Congress is used in two senses. In many of the acts it refers to the bill of entry, — the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction; a series of acts which are necessary to the end to be accomplished; viz., the entering of the goods. In the latter sense it is used in this statute. . . . The acts which accomplish this result, and which taken together constitute an entry, must have a beginning and an end. There is a moment when the entry is attempted to be made or begun: there is a moment when it is accomplished. The entry may be said to be commenced or attempted when the merchant presents his declaration or bill of entry. When the bill of entry has gone to the requisite clerk's desk, when accompanied by the certificate of the consul, the invoice and the oath, it is delivered to the collector, and accepted by him, then the goods may in a just sense be said to be admitted to entry, and the entry to be accomplished." *United States v. Cargo of Sugar*, 3 Sawy. (C. C.) 46. "The word 'entry,'" said *Blatchford, J.*, in interpreting the same act, "means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the United States," including the liquidation and payment of duties. Until the entire transaction between him and the government is closed, the entry of the goods is

ENTERTAINMENT—ENTICE—ENTICING AWAY.

ENTERTAINMENT. (See BALLET; BOARD; DRAMATIC; INN; STAGE.)—The reception and accommodation of guests.¹ Amusement.²

ENTICE.³

ENTICING AWAY.—See KIDNAPPING.

not to be regarded as completed. *United States v. Baker*, 5 Ben. (C. C.) 25.

Under an act forbidding British vessels to enter, or attempt to enter, any port of the United States under pain of forfeiture, a libel must not depart from the words of the statute. An allegation that such a vessel came and arrived, is insufficient. "The words 'arrive' and 'enter' are not always synonymous, and there certainly may be an arrival without an actual entry, or attempt to enter. Though, perhaps, an arrival *within* a port cannot be without an entry into the port." *United States v. An Open Boat & Lading*, 5 Mason (C.C.), 120.

Under an order directing an arbitrator to make an award within a fixed time after he has entered on the reference, he was *held* to have entered on the reference, not at the time he gave notice of his intention to proceed, but when he began the real business of the reference. *Baker v. Stephens*, L. R. 2 Q. B. 523; s. c., 8 B. & S. 445.

1 A *café* where men and women were supplied with cigars, coffee, and ginger-beer, which they there consumed, is within the meaning of an act providing that "all houses, rooms, shops, or buildings, kept open for public refreshment, resort, and entertainment," during certain hours of the night, are to be deemed refreshment-houses, and require licenses. *Muir v. Keay*, L. R. 10 Q. B. 595. So is a shop for the sale of lemonade and ginger-beer, consisting of only one room, open in front, and without seats. *Howes v. B'rd of Inland Rev.*, L. R. 1 Ex. D. 385. In the former case, *Lusk, J.*, said, "The main objection is, that there was no public entertainment, for that means a musical or other public performance. I think that is wrong. I think entertainment is something connected with the enjoyment of refreshment-rooms, tables, and the like. It is something beyond refreshment: it is the accommodation provided, whether that includes a musical or other amusement or not." "It does not," said *Blackburn, J.*, "apply to the mere giving of refreshment, nor to the mere fact of persons coming in: it means public reception." In *Howes v. B'rd of Inland Rev.*, it was said, "I do not think that we can decide this case merely upon the interpretation of that word as found in dictionaries; but it may be useful to notice that in Webster's its meaning, amongst others, is said to be, 'the receiving and accommodating of guests, either with

or without reward,' and also, 'reception, admission.' Other definitions are given with respect to another sense of the word, namely, when it is applied to amusement; but I do not think that it is used in that sense in the present statute" (*Grève, J.*). "It seems to me that 'entertainment' qualifies 'refreshment,' and that the two words taken together mean in the statute the receiving of a customer, and the providing him with drink and food of an agreeable nature. When a guest is received into the house, of a friend, and drink and food of an agreeable nature are placed before him, he is entertained; and in my opinion a man is not the less entertained because he is not asked to sit down whilst he takes refreshment" (*Mellish, L. J.*).

An ante-room to a dance-hall where beer was sold, and for admission to which a charge was made, is not open for public entertainment under this act. *Taylor v. Oram*, 1 H. & C. 370.

Where the phrase "tavern or house of entertainment" was used in a license act, the terms were held to be synonymous, and to mean common inns. *Bonner v. Welborn*, 7 Ga. 296.

Entertainment was held to be synonymous with *board* in *Scattergood v. Waterman*, 2 Miles (Pa.), 323.

2. Meetings of Recreative Religionists held on Sunday evenings, the proceedings at which consisted of sacred music and the delivery of an address, and admission to which was free, a charge being made, however, for reserved seats, are not public entertainments within the meaning of an act making places open for public entertainment or amusement, or for publicly debating on any subject on Sunday, to which persons shall be admitted by the payment of money, disorderly places. *Baxter v. Langley*, L. R. 4 C. P. 21.

"A place of dramatic entertainment," as used in a copyright law, means a place where a dramatic entertainment is exhibited or performed, even though used but once for that purpose. *Russell v. Smith*, 12 Q. B. 217; *Lee v. Simpson*, 871.

Tumbling is not an entertainment of the stage within the meaning of an act forbidding the performance of such without authority. *The King v. Handy*, 6 T. R. 286.

3. The inducement to travel westward and find new homes, held out by a Chil-

ENTIRE. — Whole ; undivided.¹

ENTITLE. — To give a claim or right to.²

ENTRY, WRIT OF. — See also EJECTMENT ; FORECLOSURE ; TITLES.

- I. Definition, 651.
- II. Degrees, 651.
- III. General Principles, 652.

- IV. Under Mortgages, 654.
- V. Mesne Profits, Damages, etc., 654.
- VI. Improvements, 655.

I. Definition. — A writ of entry is a real action to recover the possession of land from one who wrongfully withholds possession thereof.³

II. Degrees. — Anciently much importance was attached to what were called degrees.⁴ The writ was said to be in the *quibus*⁵ when it was against the original disseizor ; in the first degree,⁶ or in the *per*⁷ when against the heir or alienee of the original disseizor ; in the *per* and *cui*⁸ when there had been two descents or

dren's Aid Society to destitute children, is not an unlawful enticement. It springs from the very nature of, and is incident to, the enterprise, and has its sanction in the act incorporating the society. "The words 'entice,' 'solicit,' 'persuade,' or 'procure,' as used in the pleadings in an action, and acted upon by the courts, have been well defined: they import an initial, active, and wrongful effort." Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187.

1. A conveyance in trust "for the entire use, benefit, profit, and advantage" of a *feme covert*, creates a separate use. "The best lexicographers define 'entire' to be, whole, undivided, not participated in by others. If this be the proper meaning of 'entire,' as it certainly is, then it is evident that it was not the intention of the deed that the husband should have any interest in the negroes whatever." Heathman *v.* Hall, 3 Ired. Eq. (N. Car.) 414.

Entire Day. — An undivided day; not parts of two days, but the whole of the twenty-four hours, beginning and ending at twelve o'clock at night. Robertson *v.* State, 43 Ala. 325; Haines *v.* State, 7 Tex. App. 30; Lawrence *v.* State, 7 Tex. App. 192.

2. Conoly *v.* Gayle, 54 Ala. 269.

A man cannot be convicted of personating a person entitled to vote, if the person personated be dead at the time. Whitely *v.* Chappell, L. R. 4 Q. B. 147; s. c., 9 B. & S. 1019.

In a covenant in a marriage settlement, that, if either husband or wife should in any way become entitled to any real or personal property, the same should be conveyed to the trustees upon the trusts already declared, "entitled" was held to mean "entitled in possession." *In re Clinton's Trusts*, L. R. 13 Eq. Ca. 295.

The same construction was put upon the word as used in a devise in Brown *v.* Rigg, 55 L. J. R. Ch. D. 114.

The *cestui que* trust, in a separate use, is not "entitled to possession or receipt of the rents and profits," within the meaning of a statute which gives to persons who are so entitled the right to lease for any term not exceeding twenty-one years. Taylor *v.* Taylor, L. R. 20 Eq. Ca. 297.

3. See Bouv. L. Dict.; Rapalje & Lawrence's L. Dict.

"This remedial instrument or writ of entry is applicable to all the cases of ouster before mentioned, except that of discontinuance by tenant entail, and some peculiar species of forfeitures. Such is that of forfeiture of dower by not assigning any dower to the widow within the time limited by law. . . . But in general the writ of entry is the universal remedy to recover possession when wrongfully withheld from the owner." 3 Black. Com. *183. See also Webster *v.* Gilman, 1 Story (U. S.), 499.

4. Co. Litt. 238 b, 239 a.

5. "*Præcipe A. quod reddat B. sex acras tenæ*, etc., *DE QUIBUS idem A.*, etc. (command A. to restore to B. six acres of land of which the same A., etc.)." Bouv. L. Dict.

6. Co. Litt. 238 b; 3 Black. Com. *181. Booth makes the original wrong the first degree. Booth, R. A. 172.

7. "*Non habuit ingressum nisi PER A., qui se in illud intrusit*, etc. (he has had no entry except through A., who is himself an intruder)." 3 Black. Com. *181.

8. "*Non habuit ingressum nisi PER B., cui A. illud demisit, qui se in illud intrusit*, etc. (he has had no entry except through B., to whom A. demised the same, who was himself an intruder)." 3 Black. Com. *181.

alienations, or a descent and an alienation; in the *post*¹ when the wrong was removed beyond the *per* and *cui*. A writ of entry did not lie in the *post*; ² but by the statute of Marlbridge³ it was provided, that, when the number of degrees exceeded two, a new writ should be allowed without any mention of degrees.

There were many varieties of the writ, depending on the nature of the dispossession, any of which could be brought in any of the degrees mentioned.⁴

III. General Principles. — Writs of entry are abolished in England,⁵

1. "*Non habuit ingressum nisi post*, etc. (he has had no entry except after)." 3 Black. Com. *182.

2. 3 Black. Com. *182. But the demandant was driven to a writ of right. Co. Litt. 238 b.

3. 52 Hen. III. c. 30 (A.D. 1267).

4. "The most usual were, 1. The writs of entry *sur disseisin*, and of *intrusion* (F. U. B. 191, 203), which are brought to remedy either of those species of ouster.

2. The writs of *dum fuit infra ætatem*, and *dum fuit non compos mentis* (ibid. 192, 202), which lie for a person of full age, or one who hath recovered his understanding after having (when under age or insane) alienated his lands; or for the heirs of such alienor.

3. The writs of *cui in vita* and *cui ante divortium* (ibid. 193, 204) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit*) hath aliened her estate.

4. The writ *ad communem legem* (ibid. 207) for the reversioner after the alienation and death of the particular tenant for life.

5. The writs *in casu proviso* and *in consimili casu* (ibid. 205, 206) which lay not *ad communem legem*, but are given by stat. Gloc. 6 Edw. I. c. 7, and Westm. 2, 13 Edw. I. c. 24, for the reversioner after the alienation, but during the life, of the tenant in dower or other tenant for life.

6. The writ *ad terminum qui præterit* (ibid. 201) for the reversioner when the possession is withheld by the lessee or a stranger after the determination of a lease for years.

7. The writ *causa matrimonii prælocuti* (ibid. 205) for a woman who giveth land to a man in fee or for life to the intent that he may marry her, and he doth not; and the like in case of other deforcements."

3 Black. Com. *183, note 2.

The statute of 3 & 4 Wm. IV. c. 27, which abolishes writs of entry, mentions "writ of entry *sur disseisin* in the *quibus*, in the *per*, in the *per* and *cui*, or in the *post*, writ of entry *sur intrusion*, writ of entry *sur alienation*, *dum fuit non compos mentis*, *dum fuit infra ætatem*, *dum fuit in prisona*, *ad communem legem*, *in casu proviso*, *in consimili casu*, *cui in vita*, *sur cui in vita*, *cui ante divortium*, or *sur cui ante divortium*,

writ of entry *sur abatement*, writ of entry *quare ejecit infra terminum*, or *ad terminum qui præterit*, or *causa matrimonii prælocuti*." See Abbott's Law Dict.; Wharton's Law Lexicon.

5. Stat. 3 & 4 Wm. IV. c. 27; Wharton's L. Lex.

On account of its dilatoriness and the niceties required in the pleadings, the writ of entry fell into disuse in England long before it was expressly abolished. It was succeeded by the writ of *assize* invented by Glanvil, chief justice to Henry II., which was also abolished by stat. 3 & 4 Wm. IV. c. 27. The remedy now is generally by *ejectment*.

Statutes. — The statutes of Maine and Massachusetts are substantially alike in their main features. They declare that the writ lies to recover any estate in lands in fee-simple, fee-tail, or for life (or for years in Maine); that the demandant shall declare on his own seizin within twenty years, and allege a disseizin; that he shall set forth the estate claimed, but need not state its origin; that no actual entry is necessary, if the right of entry exists; that any person in possession of the demanded premises may be treated as a disseizor (though the tenant may disclaim or plead non-tenure); that the writ lies against one claiming less than a freehold interest, where there has been an actual ouster; that tenants in common, joint tenants, and coparceners, may join in the action or sue alone; that recovery may be for part only of the demanded premises; provisions for rents, profits, and damages for six years for the demandant (and in Maine for mesne profits against others than the tenant); provision for payment for improvements, where there has been possession for six years; provision for the abandonment of the premises to the defendant who has made improvements at the estimated value of the land without the improvements; and for the recovery by the defendant of money so paid, when evicted under title paramount to the demandant's. The Maine statute provides, that no descent or discontinuance shall defeat the right of entry, and that neither death nor marriage shall abate the action. The Massachusetts

but are in use, in a modified form, in several of the New-England States.¹

Formerly the action was strictly possessory,² but it now seems that title as well as the right of possession may be in issue.³ Possession, under claim of title, is sufficient as against one entering under no legal claim.⁴

An equitable title will not support the action,⁵ nor will a valid claim of easement either support or defeat it.⁶

The demandant must recover, if at all, upon the strength of his

statute provides for continuing the action commenced by a decedent.

1. See statutes of Maine, Massachusetts, and New Hampshire; also *Potter v. Baker*, 19 N. H. 166; *Hodgkins v. Price*, 137 Mass. 13; *Wilbur v. Ripley*, 124 Mass. 468; *Sherman v. Galbraith*, 141 Mass. 440.

Pleading.—"Under the practice in Maine, four things are necessary in a declaration in a writ of entry. *First*, The premises must be clearly described. *Secondly*, The estate which the demandant claims in the premises must be stated, whether it be a fee-simple, a fee-tail, for life or for years; and if for life, then whether for the demandant's own life, or that of another. *Thirdly*, An allegation that within twenty years the demandant was seized of the estate claimed. *Fourthly*, A disseizin by the tenant." *Sedgw. & Wait on Tr. Title to Land* (2d ed.), sec. 430; *Wyman v. Brown*, 50 Me. 139.

For description of premises, see *Baker v. Bessey*, 73 Me. 472; *Willey v. Nichols*, 59 Me. 253; *Lyman v. Dodge*, 13 N. H. 197; *Woodman v. Lane*, 7 N. H. 241.

Though the demandant must state the nature of his title, he need not show its inception. See *Stats. Mass. and Me.*; *Jordan v. Record*, 70 Me. 529. Nor can the defendant show the particular title of the demandant for the purpose of pleading matter in estoppel. *Potter v. Baker*, 19 N. H. 166.

A trustee holding the legal title need not allege that he is such. *Simpson v. Dix*, 131 Mass. 179.

The plea of *nul disseizin* admits the possession by the defendant under claim of a freehold interest. *Gammon v. Huff*, 67 Me. 184; *Swan v. Stephens*, 99 Mass. 7; *Higbee v. Rice*, 5 Mass. 344; *Washington Bank v. Brown*, 2 Met. (Mass.) 293; *Devens v. Bower*, 6 Gray (Mass.), 126; *Wiggin v. Smith*, 54 N. H. 213; *Gibson v. Bailey*, 9 N. H. 168. And in Maine the defendant admits possession, unless he files a disclaimer. *Blake v. Dennett*, 49 Me. 102.

Under the general issue the defendant may dispute the demandant's seizin, or show better title in himself. *Clarke v. Hilton*, 75 Me. 426; *Croacher v. Oesting*, 143 Mass. 195; *Wells v. Jackson*, etc., Co., 47 N. H.

235. For matters that cannot be shown under the general issue, see *Bennock v. Whipple*, 12 Me. 346; s. c., 28 Am. Dec. 186; *Kelleran v. Brown*, 4 Mass. 443; *Pray v. Pierce*, 7 Mass. 381; *Alden v. Murdock*, 13 Pick. (Mass.) 256; *Dunbar v. Mitchell*, 12 Pick. (Mass.) 373; *Melcher v. Flanders*, 40 N. H. 139. But in Massachusetts, by statute, any defence may be shown under the plea of *nul disseizin*, by filing a specification thereof. *Wheelwright v. Freeman*, 12 Met. (Mass.) 154. See further, on the subject of pleading, *Burnham v. Howard*, 31 Me. 569; *Walcutt v. Spencer*, 14 Mass. 309; *Waldo v. Mitchell*, 24 N. H. 229.

On *Amendments*, see *Howe v. Wildes*, 34 Me. 566; *Fay v. Taft*, 12 Cush. (Mass.) 448; *Wyman v. Kilgore*, 47 Me. 184.

For *Disclaimer*, see *Pettingell v. Boynton*, 139 Mass. 244.

2. 3 Black. Com. *180, 184, 185.

3. See *Derby v. Jacques*, 1 Cliff. (U. S.) 425; *Butrick v. Tilton*, 141 Mass. 93.

4. *Pettingell v. Boynton*, 139 Mass. 244; *Provident Institution v. Burnham*, 128 Mass. 458; *Porter v. Perkins*, 5 Mass. 234; *Hubbard v. Little*, 9 Cush. (Mass.) 475; *Wolcott v. Ely*, 2 Allen (Mass.), 338; *Aldrich v. Parsons*, 6 N. H. 555; *Gibson v. Bailey*, 9 N. H. 168; *Mills v. Peirce*, 2 N. H. 9. See further, *Nichols v. Todd*, 2 Gray (Mass.), 568; *Blaisdell v. Martin*, 9 N. H. 253. One who claims a freehold estate, though his grantor had less, may maintain a writ of entry. *Melcher v. Flanders*, 40 N. H. 139.

5. *Wilson v. Black*, 104 Mass. 406; *Chapin v. Universalist Soc.*, 8 Gray (Mass.), 580; *Eastman v. Fletcher*, 45 Me. 302; *Dyer v. Toothaker*, 51 Me. 380; *Ela v. Pennock*, 38 N. H. 154. See also *Shaw v. Wise*, 10 Me. 113. So where there is an active trust, the trustee may maintain a writ of entry against the *cestui que trust*. *Sawyer v. Skowhegan*, 57 Me. 500. But an equitable defence to a writ of entry is made good by statute in Massachusetts. *Nott v. Sampson Mfg. Co.*, 142 Mass. 479.

6. *Ayer v. Phillips*, 69 Me. 50; *Provident Institution v. Burnham*, 128 Mass. 458; *Cole v. Eastham*, 124 Mass. 307; *Morgan v. Moore*, 3 Gray (Mass.), 319; *Elliot v. Heath*, 6 N. H. 426; *Woodman*

own right or title,¹ and is bound to show the seizin upon which he counts.² Neither can the defendant succeed by showing the right of possession to be in a third person under whom he does not claim.³

By statute no entry is necessary if the right of immediate entry exists.⁴

Generally the action will not lie at the instance of one claiming less than a freehold estate,⁵ nor against one claiming a less estate,⁶ unless there has been an actual ouster.⁷

By statute, one or more joint tenants, tenants in common, or coparceners, may bring a writ of entry to recover the particular estate to which they are entitled.⁸

IV. Under Mortgages. (See FORECLOSURE.)—Where the mortgagee has the right of possession, he may maintain a writ of entry either before or after condition broken against the mortgagor⁹ or his alienees.¹⁰

A writ of entry in the nature of a bill in equity¹¹ may be maintained by the holder of the legal estate¹² to foreclose a mortgage in Maine¹³ and Massachusetts.¹⁴ Judgment for the demandant is conditional.¹⁵ Mortgages are foreclosed by writs of entry in New Hampshire also.¹⁶

V. Mesne Profits and Damages.—In real actions, at common law, the relief was limited, ordinarily, to the recovery of the demandant's interest in the realty;¹⁷ but by statute he is entitled also to mesne profits and damages.¹⁸

v. Lane, 7 N. H. 241; *Kenniston v. Hannaford*, 58 N. H. 268.

1. *Wiley v. Williamson*, 68 Me. 71; *Miller v. Ewer*, 27 Me. 509; s. c., 46 Am. Dec. 619; *Butrick v. Tilton*, 141 Mass. 93; *Crouch v. Eveleth*, 15 Mass. 305; *Bussey v. Grant*, 20 Me. 281; *Thayer v. McLelland*, 23 Me. 417. But he need only show a right of possession good as against the defendant. *Pettingell v. Boynton*, 139 Mass. 244. See also *Howard v. College*, 116 Mass. 117.

An assignee may maintain the action, if his assignor might. *Austin v. Stevens*, 24 Me. 520.

2. *Bussey v. Grant*, 20 Me. 281; *Thayer v. McLelland*, 23 Me. 417.

3. *King v. Barns*, 13 Pick. (Mass.) 24; *Gammon v. Huff*, 67 Me. 184; *Wiggin v. Smith*, 54 N. H. 213; *Enfield v. Permitt*, 8 N. H. 512; s. c., 31 Am. Dec. 207. Compare *Kenniston v. Hannaford*, 55 N. H. 268. See also *Brinley v. Whiting*, 5 Pick. (Mass.) 347.

Defendant may plead a subsequently acquired title. *Bailey v. March*, 3 N. H. 274.

4. See Stats. Me. and Mass. See *Wells v. Prince*, 4 Mass. 64.

5. *Fay v. Taft*, 12 Cush. (Mass.) 448.

6. *Kerley v. Kerley*, 13 Allen (Mass.), 286; *Mathews v. Demeritt*, 22 Me. 312.

7. So by statute, *Wyman v. Brown*, 50 Me. 139; *Gregory v. Tozier*, 24 Me. 308; *Dolby v. Miller*, 2 Gray (Mass.), 135.

8. *Butrick v. Tilton*, 141 Mass. 93. See also *Chandler v. Simmons*, 97 Mass. 508; *Oxnard v. Proprietors of Kennebeck Purchase*, 10 Mass. 179. For like principle, see *Greenlaw v. Greenlaw*, 13 Me. 182; *Melvin v. Proprietors*, 16 Pick. (Mass.) 161; *Williams v. Hilton*, 35 Me. 547; s. c., 58 Am. Dec. 729.

9. *Blaney v. Bearce*, 2 Me. 132.

10. *Stewart v. Davis*, 63 Me. 539.

11. *Holbrook v. Bliss*, 9 Allen (Mass.), 69; *Cochran v. Goodell*, 131 Mass. 465.

12. *Young v. Miller*, 6 Gray (Mass.), 152; *Somes v. Skinner*, 16 Mass. 348.

13. *Treat v. Pierce*, 53 Me. 71.

14. *Holbrook v. Bliss*, 9 Allen (Mass.), 69.

15. *Amidown v. Peck*, 11 Met. (Mass.) 467; *Powers v. Patten*, 71 Me. 583; *Johnson v. Brown*, 31 N. H. 405. But not unless a conditional judgment is moved for. *Provident Institution v. Burnham*, 128 Mass. 458.

16. *Green v. Cross*, 45 N. H. 578.

17. *Sedgw. & Wait's Tr. Title Land* (2d ed.), sec. 646.

18. *McMahan v. Bowe*, 114 Mass. 140; *Raymond v. Andrews*, 6 Cush. (Mass.) 265;

ENUMERATE — ENVOY — EQUAL — EQUIPMENT.

VI. Improvements. — So, too, the common law did not usually make any allowance for improvements made by the tenant on the disputed premises,¹ but by statute he is frequently allowed for such improvements.²

ENUMERATE.³

ENVOY. (See CONSULS and AMBASSADORS.) — An ambassador of second class.⁴

EQUAL.⁵

EQUIPMENT.⁶

Curtis *v.* Francis, 9 Cush. (Mass.) 427; Richards *v.* Randall, 4 Gray (Mass.), 53; Larrabee *v.* Lumbert, 36 Me. 440; Pierce *v.* Strickland, 25 Me. 277; Withington *v.* Corey, 2 N. H. 115. Rents and profits need not be demanded in the writ. Provident Institution *v.* Burnham, 128 Mass. 458.

1. Sedgw. & Wait's Tr. Title to Land (2d ed.), sec. 690.

2. See Backus *v.* Chapman, 111 Mass. 386; Curtis *v.* Gay, 15 Gray (Mass.), 36; Saunders *v.* Robinson, 7 Met. (Mass.) 310; Daggett *v.* Tracy, 128 Mass. 167; Flanders *v.* Davis, 19 N. H. 139.

Authorities for Writ of Entry. — Stearns, Real Actions; Jackson, Real Actions; Booth, Real Actions; Coke on Littleton, 238 b, 239 a; 3 Black. Com. *180-185; Sedgwick & Wait on the Trial of Title to Land; Jones on Mortgages (2d ed.), secs. 718, 1276-1316; Boone on Mortgages, secs. 119, 206.

3. In a provision in the Rev. Sts. of N. Y., the terms of which were that "no beneficial power, general or special, hereafter to be created, other than such as are already enumerated and defined in this article, shall be valid," the words "enumerated and defined," it was *held*, are not to be read literally as limiting beneficial powers to the few specially detailed in the previous sections. "The use of the word 'enumerated' may have been infelicitous and inexact. That it was used in the sense of 'mentioned,' 'indicated,' 'referred to,' 'authorized,' cannot well be doubted; that is the true construction. Cutting *v.* Cutting, 20 Hun (N. Y.), 360; s. c., 86 N. Y. 522.

4. Heathfield *v.* Chilton, 4 Burr. 2015.

5. Equal means "not less than" in a contract to keep a number of boats on a steamboat line equal to the number granted in the contract. "It always excludes the idea of inferiority; and therefore when we assert that two things are equal to each other, we give it more of mathematical accuracy, because we deny the inferiority of either to the other; but when we say that one person or thing is equal to another,

we do not necessarily nor ordinarily deny its superiority to the other. We, in such assertion, recognize the notion that the greater includes the less, and so do not deny that the greater equals the less, because it contains that which does, in the strictest sense, equal the less. Indeed, this phrase, 'equal to,' when coupled with an adverbial modification, contains a strong implication of superiority. 'Washington was, at least, equal to Arnold in patriotism,' is a statement which, though true, by no means converts the traitor into a lover of his country." Stewart *v.* Lehigh Valley R. Co., 38 N. J. 505.

In a statute of descent and distribution, which, after providing for descent to children, continued, "And if the intestate shall have no child or children at the time of his decease, such estate shall descend *equally* to the next of kin, in equal degree, and those who represent them, the word is not used in its verbal sense, as it is in the former part of the section, where it is said that 'the portions of all the male children shall be equal,' where it intends that they shall be on a level, or to the same amount; but the term 'equally,' as an adverb, is used in one of its adverbial senses, and intends, in like manner, or in the same manner as has been before provided." Auger *v.* Taylor, 2 Tyler (Vt.), 260.

The word, however, generally refers to size or quantity, meaning *like* or *same*. Bannister *v.* Bull, 16 S. Car. 220. But in a statutory provision that in a suit prosecuted or defended by the representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, should "not be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person," "equally" does not relate to the degree of knowledge of the opposite party, but is used in the sense of "alike" to preclude the evidence of the party where the facts to which he is called were known to both. Kimball *v.* Kimball, 16 Mich. 211.

6. In an act exempting from taxation the buildings and grounds of charitable and

EQUITABLE ASSETS—EQUITABLE ASSIGNMENTS.

EQUITABLE ASSETS.—See ASSETS.

EQUITABLE ASSIGNMENTS.

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| III. What is assignable in Equity, 658. | VII. Rights of Assignee, 663. |
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I. Definition.—An equitable assignment is such an assignment as gives the assignee a title, which, though not cognizable at law, equity will recognize and protect.¹

II. What constitutes an Equitable Assignment.—No particular form is necessary in order to constitute a valid equitable assignment of a debt or other *chose in action*. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund.²

benevolent institutions and their equipments, this term "means the visible, tangible furniture, fixtures, and apparatus on the premises which are usual and necessary for the operations there conducted. In this case it clearly embraces the library and silver vessels, as well as the necessary furniture for the college buildings; but it is a term altogether inappropriate as a description of the endowments or investments by the income from which the charitable work is sustained and its expenses defrayed." App. Tax. Ct. of Baltimore v. St. Peter's Academy, 50 Md. 321.

Under a description of property in a deed of trust, as "all equipments, machinery, implements, tools, instruments, and fixture of whatever kind or nature, that now are, or may hereafter be, belonging or appertaining to said mines, or any of them, or used in connection therewith," "equipments" was held to include the pit-mules that were essential to the operation of the mines. Said *Hall*, 7, "One of the definitions of the word 'equipment,' given by Mr. Webster, is '3 (Civ. Eng.), the necessary adjuncts of a railway, as cars, locomotives.' The equipments of a coal-mine are all its necessary adjuncts, and include pit-mules, which are an essential part of its apparatus, and without which it cannot be operated." In the absence of such a connecting phrase as "such as," "consisting of," or "as follows," the meaning of the general word "equipment" cannot be held to be limited by the particular words which follow it. *Rubey v. Mo. Coal & Mining Co.*, 21 Mo. App. 159.

When a barge becomes necessary in navigating a boat, and one is hired for that purpose, its letting is material furnished for the equipment of the boat within the meaning of a lien law. *Gleim v. Steamboat Belmont*, 11 Mo. 113.

1. Abbott's L. Dict.

At common law, no possibility, right, title, or thing in action could be granted to third persons, the grounds being that such assignment would violate the rules against champerty and maintenance. *Lampet's Case*, 10 Coke, 48; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623.

The only exceptions were in case of the king, to whom an assignment of a chose in action could always be made,—*Miles v. Williams*, 1 P. Will. 252; *U. S. v. Buford*, 3 Pet. (U. S.) 12,—and in the case of annuities which could be assigned. *Gerrard v. Boden*, Hill, 80. This is still the general rule at law. But courts of equity have disregarded this rule, and give effect to assignments of contingent interests and expectancies, as well as assignments of choses in action. *Bacon v. Bonham*, 33 N. J. Eq. 614; *East Lewisburg Mfg. Co. v. Marsh*, 91 Pa. St. 96; *Trull v. Eastman*, 3 Met. (Mass.) 121. *Sed. cf. In re Duggan* L. R. 8 Eq. 697; *Patton v. Mfg. Co.*, 3 Colo. 265.

2. 2 Story Eq. Jur. (13th ed.) 365; *Bispham's Eq.* (4th ed.) 219.

What is necessary to constitute a valid equitable assignment has been well expressed by the Supreme Court of the United States in *Christmas v. Russell*, 14 Wall. (U. S.) 69.

"To make an equitable assignment, there must be such an appropriation of the subject-matter as to confer a complete and present right on the party intended to be provided for, even where the circumstances do not admit of its immediate exercise. A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. If the holder of the fund retains control over it, such as power on his own account to collect it, or

to revoke the disposition promised, that is fatal to the transaction as an equitable assignment."

The question was discussed in *Bank of Commerce v. Bogy*, 44 Mo. 13, and the court said, "A bill drawn upon a debtor does not of itself operate as an assignment in equity of the debt, even if it is negotiated for a good consideration. . . . In *Kimball v. Donald*, 20 Mo. 577. *Judge Leonard* clearly states the recognized doctrine: 'Any thing that shows an intention on the one side to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration.' . . . In *Dickenson v. Phillips*, 1 Barb. (N. Y.) 454, the court, in holding that the transaction under consideration did not amount to an assignment, recognize the doctrine in saying that no particular form of words is necessary to constitute an equitable assignment. But there must be evidence of intention to appropriate the fund." See also *Shannon v. Hoboken*, 37 N. J. Eq. 123; *East Lewisburg L. & M. Co. v. Marsh*, 91 Pa. St. 96; *Row v. Dawson*, 1 Ves. Sr. 331; *Pass v. McCrea*, 36 Miss. 143; *Kimball v. Donald*, 20 Mo. 577.

No particular form is necessary in order to constitute a valid assignment. An oral or written declaration may be as effectual to constitute an assignment as the most formal instrument. *Kessil v. Albetis*, 56 Barb. (N. Y.) 362; *Spiker v. Nydegger*, 30 Md. 315; *Noyes v. Brown*, 33 Vt. 431; *Newby v. Hill*, 2 Met. (Ky.) 530; *Arpin v. Burch* (Wis.), 32 N. W. Rep. 681; *Gage v. Dow*, 59 N. H. 383; *Tingle v. Fisher*, 20 W. Va. 497; *Bower v. Blue Stone Co.*, 30 N. J. Eq. 171.

But in *Georgia*, where the thing assigned is a chose in action, the assignment must be in writing. *Ins. Co. v. Walrar*, 30 Fed. Rep. 653.

It is sufficient if the intent to appropriate the fund is implied, though not expressed in terms. *Garnsey v. Gardiner*, 49 Me. 167; *Smith v. Sterritt*, 24 Mo. 260. But the transfer of the fund to the control of the assignee must be absolute. *Dickenson v. Phillips*, 1 Barb. (N. Y.) 454; *Hoyt v. Story*, 3 Barb. (N. Y.) 262.

The true test whether an absolute appropriation is made out or not, depends upon the point at whose risk the property is, and, until the creditor has consented, the property will clearly be at the risk of the assignor or remitter. *Williams v. Everett*, 14 East, 582; *Tiernan v. Jackson*, 5 Pet. (U. S.) 580; *In re Baber* L. R. 10 Eq. 554.

The following have been held to constitute Valid Equitable Assignments.—A draft drawn by A. on B., in favor of C., for a valu-

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able consideration, when drawn on a designated fund. *McWilliams v. Webb*, 32 Iowa, 577; *Conway v. Cutting*, 51 N. H. 407; *Walker v. Manro*, 18 Mo. 564; *McLellan v. Walker*, 26 Me. 114; *Cutts v. Perkins*, 12 Mass. 206; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Code v. Carlton*, 18 Neb. 328.

So of a bill of exchange. *Kahnweiler v. Anderson*, 78 N. Car. 133.

But if the draft be not accepted, it does not amount to an assignment. *Gammel v. Carmer*, 55 Mich. 201; s. c., 54 Am. Rep. 363; *Canton Bank v. D. S. W. Ry. Co.*, 52 Iowa, 378; *Jones v. Pacific, etc., Co.*, 13 Nev. 359.

Any order, writing, or act which makes an appropriation of the fund. *Shannon v. Hoboken*, 37 N. J. Eq. 123; *Brokaw v. Brokaw*, 41 N. J. Eq. 215; *Bank of Commerce v. Bogy*, 44 Mo. 13; *East Lewisburg L. & M. Co.*, 91 Pa. St. 96; *McLellan v. Walker*, 26 Me. 114; *Cutts v. Perkins*, 12 Mass. 206; *Wiggins v. McDonald*, 18 Cal. 126; *Newby v. Hill*, 2 Metc. (Ky.) 530.

Where the owner of goods then in the hands of an agent promised a creditor by letter that he would direct the agent to deliver the goods to the creditor, and subsequently gave such direction. *Cabada v. De Jorgh*, 1 W. N. C. (Pa.) 342.

The delivery of the written evidence of a debt. *Mowry v. Todd*, 12 Mass. 281.

The symbolical delivery of the evidence of a debt, when an actual transfer is impossible. *Gayoso Savings Institution v. Fellows*, 6 Coldw. (Tenn.) 467; *Jones v. Witter*, 13 Mass. 304; *Prescott v. Hull*, 9 Johns. (N. Y.) 284.

A parol assignment of a debt. *Tibbets v. George*, 5 Ad. & El. 107; *Galway v. Fullerton*, 2 C. E. Green (N. J.), 389.

Of a promissory note. *Foster v. Emery*, 7 Fost. (N. H.) 269.

Of rent. *Morton v. Naylor*, 1 Hill (N. Y.), 583; *Esling v. Zantzinger*, 1 Harris (Pa.), 50.

Of a judgment. *Ford v. Steuart*, 19 Johns. (N. Y.) 342; *Braham v. Ragland*, 3 Stew. (Ala.) 247.

Of an action for a debt. *Brewer v. Mills*, 24 N. H. 292.

Agreement to transfer stock as collateral security, followed by a letter of attorney to enforce the same. *Lightner's Appeal*, 82 Pa. St. 301; *Taft v. Bowker*, 132 Mass. 277.

A power of attorney to collect a debt, and an order for the amount due. *State Bank v. Hastings*, 15 Wis. 83; *Wallace v. The Chair Co.*, 16 Gray (Mass.), 209; *McEwen v. Johnson*, 7 Cal. 258.

The placing of a receipt for goods attached, approved by the plaintiff's attorney, in the hands of that attorney. *Jewett v. Dockray*, 34 Me. 45.

A deposit of a life policy to secure a sum

III. What is assignable in Equity. — In general, equity favors the transfer of things not in possession.¹ But there are certain

of money. *Dufaur v. The Professional Life Assurance Co.*, 25 Beav. 599.

A letter charging a life policy with a debt. *Jones v. Consolidated Investment Assurance Co.*, 26 Beav. 256.

An order drawn by A. on B., who had agreed to purchase land belonging to A., to pay the purchase-money to C., a creditor of A., was *held* to be a valid equitable assignment of the purchase-money. *Yeates v. Groves*, 1 Ves. Jr. 281.

So where a firm makes a remittance to its agent for the purpose of paying a particular draft. *Harwood v. Tucker*, 18 Ill. 544.

So an order drawn for value by a legatee on the executor for the amount of his legacy. *Anderson v. DeSoer*, 6 Gratt. (Va.) 363.

So where a creditor having a claim against a debtor, placed it in the hands of an attorney, under an agreement by which the latter was to have one-third of what was to be realized. *Fairbanks v. Sargent*, 104 N. Y. 108.

And the delivery of a savings-bank book, although unaccompanied by a written assignment, and with the intention only that it shall be held as collateral security for the payment of a debt, is an equitable assignment of the deposit represented by the book. *Taft v. Bowker*, 132 Mass. 277.

As to when a covenant to assign amounts to an assignment. See *Townshend v. Windham*, 2 Ves. Sr. 1.

The following have been held not to constitute Valid Equitable Assignments. — A simple draft or check not drawn upon a designated fund. *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; *Loyd v. McCaffrey*, 46 Pa. St. 410; *Bank v. Gish*, 22 Pa. St. 13; *Laclede Bank v. Schuler*, 120 U. S. 511; *Kimball v. Donald*, 20 Mo. 577; *Sands v. Matthews*, 27 Ala. 399; *Bush v. Foote*, 58 Miss. 5; s. c., 38 Am. Rep. 810; *Canton Bank v. D. S. W. Ry. Co.*, 52 Iowa, 378; *Jones v. Pacific, etc., Co.*, 13 Nev. 359.

A covenant by a debtor to pay certain debts owing by him out of a designated fund, when the same shall be received by him. *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Christmas v. Griswold*, 8 Ohio St. 563; *Pearce v. Roberts*, 27 Mo. 179.

A bill of exchange drawn by a creditor upon his debtor, even where negotiated for a good consideration. *Bank of Commerce v. Bogy*, 44 Mo. 13.

A check. *Tyler v. Gould*, 48 N. Y. 682; But compare *Munn v. Burch*, 25 Ill. 35; *Rhodes v. Childs*, 64 Pa. St. 18. Otherwise if the check be so worded as to leave no doubt of the drawer's intention to transfer the entire deposit specifically to the

payee. *Kingman v. Perkins*, 105 Mass. 111.

A mere verbal agreement between a plaintiff and a third person that the latter shall receive the money sued for. *Seaver v. Bradley*, 6 Me. 60.

A direction to an agent to collect money and hand it over to a third party. *Rodick v. Gaudell*, 1 De G. M. & G. 763.

An order in the form, "Please pay L. and A. my wages from month to month as they become due, and what may now be due," drawn on the clerk of a corporation. *Carrique v. Sidebottom*, 3 Met. (Mass.) 297.

An order on funds of a third person, not a banker, not accepted by or presented to the drawee. *Poole v. Carhart* (Iowa), 32 N. W. Rep. 16.

A promise to pay money when the debtor receives a debt due him from a third person. *Field v. Megaw*, L. R. 4 C. P. 660; *Connely v. Harrison*, 16 La. Ann. 41.

An assignment of existing chattels, coupled with words which amount to a mere license to seize after-acquired property, is not a valid assignment of the latter. *Reeve v. Whitmore*, 4 De G. Jo. & S. 1; s. c., 33 L. J. Ch. N. S. 63.

So, a conveyance of land before the grantor has acquired title, is not an assignment, but operates an agreement to convey, which may be enforced in chancery. *Chew v. Barnet*, 11 S. & R. (Pa.) 389; *Vreeland v. Blanveet*, 8 C. E. Green (N. J.), 483. See also *Dickenson v. Phillips*, 1 Barb. (N. Y.) 454.

1. The following have been held to be assignable in Equity. — An expected legacy. *Bacon v. Bonham*, 33 N. J. Eq. 614.

A devise of land upon a contingency. *Wright v. Wright*, 1 Ves. Sr. 408.

The expectancy of an heir of his father's estate. *Hannon v. Christopher*, 34 N. J. Eq. 459; *Jenkins v. Stetson*, 9 Allen (Mass.), 128; *Power's Appeal*, 63 Pa. St. 443; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84; *Varrick v. Edwards*, 1 Hoff. Ch. (N. Y.) 382; *Hobson v. Trevor*, 2 P. Wms. 191; *Wethered v. Wethered*, 1 Sim. (Eng. Ch.) 182; *Fitzgerald v. Vestal*, 4 Sneed (Tenn.), 258; *Steel v. Frierson*, 85 Tenn. 430. But compare *Meedles v. Meedles*, 7 Ohio St. 432.

A widow's interest in her deceased husband's estate. *Powell v. Powell*, 10 Ala. 900.

A demand which would survive to the personal representatives of the party after his death. *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Grant v. Ludlow*, 8 Ohio St. 1; *Zabriskie v. Smith*, 13 N. Y. 322. Compare *Gray v. McCallister*, 50 Iowa, 497, where a claim which would not so survive was *held* assignable.

exceptions to the rule, generally founded on principles of public policy.¹

A debt not in existence, but afterwards to accrue. *Hassie v. Congregation*, 35 Cal. 378; *Cutts v. Perkins*, 12 Mass. 206; *Garland v. Harrington*, 51 N. H. 409; *Field v. The Mayor, etc.*, 6 N. Y. 179.

A due bill. *Groot v. Story*, 41 Vt. 533.

A contract to do work on a street. *Taylor v. Palmer*, 31 Cal. 240; *St. Louis v. Clemens*, 42 Mo. 69.

One-half of a contract to build a bridge. *Dougherty v. Grouff* (Neb. 1888), 36 N. W. Rep. 351.

An executory contract to sell and deliver oil. *Tyler v. Barrows*, 6 Robt. (N. Y.) 104.

Rights under executory contracts. *Hawley v. Bristol*, 39 Conn. 26; *Bracket v. Blake*, 7 Met. (Mass.) 335; *Phila. v. Lockhard*, 73 Pa. St. 211; *Cochran v. Collins*, 29 Cal. 129; *St. Louis v. Clemens*, 42 Mo. 69.

Freight to be earned. *Douglas v. Russell*, 4 Sim. (Eng. Ch.) 524; *Gardner v. Lachlan*, 4 My. & Cr. 129; *Curtis v. Auber*, 1 Jac. & Wal. 506.

The future earnings of a ship. *In re Ship Warre*, 8 Price (Exch.), 269.

The share in the profits of a voyage which a seaman in a whaling-ship receives in lieu of wages. *Gardner v. Hoy*, 18 Pick. (Mass.) 168.

The head matter and whale-oil to be caught in a whaling voyage in progress at the time of the assignment. *Langton v. Horton*, 1 Hare, 549.

Wages due, and to become due. *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Boyley v. Leonard*, 2 Allen (Mass.), 407; *Augur v. N. Y. Belting Co.*, 39 Conn. 536; *Garland v. Harrington*, 51 N. H. 409; *McCormick v. Towns* (N. H.), 9 Atl. Rep. 97.

But a person not engaged in any employment of another, and not under contract of employment, cannot, even for a valuable consideration, make a valid assignment of all the wages which he may earn in the future, without limit as to time and amount. *Lehigh Valley R. R. Co. v. Woodring* (Pa.), 9 Atl. Rep. 58; *Herbert v. Bronson*, 125 Mass. 475.

So where the assignment is made with fraudulent intent. *Runnels v. Bosquet*, 60 N. H. 38.

Claims against Indian tribes, which the United States Government was expected to pay. *Coquillard v. French*, 19 Ind. 274.

Interest in a claim to be established against a foreign government before a mixed commission. *Peugh v. Porter*, 112 U. S. 737.

A claim not at the time legally enforceable, and the exact amount of which is not known. *Jones v. New York*, 90 N. Y. 387.

The right given by the statute to a mortgagor to redeem the right in equity after it has been sold on execution. *Bigelow v. Willson*, 1 Pick. (Mass.) 485.

A bill of lading for a cargo of oil. *Ex parte Barber*, 3 Mont. Deac. & De G. 174.

Machinery at a future time to be added to, or substituted for, existing machinery. *Holroyd v. Marshall*, 10 H. L. Cas. 191; s. c., 6 Jur. N. S. 931. Compare *Moody v. Wright*, 13 Met. (Mass.) 17.

Specific property in controversy in an action of replevin. *Taylor v. Galland*, 3 Iowa, 17.

The equitable rights of a debtor. *Edmeston v. Lyde*, 1 Paige (N. Y.), 637.

A lien of an attorney for services. *Day v. Bowman*, 109 Ind. 383.

A chance in a land lottery authorized by a statute of Georgia. *Dugas v. Lawrence*, 19 Ga. 557.

An interest created by a pledge of personal property. *Russell v. Filmore*, 15 Vt. 130.

The interest of the vendee in a contract for the sale of real estate. *Brayton v. Sawin*, 5 Wis. 117.

The general grant of a mining privilege. *McBee v. Loftis*, 1 Strobb. (S. Car.) Eq. 90.

Money in the hands of a county treasurer, being part of a tax collected in aid of a railroad company. *Manning v. Mathews*, 70 Iowa, 503.

The next year's crop. *Forman v. Proctor*, 9 B. Mon. (Ky.) 124.

Covenants running with the land. *Redwine v. Brown*, 10 Ga. 311.

A right of action for the value of goods converted where the tort is waived. *Hawk v. Thorn*, 54 Barb. (N. Y.) 164; *Bank v. Clark*, 48 Barb. (N. Y.) 6; *McKee v. Judd*, 12 N. Y. 622. See also *Ringe v. Coleraine*, 11 Gray (Mass.), 157.

The right to proceed against a vendor for fraud or breach of warranty. *Haight v. Hoyt*, 19 N. Y. 464.

A right of action for damages to property. *North v. Turner*, 9 S. & R. (Pa.) 244; *Butler v. N. Y. & E. R. R. Co.*, 22 Barb. (N. Y.) 110.

A right of action against a railway company for killing stock. *Everett v. Railway Co.* (Iowa), 35 N. W. Rep. 609; *East Tenn., etc., R. Co. v. Henderson*, 1 Lea (Tenn.), 1.

And where a note is owned by two, an assignment by one of his share is valid in equity. *Fordyce v. Nelson*, 91 Ind. 447. See also *Hope v. Hayley*, 85 E. C. L. R. (5 El. & Bl.) 829; *Hinkle v. Wanzer*, 17 How. (U. S.) 353.

1. The following have been held not to be assignable. — The commission of an officer

in the army. *Calisher v. Forbes*, L. R. 7 Ch. 109; *Addison v. Cox*, L. R. 8 Ch. 76. But compare *L'Estrange v. L'Estrange*, 1 Eng. L. & E. 153; s. c., 20 L. J. Ch. 355.

The full or half pay of an officer in the army or navy. *Davis v. Duke of Marlborough*, 1 Swanst. 79.

Salary, not yet due, of a public officer. *Beal v. McVickar*, 8 Mo. App. 202; *King v. Hawkins* (Ariz. 1888), 16 Pac. Rep. 434.

The profits of a public office. *Hill v. Paul*, 8 Clark & F. 295.

Claims against the United States in some cases. *Becker v. Sweetzer*, 15 Minn. 327; *Wanless v. U. S.*, 6 Ct. of Cl. 123; *Dankless v. Braynard*, 3 Daly (N. Y.), 183; *Bates v. U. S.*, 4 Ct. of Cl. 569; *St. Paul & D. R. R. v. U. S.*, 112 U. S. 733.

A pre-emption right. *Whitney v. Buckman*, 13 Cal. 536.

A bare right to file a bill in equity. *Dayton v. Fargo*, 45 Mich. 153; *Marshall v. Means*, 12 Ga. 61; *Jones v. Babcock*, 15 Mo. App. 149.

A right of action to set aside a release from the obligation of a covenant on the ground that such release was fraudulently procured. *Milwaukee, etc., R. Co. v. Milwaukee, etc., R. Co.*, 20 Wis. 174.

A mere right of action for a tort. *Dunklin v. Wilkins*, 5 Ala. 199; *Dickinson v. Seaver*, 44 Mich. 624; *McKee v. Judd*, 12 N. Y. 622; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Davis v. Herndon*, 39 Miss. 484; *Linton v. Hurley*, 104 Mass. 353. But compare *Gray v. McCallister*, 50 Iowa, 497, where it was held that a claim based on a personal tort which dies with the party (in this case malicious prosecution) is assignable.

A right of entry for condition broken. *Warner v. Bennett*, 31 Conn. 486; *Southard v. C. R. R. Co.*, 2 Dutcher (N. J.) 13; *McMahon v. Allen*, 34 Barb. (N. Y.) 56; *Gwynn v. Jones*, 2 Gill & J. (Md.) 173.

A claim against a trustee, where tenant for life of a trust having mortgaged it, and the estate having been sold by the mortgagee, after the sale the purchaser and mortgagee, for a nominal consideration, assigned to the tenant for life certain alleged arrears of interest and profits of part of the trust fund, which, as the plaintiff alleged, the trustee had made in excess of the interest for which he had accounted. *Hill v. Boyle*, L. R. 4 Eq. 260.

A contract founded in personal trust and confidence. *Lansden v. McCarthy*, 45 Mo. 106; *Boykin v. Campbell*, 9 Mo. App. 495.

A contract not yet made, nor right to compensation for services which the would-be assignor is under no obligation to perform. *Skipper v. Stokes*, 42 Ala. 255; *Jermyn v. Moffitt*, 75 Pa. St. 399; *Farnsworth v. Jackson*, 32 Me. 419; *Hall v. Jackson*, 20 Pick. (Mass.) 194.

The right to cancel usurious contracts by action. *Boughton v. Smith*, 26 Barb. (N. Y.) 635. Compare *Spicer v. Jarrett*, 58 Tenn. 454.

A mere inchoate right to a mechanic's lien. *Goodman v. Pence*, 21 Neb. 459.

The lien of a vendor for purchase-money. *Richards v. Leaming*, 27 Ill. 431; *Keith v. Horner*, 32 Ill. 524; *Eldel v. Jones*, 85 Ill. 384; *Dunklin v. Wilkins*, 5 Ala. 199; *Iglehart v. Armiger*, 1 Bland (Md.), 519.

A covenant to deliver boards, or do any collateral act, though the words "to order" are inserted. *Breen v. Ingram*, 1 Bay (S. Car.), 173.

A license to shoot, fish, etc. *Cowles v. Kidder*, 24 N. H. 364; s. c., 2 Am. Ldg. Cas. (5th ed.) 550. Compare *Wickham v. Hawker*, 7 M. & W. 63.

See title, "Champerly and Maintenance." The liability to be sued, the exceptions to the rule being, "The assignment of liabilities or covenants which run with the land; the assignment of liability for a debt, by agreement among all the parties interested; and the assignment of liabilities in consequence of marriage, bankruptcy, or death." *Bispham's Eq.* (4th ed.) 227; *Dacey on Parties to Actions*, 76, 234; *Jones v. Walker*, 2 Paine (U. S.), 688; *Van Scoter v. Lefferts*, 11 Barb. (N. Y.) 140.

It has also been held "that an order drawn on a fund for only a part thereof does not amount to an assignment of that part, for the reason that a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of the debtor. In other words, . . . a part only of a *chose in action* cannot be assigned" without the consent of the debtor. *Bispham's Eq.* (4th ed.) 219; 2 Story Eq. Jur. (13th ed.) 363; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Chicago R. Co. v. Nichols*, 57 Ill. 467; *Moore v. Gravelot*, 3 Ill. App. 442; *Jermyn v. Moffitt*, 75 Pa. St. 399; *Tyler v. Tuel*, 6 Cranch (C. C.), 324; *Beardsen v. Morgan*, 70 Me. 22; *Gibson v. Cooke*, 20 Pick. (Mass.) 15; *Walker v. Manro*, 18 Mo. 564; *Blin v. Pierce*, 20 Vt. 25; *Stanbery v. Smythe*, 13 Ohio St. 495; *Gibson v. Finley*, 4 Md. Ch. 75; *Wilson v. Carson*, 12 Md. 55; *Westham Granite Co. v. Chandler*, 4 Mackey (D. C.), 32. But compare *Bank v. McLoon*, 73 Me. 498; s. c., 40 Am. Rep. 388; *Caldwell v. Hartuppee*, 70 Pa. St. 74; *Field v. Mayor*, etc., 6 N. Y. 179; *McMenomy v. Ferrers*, 3 Johns. (N. Y.) 72; *Superintendent*, etc., *v. Heath*, 15 N. J. Eq. 22; *Brown v. Dunn* (N. J.), 11 Atl. Rep. 149; *Moody v. Kyle*, 34 Miss. 506; *Whitney v. Cowan*, 55 Miss. 626; *Stanbery v. Smythe*, 13 Ohio St. 490; *Campbell v. Hildebrandt* (Tex.), 3 S. W. Rep. 243; *Godbold v. Kirkpatrick* (S. Car.), 1 S. E. Rep. 156.

In *Indiana* such an assignment may be

IV. Notice by Assignee. — In order to perfect his title as against the debtor, subsequent *bona fide* purchasers from the assignor, and subsequent assignees, the assignee must give notice of the assignment to the debtor, or the party in whose hands is the fund intended to be assigned.¹

sustained for some purposes. *Sapping v. Duffy*, 47 Ind. 51.

A municipality is not bound to recognize such a partial assignment of a contract to which it is a party. *Philadelphia's Appeal*, 86 Pa. St. 179.

1. In *Spain v. Hamilton*, 1 Wall. (U. S.) 604, *Wayne, J.*, said (p. 624), "But in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

So in *Loomis v. Loomis*, 26 Vt. 198, it was *held* that until notice of an assignment is given to the debtor, the rights and interests of the debtor are in no way affected by the assignment."

And this seems to be the rule in most of the States. See *Cloofelter v. Cox*, 1 Sneed (Tenn.), 330; *Hartford Insurance Co. v. Van Buskirk*, 14 Conn. 145; *Wood v. Partridge*, 11 Mass. 488; *Littlefield v. Smith*, 17 Me. 327; *Beckwith v. Bank*, 9 N. Y., 211; *State v. Elmore*, 35 Cal. 653; *Elliott's Appeal*, 50 Pa. St. 75; *Murdoch v. Finney*, 21 Mo. 138.

The rule has not, however, been universally adopted. Thus, in *Gayoso Savings Institution v. Fellows*, 6 Cold. (Tenn.) 467, *Andrews, J.*, says (p. 471), "Whatever may be the law in regard to the necessity for notice to the debtor, in the case of an assignment of a judgment at law, we have no hesitation in holding that such notice is not necessary, where a bond, bill, note, or like evidence of debt is assigned, and is transferred by actual manual delivery to the assignee; and this, whether the legal title in the instrument passed by the assignment or not."

So in *Kennedy v. Parke*, 2 C. E. Green (N. J.), 415, it was *held* that when a legatee has assigned a legacy for a valuable consideration, it is no defence to an action brought by such assignee against the executors to recover the legacy that they have paid it in good faith to a second assignee of the legatee, without notice of the previous assignment.

But the weight of authority is decidedly in favor of the rule as stated. See, however, *Newby v. Hill*, 2 Metc. (Ky.) 530; *Richardson v. Ainsworth*, 20 How. Pr. (N. Y.) 521.

And in *Massachusetts* it is well estab-

lished that, as to third persons, the assignment of a *chase in action* is valid without notice to the debtor. *Thayer v. Daniels*, 113 Mass. 129.

The rule is different as against the assignor, creditors of the assignor, and mere volunteers, as against whom it is immaterial whether notice be given or not. Thus, in *Pellman v. Hart*, 1 Pa. St. 263, it was *held* that when a note has been assigned and transferred by a debtor *bona fide* in payment of a debt, before the service of an attachment execution, the assignee is entitled to the money due by the garnishee, and not the attaching creditor, although the garnishee had no notice of such assignment previous to the service of the attachment. See also *Beavan v. Lord Oxford*, 6 De G. M. & G. 492; *Pickering v. Ilfrcombe Ry. Co.*, L. R. 3 C. P. 235; *State v. Elmore*, 35 Cal. 653; *Westoby v. Day*, 2 El. & Bl. 605; *Kortright v. Buffalo*, 20 Wend. (N. Y.) 91; *McNeil v. Bank*, 46 N. Y. 325; *Mount Holly Co. v. Ferree*, 2 C. E. Green (N. J.), 117; *Sabin v. Bank*, 21 Vt. 353; *Ullmann v. Kline*, 87 Ill. 269. But compare *Pinkerton v. M. & L. R. R. Co.*, 42 N. H. 424; *Colt v. Ives*, 31 Conn. 25. In the first of these cases it was *held*, on the transfer of stock the delivery will not be complete until an entry of such transfer is made on the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie* and, if unexplained, conclusive evidence of a secret trust, and, therefore, as a matter of law, fraudulent and void as to creditors.

In the second case, the same doctrine is laid down; but it is further said that the presumption may be rebutted by proof that the purchaser did all in his power to complete the transfer, and failed in consequence of the unjustifiable refusal of the corporation. See also *Sabin v. Bank*, 21 Vt. 353; *Robinson v. Marshall*, 11 Md. 251; *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; *Moore v. Gravelot*, 3 Ill. App. 442.

In *Louisiana*, the notice must be served on the debtor personally, notice to his attorney being insufficient. *Morrison v. Lynch*, 36 La. Ann. 611.

In order to charge the defendant with fraudulent payment to the assignor, something equivalent to direct and positive notice of an assignment is necessary. *Maghan v. Mills*, 9 Johns. (N. Y.) 64.

The notice need not be formal or express,

V. Diligence in perfecting Title.—It is the duty of an assignee to be diligent in perfecting his title, and, if guilty of laches, he may be postponed to a subsequent purchaser who has been injured thereby.¹

VI. Equities of Assignee.—The assignee of a *chose in action* takes it subject to all the equities existing between the original parties,²

and it is enough that the debtor has such knowledge and information as will put him on his guard, and enable him to warn subsequent purchasers. *Dale v. Kimpton*, 46 Vt. 76; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343; *Kellogg v. Krauser*, 14 S. & R. (Pa.) 137; *Hamilton v. Marks*, 52 Mo. 78.

But it was said in *Baron v. Porter*, 44 Vt. 587, that the notice must emanate from the assignee, or some one authorized by him.

Where all other equities are equal, priority in time will prevail. *Fore v. Manlove*, 18 Cal. 436; *Nuir v. Schenck*, 3 Hill (N. Y.), 228; *Talbot v. Cook*, 7 T. B. Mon. (Ky.) 438.

1. An assignee who does not give notice to the debtor, until judgment has been rendered against him in an attachment rendered against him by a creditor of the assignor. *Richards v. Griggs*, 16 Mo. 416.

So it has been held, that an assignee who lies quiescent until a subsequent assignee has proceeded to judgment, loses his priority. *Judson v. Corcoran*, 17 How. (U. S.) 612; *Ins. Co. v. Corcoran*, 1 Gray (Mass.), 75.

So in *Pennsylvania*, it is negligence within the rule not to have the assignment of a judgment marked on the docket. *Fraley's Appeal*, 76 Pa. St. 42. See also *Spain v. Hamilton*, 1 Wall. (U. S.) 604; *White v. Wiley*, 14 Ind. 497; *Rives v. Brown*, 81 Ky. 636; *Wellsburg Bank v. Kimberlands*, 16 W. Va. 555.

To protect the title of the assignee against subsequent assignees for value, possession must be taken of personal chattels assigned, and, in the case of *choses in action*, that which is equivalent to possession. *Bispham's Eq.* (4th ed.), 223; *Milroy v. Lord*, 4 DeG. F. & J. 264; *Martin v. Sedgwick*, 9 Beavan, 333; *Clemens v. Davidson*, 5 Binn. (Pa.) 392.

2. Thus it was held in *Barney v. Grover*, 28 Vt. 391, that a person will not be holden to an assignee for a debt due from him to the assignor, if he was liable in an equal or greater amount to another person, as surely for the assignor, which he has since paid, though he had not at the time of the assignment.

So in *Kamena v. Huelbig*, 8 C. E. Green (N. J.), 227; it was held that an assignee takes a mortgage subject to all the equities to which it was liable in the hands of the

assignor; and where the mortgage has been pledged as security for the payment of a note, he is entitled in a suit for foreclosure, only to a decree for the balance due on the mortgage after deducting the amount of the note.

In *Martin v. Richardson*, 68 N. Car. 255, A. was indebted by bond to B., who transferred it without indorsement to C., and at the time of the transfer C. owed A. a bond; after holding it for some time, C. returned A.'s bond to B. In an action by B. against A. upon the bond due B., it was held that it was subject to the set-off of C.'s bond to A., though B. may have had no notice of the indebtedness of C. to A.

And even where there is a secret agreement between the obligor and obligee of a bond, restricting its collection to certain property of the obligor, the assignee of the bond for value, without notice of the agreement, was held to be affected thereby. *Lane v. Smith*, 103 Pa. St. 415. See also *Bebee v. the Bank*, 1 Johns. (N. Y.) 529; *Littlefield v. Bank*, 97 N. Y. 581; *Boardman v. Hayne*, 29 Iowa, 339; *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; *Kleeman v. Frisbie*, 63 Ill. 482; *Andrews v. McCoy*, 8 Ala. 920; *Ragsdale v. Hagy*, 9 Gratt. (Va.) 409; *Sutton v. Sutton* (S. Car.), 1 S. E. Rep. 19. But compare *Farmer's Nat. Bank v. Fletcher*, 44 Iowa, 252; *Sleeper v. Chapman*, 121 Mass. 404.

But the assignee acquires the rights neither more nor less than the assignor, and stands in his position. The assignor can transfer no better right than he possessed. *Jack v. Davis*, 29 Ga. 219; *Thompson v. Allen*, 12 Ind. 539; *Shotwell v. Webb*, 23 Miss. 375; *Sutton v. Sutton* (S. Car.), 1 S. E. Rep. 19.

And the equities to which he will be subject, must be such as existed at the time of the assignment. He will not be affected by after-arising equities. *Daviess v. Newton*, 5 J. J. Marsh. (Ky.) 89; *Eldred v. Hazlett*, 33 Pa. St. 307; *Walker v. Sargeant*, 14 Vt. 247; *Richardson v. Ainsworth*, 20 How. Pr. (N. Y.) 521.

Although according to some authorities it is sufficient if the equity arises before notice of the assignment. *Learey v. Reardon*, 1 A. K. Marsh. (Ky.) 1; *Dunklee v. Greenfield*, etc., Co., 23 N. H. 245; *Newman v. Crocker*, 1 Bay (S. Car.), 246.

After notice of an assignment given to the debtor, he can do no act prejudicial to

but not necessarily subject to existing equities in favor of third persons.¹

VII. Rights of the Assignee. — An equitable assignment passes to the assignee all the rights of the assignor in the thing assigned, and the latter can from the time of the assignment exercise no control over it.²

VIII. Remedy of Assignee. — The assignment of a demand entitles the assignee to every remedy, lien, or security that might have been made available by the assignor as a means of indemnity or payment.³

the assignee. *Brashear v. West*, 7 Pet. (U. S.) 608; *Bean v. Simpson*, 16 Me. 49; *Laughlin v. Fairbanks*, 8 Mo. 367; *Cummings v. Fullam*, 13 Vt. 434; *Philips v. Bank*, 18 Pa. St. 394; *Stewart v. Kirkland*, 19 Ala. 162.

But it is otherwise before notice. *Campbell v. Day*, 16 Vt. 558; *Hackett v. Martin*, 8 Me. 81; *Clark v. Boyd*, 6 T. B. Mon. (Ky.) 294; *Randall v. Reynolds*, 52 N. Y. Super. Court, 145; *McCloskey v. San Francisco*, 66 Cal. 104.

The assignee of negotiable paper takes it free from all the equities between the original holders, by the custom of the law merchant. *Kleeman v. Frisbie*, 63 Ill. 482.

So where the debtor by his statements, or by his silence, when fair dealing demanded that he should speak, has misled the assignee as to the existence of any such equity. *Bank v. Jerome*, 18 Com. 443; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Sargeant v. Sargeant*, 18 Vt. 371; *Decker v. Eismehauer*, 1 P. & W. (Pa.) 476; *Atkinson v. Runnells*, 60 Me. 440. See title *ESTOPPEL*.

The assignee cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract. *Bispham's Eq.* (4th ed.) 225; *Kountz v. Kirkpatrick*, 72 Pa. St. 376; *Wright v. Levy*, 12 Cal. 257; *Bowman v. Halsted*, 2 A. K. Marsh (Ky.), 20.

1. In *Livingston v. Dean*, 2 Johns. Ch. (N. Y.) 479, *Kent, Chancellor*, said, "Though the assignee of a bond and mortgage takes it subject to all the equity of the mortgagor, yet as to the latent equity of a third person against the mortgagee, the case is a little different. The assignee does not take the mortgage subject to such an equity, unless he has notice of it expressly or constructively."

This case follows that of *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441, in which *Chancellor Kent* said, "It is a general and well settled principle that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity remaining

in the original obligor or debtor, and not an equity residing in some third person against the assignor. The assignee can always go to the debtor and ascertain what claim he may have against the chose in action in question; . . . but he may not be able to ascertain the equity of some third person against the obligee."

Redfearn v. Ferrier, 1 Dow, 50, was decided by *Lord Eldon* on this ground. See also *Mott v. Clark*, 9 Pa. St. 399; *Welsh v. Bekey*, 1 P. & W. (Pa.) 57; *Garland v. Harrison*, 17 Mo. 282; *Anderson v. Baumgartner*, 27 Mo. 80; *Olds v. Cummings*, 31 Ill. 188; *Moore v. Holcombe*, 3 Leigh (Va.), 597; *Ohio Life Insurance Co. v. Ross*, 2 Md. Ch. 25. But compare *Bush v. Lathrop*, 22 N. Y. 535; *Schafer v. Reilly*, 50 N. Y. 61; *Fairbanks v. Sargent*, 104 N. Y. 108.

In *The United States v. Sturgis, Paine* (U. S. C. C.), 525, the rule that latent equities of a third person are not available against an assignee was held not to affect a judgment creditor, claiming to redeem an assigned mortgage.

2. It has been held that an assignment of a legacy passes the whole right of the assignor. After such assignment, there remains in the assignor no distinct subsisting right capable of being assigned. *Kennedy v. Park*, 2 Green (N. J.), 145. And, generally, that an assignment, though not in all the forms of law, vests the equitable interest in the assignee, and the assignor will not thereafter be permitted to exercise any authority over the property assigned. *Buchanan v. Taylor*, Add. (Pa.) 155. So of the assignment of a bond for title. *Broadwell v. Gantis*, 10 Mo. 398. Of a judgment. *Beale v. Bank*, 5 Watts (Pa.), 529; *State v. Herod*, 6 Blackf. (Ind.) 444. Accordingly, an assignee of a demand may release it. *Dade v. Herbert*, 1 Cranch (C. C.), 85. While a release by an assignor of his assignee's claim is a nullity. *Parker v. Kelley*, 18 Miss. 184; *Sampson v. Fletcher*, 1 Vt. 168; *Blin v. Pierce*, 20 Vt. 25; *Reed v. Nevins*, 38 Me. 193.

As to rights of assignee against third parties, see §§ 4, 5, and 6, *supra* and notes.

3. Note to *Ryall v. Rowles*, 2 White &

EQUITABLE CONVERSION AND RECONVERSION.

- I. Conversion: Definition, 664.
- II. How it may arise, 665.
- III. What is necessary to constitute, 665. [668.]
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- VII. Reconversion: Definition, 672.
- VIII. Who may elect to reconvert and to what Extent, 673.
- IX. Manner of making, 674.
- X. Reconversion by Operation of Law, 674.

I. Definition.—Equitable conversion is the notional alteration of land into money, or money into land, in accordance with a direction to that effect of a testator or settler, and in pursuance of the equitable doctrine that what is agreed or imperatively directed to be done is already done, or as good as done.¹

Tudor Ldg. Cases in Eq. (4th Am. ed.) 1667; *Bank v. Fordy*, 1 Pa. St. 454; *Craig v. Parkis*, 40 N. Y. 181; *Wilson v. Bowden*, 26 Ark. 151; *Coffing v. Taylor*, 16 Ill. 457; *Perry v. Roberts*, 30 Ind. 244; *Schlieman v. Bowlin*, 36 Minn. 198.

In bringing suit, the assignee should sue, as a general rule, in the name of the assignor, which the assignment gives him the right to do. And this action may now be brought in the courts of common law. Equity, therefore, will not ordinarily entertain a bill in the first instance, filed by the assignee against the debtor, simply for recovering the debt; but if the assignor interferes in the matter for the purpose of preventing the assignee's using his name, this will give rise to the jurisdiction of the court of equity. *Bispham's Eq.* (4th ed.) 227; *Chicago Rd. v. Nichols*, 57 Ill. 466; *Hayward v. Andrews*, 106 U. S. 672; *Guarantee Co. v. Water Co.*, 107 U. S. 205; *Goodwyn v. Lloyd*, 8 Port. (Ala.) 237; *Dickinson v. Burr*, 15 Ark. 372; *Batchelder v. Jenness*, 59 Vt. 104.

If the assignor dies before suit brought, the assignee may substitute the name of the executor or administrator of the assignor. *Cutts v. Perkins*, 12 Mass. 206. But where the remedy is in equity alone, the assignee can sue in his own name. *Bispham's Eq.* (4th ed.) 227; *Hammofid v. Messenger*, 9 Lin. 327; *Adair v. Winchester*, 7 Gill & J. (Md.) 114; *Hagar v. Buck*, 44 Vt. 285; *Caldwell v. Meshew*, 44 Ark. 564.

In *Iowa*, one holding under an oral assignment of an account may sue thereon in his own name. *White v. Tucker*, 9 Iowa, 100. And where there is an express promise by the debtor to pay the assignee, the latter may sue in his own name. *Barger v. Collins*, 7 Har. & J. (Md.) 213; *Currier v. Hodgdon*, 3 N. H. 82; *Crocker v. Whitney*, 10 Mass. 316; *Bucklin v. Ward*, 7 Vt. 195; *Matheson v. Crain*, 1 McCord (S. Car.), 219; *Lang v. Fiske*, 11 Me. 385; *Compton v. Jones*, 4 Cow. (N. Y.) 13.

In the United States courts it has been said, that, though in equity an assignee may sometimes sue in his own name, he cannot sue in the courts of the United States unless his assignee could have sued there. *Sere v. Pitot*, 6 Cranch (C. C.), 332.

Authorities.—*Bispham's Equity* (4th ed.); *Story's Eq. Juris.* (13th ed.); *Note to Ryall v. Rowles*, 2 Leading Cases in Equity (4th Am. ed.).

1. Brown's Law Dict.

In *Rapalje & Lawrence (Law Dict.)* it is said, "In equity, conversion is the operation of changing the nature of property. It is either actual or constructive. Actual conversion is the act of converting land or other property into money by selling it, or of converting money into land by buying land with it. . . . Constructive conversion is a fictitious conversion which is assumed, in certain cases, to have taken place in order to carry out the intention of the parties. The constructive or equitable conversion of land into money (realty into personalty), and *vice versa*, takes place when an actual conversion has been agreed to, but not actually carried out."

Pomeroy (3 Eq. Jur. 126) says, "Conversion has been briefly and accurately defined as 'that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such.'"

To the same effect see *Bispham's Eq.* (4th ed.) 370; *Bouvier's Law Dict.*

The leading case is *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 497; s. c., 1 Leading Cases in Equity (4th Am. ed.), 1118. In that case, *Fletcher* by will devised his real property to trustees, to permit his widow to enjoy the same during her life or widowhood, and after her decease or marriage to sell the same, and divide the proceeds of the sale between his son and daughter; with the proviso that, should either die before his or her legacy should become due, the legacy should go to the

II. How it may arise.—Equitable conversion may arise in two ways: first, under a will;¹ and secondly, under settlements and other instruments *inter vivos*.²

III. What is necessary to constitute.—Equitable conversion may arise not only from an express, clear, and imperative direction in a will, deed, or settlement, or a clear and imperative agreement in a contract to convert the property, but also from a necessary implication of such express direction or agreement.³

survivor. William survived Mary, but both died within the lifetime of their mother, who died the widow of the testator. Upon the death of the latter, the heir-at-law of the father and son filed a bill against the trustees and the personal representatives of the testator and the widow to have a conveyance of the real estate. The bill was dismissed, the court holding that, under the terms of the will, the real estate was to be regarded as money, and that therefore it went to the personal representatives of the widow and son, and not to the heir-at-law of the father and son.

Sir Thomas Sewell, M. R., delivering the opinion of the court, said that "Nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they have been directed to be converted."

In *Craig v. Leslie*, 3 Wheat. (U. S.) 563, Craig by his last will and testament devised all his real estate to trustees, to sell the same, and to remit the proceeds to his brother, *an alien*. The brother could inherit personal, but not real, estate. *Fletcher v. Ashburner*, *supra*, was followed, *Washington, J.*, saying (p. 577), "Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine that a devise of money,—the proceeds of land directed to be sold is a devise of money,—notwithstanding it is to arise out of land, and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made. The settled doctrine of the courts of equity corresponds with this obvious construction of wills as well as of other instruments whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. . . . The principle upon which the whole of this doctrine is founded is that a court of equity, regarding the substance, and not the mere forms and circumstances, of agreements and other instruments, considers things

directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance." See also *Rankin v. Rankin*, 36 Ill. 293; s. c., 87 Am. Dec. 205, and note.

1. *Fletcher v. Ashburner*, 1 Bro. C. C. 497; s. c., 1 Leading Cases in Eq. (4th Am. ed.) 1118; *Craig v. Leslie*, 3 Wheat. (U. S.) 563.

2. *Masterson v. Pullen*, 62 Ala. 145; *D'Arras v. Keyser*, 26 Pa. St. 249; *Turner v. Davis*, 41 Ark. 270; *Evans v. Kingsberry*, 2 Rand. (Va.) 120; s. c., 14 Am. Dec. 779.

3. 3 Pomeroy's Eq. Jur. 126, 129; *Bispham's Eq.* (4th ed.) 373.

The question of equitable conversion is one of intention. *Bispham's Eq.* (4th ed.) 374; 3 Pomeroy's Eq. Jur. 127.

In *King v. King*, 13 R. I. 501, the subject is discussed. *Durfee, C. J.*, delivering the opinion of the court, said (p. 506), "The question submitted in this case is, Did the seventh clause of the will of the late Edward King work a conversion of the real estate therein disposed of into personalty? The question, like all other questions in regard to the effect of testamentary devises or bequests, is a question of what was the testator's intention. . . . Did the testator intend to have his real estate, out and out, converted into personalty? If he did, the court will give his intention effect by treating the real as personal property from the time of his decease. Or did he intend to have it converted for certain purposes only? If so, the court will treat it as converted for those purposes, but beyond what is required for those purposes, as remaining unchanged. . . . Or again, on the other hand, did he intend simply to give the executor or trustees under his will a power to convert, leaving it discretionary with them to convert it or not? If so, the conversion will depend on the will or discretion of the executor or trustees, and will not be regarded as consummated in law till it is consummated in fact."

So in *Wurts v. Page*, 19 N. J. Eq. 365, it was said, "The question of conversion is a question of intention; and the real question is, Did the testator intend his lands to be converted into money at all events before distribution?"

To the same effect see *Hunt's Appeal*, 105 Pa. St. 128; *Dodge v. Williams*, 46 Wis. 70; *Dodge v. Pond*, 23 N. Y. 69; *Chamberlain v. Taylor*, 105 N. Y. 185.

But this intention must be so clearly expressed as to leave no possible doubt as to its meaning. "The rule for the decision of such a question . . . is, that, in general, courts of equity do not incline to interfere to change the quality of the property, as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite character, either as money or land. . . . For the will to operate as an immediate conversion, it must appear in terms, or by necessary implication, that the testator intended the property to be converted absolutely and at all events. The reason for this rigor of construction is, that there is not a spark of equity between the next of kin and the heir, and that, therefore, neither ought to lose the right which the existing character of the property gives him until it is clearly demonstrated that the testator intended to have it changed." *Per Duffee, C. J.*, in *King v. King*, 13 R. I. at p. 50. And see *Hobson v. Hale*, 95 N. Y. 589.

As a general rule, it may be stated that the direction to convert in the case of a trust must be imperative, and the agreement in the case of a contract binding. *Bispham's Eq.* (4th ed.) 372.

In *Hunt's Appeal*, 105 Pa. St. 128, *Paxson, J.*, said, "It ought to be settled by this time, that, in order to work a conversion, there must be either, 1st, A positive direction to sell; or, 2d, An absolute necessity to sell in order to execute the will; or, 3d, Such a blending of the real and personal estate by the testator in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money. In each of the two latter cases, an intent to convert will be implied."

"If the directions in the will as to the proceeds require a sale, it is equivalent to a positive direction to sell." *Cook v. Cook*, 20 N. J. Eq. 375. See also *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Hobson v. Hale*, 95 N. Y. 588; *Kane v. Gott*, 24 Wend. (N. Y.) 641; s. c., 35 Am. Dec. 641; *Pratt v. Taliaferro*, 3 Leigh (Va.), 419; *Hannah v. Swarner*, 3 W. & Serg. (Pa.) 223; s. c., 38 Am. Dec. 756; *Perot's Appeal*, 102 Pa. St. 235; *Dodge v. Williams*, 46 Wis. 70; *Ford v. Ford* (Wis.), 33 N. W. Rep. 188; *Proctor v. Ferebee*, 1 Ired. Eq. (N. C.) 143; s. c., 36 Am. Dec. 34; *Barker v. Copenhagen*, 15 Ill. 103; s. c., 58 Am. Dec. 600; *Collins v. Champ*, 15 B. Mon. (Ky.) 118; s. c., 61 Am. Dec. 179; *Janes v. Throckmorton*, 57 Cal. 368.

Where there is proper authority to con-

vert, it is immaterial whether the donee of the power is named or not, if the proceeds of the sale are directed to be paid out by some person named. *Rankin v. Rankin*, 36 Ill. 293; *School v. Fisher*, 30 Me. 353; *Going v. Emery*, 16 Pick. (Mass.) 107; s. c., 26 Am. Dec. 645; *Hale v. Hale*, 137 Mass. 168; *Haggerty v. Lanterman*, 30 N. J. Eq. 37; *Mandlebaum v. McDonell*, 29 Mich. 78; s. c., 18 Am. Rep. 61.

As to when the executor is vested with the power of sale by implication. See *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Hollman v. Tigges*, 42 N. J. Eq. 127; *Gray v. Henderson*, 71 Pa. St. 368; *Winston v. Jones*, 6 Ala. 550. And compare *Geroe v. Winter*, 5 N. J. Eq. 655; *Seeger v. Seeger*, 21 N. J. Eq. 90; *Mapes v. Tyler*, 43 Barb. (N. Y.) 421; *Dunn v. Keeling*, 2 Dev. (N. Car.) L. 283.

If, therefore, the act of converting is left to the discretion of the trustees, or other parties, conversion will not take place.

In *Parker v. Glover*, 42 N. J. Eq. 560, the facts were, that Charles Parker, by the fourth clause of his will, directed that the residue of his estate, real and personal, except two houses, should be converted into money, and the proceeds applied to certain trusts. By the fifth clause he authorized his executor to sell the above excepted houses at his discretion, and apply the proceeds to the same trusts. It was held that there was a conversion of all the property except the two houses under the fourth clause, and that there was no conversion of those houses under the fifth clause; *Runyon, Ch.*, saying (p. 562), "The direction to convert the Southard Street property was not absolute, but discretionary only. That property is expressly excepted from the direction to sell in the preceding section. The testator intended that it should, in its then condition as land, be and continue part of the property given to his daughter, and should go to her children, unless the trustee should think it best to sell it. There is no ground for holding that there was a notional conversion of it."

And in *Ford v. Ford* (Wis.), 33 N. W. Rep. 188, it was held that a clause in a will, directing that the executors "shall at their discretion either sell part of the lands, and invest the proceeds in more desirable rentable property, or use the proceeds in improving the part not sold," did not work an equitable conversion. See to the same effect, *Kouvalinka v. Geibel*, 40 N. J. Eq. 443; *Hunt's Appeal*, 105 Pa. St. 128; *Perot's Appeal*, 102 Pa. St. 235; *Taylor v. Maris*, 90 N. Car. 619; *Lent v. Howard*, 89 N. Y. 169; *Montgomery v. Milliken*, 1 S. & M. (Miss.) 495; *Evans v. Kingsberry*, 2 Rand. (Va.) 120; s. c., 14 Am. Dec. 779.

If, however, the discretion of the trustees does not extend to the very act itself, but

merely to the details of the conversion,—as, for example, the time and place of the sale,—the conversion will still take place. *Ford v. Ford* (Wis.), 33 N. W. Rep. 188; *Wurts v. Page*, 19 N. J. Eq. 365.

So, where the discretion extended only to determining the prices at which, and the terms upon which, the sales should be made. *Hancox v. Wall*, 28 Hun (N. Y.), 214; *Ford v. Ford* (Wis.), 33 N. W. Rep. 188.

But where the direction was to sell the real estate, but with a subsequent proviso that it was not to be sold until the widow should cease to desire it as her home, and not even then unless it would bring ten thousand dollars, it was *held* to be no equitable conversion of the real estate. *Ford v. Ford* (Wis.), 33 N. W. Rep. 188.

But the fact that one of the beneficiaries may be given an option to take the property in an unconverted state, does not prevent a conversion. *Pyle's Appeal*, 102 Pa. St. 317; *Miller v. Com.*, 111 Pa. St. 321.

An order of probate to sell lands does not work a conversion until the sale has taken place, and no parol agreement can convert it into personalty so as to affect the lien of a third person. *Wither's Appeal*, 14 S. & R. (Pa.) 185; s. c., 16 Am. Dec. 488.

But if the trustees, having been clothed with a discretion, have actually exercised it, the property has generally been held to be converted. *Van Vechten v. Keator*, 63 N. Y. 52.

So it is necessary that a contract be binding in order to work a conversion. In *Turner v. Davis*, 41 Ark. 270, Watkins and Quarles jointly conveyed to a trustee certain lands in trust, to sell them, and divide the proceeds between Watkins and Quarles. The deed provided that the trustee should convey to whomsoever the grantors should in writing request, "provided, however, that the price should be fixed by the grantors, and should be fully paid or secured." On efforts being made by judgment creditors of Watkins to have his interest in the land sold to satisfy their judgments, it was *held* that the deed of trust was an equitable conversion of the land into money. See also *Garnet v. Acton*, 28 Beav. 145; *Masterson v. Pullen*, 62 Ala. 145.

In *Evans v. Kingsberry* there was a deed containing a proviso. It was *held* not to work a conversion, *Green, J.*, saying, "The deeds of trust . . . did not convert the lands thereby conveyed into personal estate, in the contemplation of a court of equity, because they did not provide that the lands should be converted out and out and at all events into money. On the contrary, the sale was to be made only on the request of Clay, or Bradley (the grantor), and, until

a sale was actually made, Bradley or his heirs-at-law could have redeemed the land by the payment of the debts secured by the deed." *Evans v. Kingsberry*, 2 Rand. (Va.) 120; s. c., 14 Am. Dec. 779.

As to when real property of a partnership is regarded as personalty, see *Manufacturing Co. v. Hoyt*, 29 Fed. Rep. 421; *Allen v. Withrow*, 110 U. S. 119; *Foster's Appeal*, 74 Pa. St. 391; *Lindley v. Davis* (Mont.), 14 Pac. Rep. 717; *Lenow v. Fones* (Ark.), 4 S. W. Rep. 56. From these cases it will be seen that the general principle is, that equity converts real estate held for partnership purposes into personalty so far as may be necessary to settle all the equities as between the firm and its creditors, and between the partners themselves. In *Lenow v. Fones* (Ark.), 4 S. W. Rep. 56, it was said, "This assumed conversion is an equitable fiction devised for the accomplishment of equitable results, and to carry into effect what is presumed to be the intention of the parties themselves; for when they put land into a commercial firm, it must be taken that they intend it to be considered or treated as personalty, since commerce concerns itself with personal property alone."

If the direction is to sell land, and invest the proceeds in other land, there is no conversion. *White v. Howard*, 46 N. Y. 144.

The following have been held to work Equitable Conversions.—A codicil, as follows: "I, David Jones, make this codicil to my last will and testament; that is, I sell unto Charles H. Smith my tavern house and lot . . . for . . . \$6,950, provided he . . . satisfies my executors as to the payment of the same." *Jones v. Jones*, 13 N. J. Eq. 236.

A direction by a testator "that all the rest and residue of his estate, of what kind soever there might be at the time of his death, should be converted into money by his executors," even as to real estate acquired after the date of the will. *Fluke v. Fluke*, 16 N. J. Eq. 478.

A provision in a mortgage of real property, directing that, when any amount or any note is due, and, on demand made, the mortgagor shall not pay the same, the mortgagee may sell enough to pay what is due. *Hilton v. Devereux*, 63 N. Car. 624.

A direction to sell land to pay debts. *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Foster v. Craig*, 2 Dev. & B. Eq. (N. C.) 209; *Haggerty v. Lauterman*, 30 N. J. Eq. 37.

Otherwise in *New York*. *In re will of Fox*, 52 N. Y. 530.

And where the lands are devised, even though the words "after all my debts are paid" be annexed to the devise. *Dunn v. Keeling*, 2 Dev. (N. Car.) L. 283.

A provision in a will directing that the

IV. Time at which Conversion takes place.—Conversion will, in general, be considered to take place in the case of a will from the death of the testator,¹ in the case of deeds from the time of

testator's real estate should be converted into money, when his youngest child should come of age or marry. *Massey v. Modawell*, 73 Ala. 421.

A direction to sell land seven years after the death of the testator. *McWilliam's Appeal* (Pa.), 9 Cent. Rep. 773.

A direction to sell land, and apply the proceeds to certain uses. *Kane v. Gott*, 24 Wend. (N. Y.) 641; s. c., 35 Am. Dec. 641; *Proctor v. Ferebee*, 1 Ired. Eq. (N. Car.) 143; s. c., 36 Am. Dec. 34; *Smilie v. Biffie*, 2 Pa. St. 52; s. c., 44 Am. Dec. 156.

A direction to employ money in the purchase of land, or to sell land and convert it into money, in whatever way the direction is given. *Collins v. Champ*, 15 B. Mon. (Ky.) 118; s. c., 61 Am. Dec. 179.

A deed of trust transferring certain real estate to raise money from, to an amount not exceeding twelve thousand dollars as called for, and to pay over the amount. *Dobson's Estate*, 11 Phila. (Pa.) 81.

The following have been held not to operate as Conversions.—A direction in a will giving the executor a discretion to sell a portion of his realty, but not ordering an absolute sale. *Montgomery v. Milliken*, 1 L. & M. (Miss.) 495.

A direction that, "All the rest, residue, and remainder of all my estate, both real and personal, it is my will that the same be and remain in the care and custody of my said trustees . . . until the decease of the last survivor of the life annuitants, . . . and that then the said residue and remainder, with all the accumulated interest thereof, shall be divided equally among my grandchildren *per stirpes*." *Hobson v. Hale*, 95 N. Y. 589.

A direction in a deed to sell land on a certain condition. *Evans v. Kingsberry*, 2 Randolph (Va.), 120; s. c., 14 Am. Dec. 779.

An order of probate to sell land. *Wither's Appeal*, 14 L. & R. (Pa.) 185; s. c., 16 Am. Dec. 488.

A clause in a will as follows: "All the rest, residue, and remainder of my estate I give, devise, and bequeath to St. Luke's Hospital, as a fund for the burial of the dead dying at said hospital." *Lawrence v. Elliot*, 3 Redf. (N. Y.) 235.

So, under a contract, it was held that personal estate necessary to perfect improvements of an intestate's real estate was not converted into real property, where the improvements were not intended to be made as an investment, but merely incident to an object which ceased on the death of

the intestate. *Gray v. Hawkins*, 8 Ohio St. 449; s. c., 72 Am. Dec. 601.

So, where a widow agreed to commute her dower, and the lands of her husband were sold free of all claim of dower, but the widow consented to receive in lieu of money a house and lot, it was held that this did not convert the money which she was to receive in lieu of dower into real estate, so that on her death the house and lot could be sold for her husband's debts. *Fisher v. Clements* (Va.), 1 S. E. Rep. 182.

So, where a testator directed certain real estate to be sold, and the proceeds to be devoted to certain objects, and the bequest of the proceeds was held void, it was held that there was no such conversion of realty into personalty as to entitle the residuary legatees to take, to the exclusion of the heirs. *Rizer v. Perry*, 58 Md. 112.

The law never considers a conversion of real into personal property, unless there has been a valid devise of the property in dispute in some form to a specified beneficiary, and the purposes of the will require it to be done. *Chamberlain v. Taylor*, 105 N. Y. 185.

And where there is no absolute direction to sell lands situated out of the State, but the power of the executors to sell was dependent on the contingencies that co-tenants should sell, and the executors should realize the same price as the co-tenants, it does not work a conversion. *Com. v. Gordon* (Pa.), 5 Cent. Rep. 276.

1. In *Tickel v. Quinn*, 1 Dem. (N. Y.) 425, *Rollins, Surrogate*, said: "It is laid down as a general rule, that the equitable conversion takes place on the death of the testator, unless there is something special in the power of sale, making its exercise or performance depend upon the happening of some event or contingency to arise subsequently."

And in *Roland v. Miller*, 100 Pa. St. 47, the testatrix directed an equal division of the proceeds of the sale of her real estate, and of the rents of her real estate, among her children. She directed that the executors should not be compelled to sell for fifteen years, and prohibited sales of real estate within ten years after her decease, unless her executors deemed it advisable to make such sales. Held to be a conversion of the real estate from the death of the testatrix.

A similar conclusion was reached in *Kane v. Gott*, 24 Wend. (N. Y.) 641; s. c., 35 Am. Dec. 641, where the real estate was directed to be sold, and the income to be devoted to the support of two nieces of

delivery,¹ or in the case of other instruments from the time of their execution,² unless some specified time is mentioned in the

the testator, until they arrived at the age of twenty, or married, after which the income was to be paid to them in equal proportions during their lives, remainder to their children.

So, in *Fisher v. Banta*, 66 N. Y. 468, where there was a direction to divide the real estate of the testator equally between his two sons when his youngest son reached the age of twenty-three, and a codicil directing the executrix to sell all the real estate. See also *Cook v. Cook*, 20 N. J. Eq. 375; *Jones v. Caldwell*, 97 Pa. St. 42; *Beauclerk v. Mead*, 2 Atk. 167.

As to time of conversion when the direction is to sell the land and distribute after the termination of a life estate arising under the will, see *infra*, note 8, and sect. 5 and notes.

1. As to conversion of real estate into personality by a deed, see *Griffiths v. Ricketts*, 7 Hare (Eng. Ch.), 299. In that case Griffiths conveyed his real estate to trustees, upon trust, for sale for the payment of his debts, and the question was, whether this deed operated as a conversion. It was held that it did so operate from the time of delivery. *Wigram, V. C.*, said, giving the ground for the difference of the rule between the case of a will and that of a deed, "A deed differs from a will in this material respect: the will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personality, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will, but the application is different by reason that the deed converts the property in the lifetime of the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator; and there is no principle on which the court, as between the real and personal representatives (between whom there is confessedly no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs."

In *Loughborough v. Loughborough*, 14 B. Mon. (Ky.) 441, there was a similar deed, and the court reached a similar conclusion, *Simpson, J.*, saying (p. 554), "The application of this equitable doctrine, however,

differs in the case of a deed from that of a will in this particular: the will speaks from the death, the deed from the delivery. If, then, the maker of the deed impress upon his real estate the character of personality, that, for the purposes of distribution after his death, makes it personal and not real estate from the delivery of the deed."

Similarly, where a husband and wife conveyed their equity of redemption in the wife's land to a trustee to sell for their use and benefit, the property thereby was held, in equity, to have become converted into money, and brought under the control of the husband as personality. *Siter v. McClanachan*, 2 Gratt. (Va.) 280. See also *Turner v. Davis*, 41 Ark. 270; *Clarke v. Franklin*, 4 K. & J. (Eng. Ch.) 257.

2. *Masterson v. Pullen*, 62 Ala. 145. In this case a vendor sold land, taking notes in payment, and giving bond to convey title upon full payment. It was held that, though the legal title to the lands passed, on the vendor's death, to his heirs, that they held it as trustees for the vendee, and that the notes for the purchase-money passed to the personal representatives, the transaction being an equitable conversion of the land into personal property from the time of the execution of the bond. But in other cases, the time of the conversion in this case is the time at which the agreement largely takes effect. *Nagle v. Ingersoll*, 7 Pa. St. 185, 196; *Washington v. Abraham*, 6 Gratt. (Va.) 67.

In a contract of sale which is binding on the vendor, although the purchase is at the option of the vendee, the question whether or not the conversion is effected cannot be determined until the vendee exercises his option. But when he has so exercised it, the conversion relates back to the date of the contract, and the property will be regarded as converted from that time.

Lawes v. Bennett, 1 Cox Ch. 167. In this case Thomas Witterwonge demised a farm to John Douglas for seven years, giving him the option of purchasing at any time between September, 1761, and September, 1765. Witterwonge by his will, dated September, 1761, devised all his real estate to John Bennett, and his personal estate equally to John Bennett and Mary his sister, intermarried with Thomas Lawes. Testator died in 1863. Douglas assigned his interest in the farm to Waller in 1762, and in 1765, Waller exercised his option to purchase; whereupon Thomas Lawes and Mary his wife filed their bill in equity against Bennett, claiming one-half the price

will or deed, or the direction is that the conversion shall take place on the happening of some contingency. In the latter case the property will be converted from the specified time, or the happening of the contingency.¹

V. Effects of Equitable Conversion. — From the time that equitable conversion takes place, under any will, deed, contract, or other instrument, equity will, in general, so far as is necessary to effectuate the lawful purposes of the instrument, carry out the principle to all its legitimate consequences, and will treat the property as that kind into which it should have been changed.²

paid by Waller, on the ground that the purchase-money received by Bennett was part of the personal estate of the testator, Witterwonge. The Master of the Rolls entered a decree in favor of the plaintiff, saying, "It is very clear that if a man seized of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no difference at all. . . . When the party who has the power of election has elected, the whole is to be referred back to the original agreement." See also *Weeding v. Weeding*, 4 J. & H. Eng. Ch. 424; *Collingwood v. Row*, 3 Jur. N. S. 785; *Kerr v. Day*, 14 Pa. St. 112, 114; *D'Arras v. Keyser*, 26 Pa. St. 249. But compare *Draut v. Vause*, 1 Y. & C. Ch. 580; *Emuss v. Smith*, 2 Deg. & Sm. 722; explained, however, in *Weeding v. Weeding*, 4 J. & H. Eng. Ch. 424. But until the option is exercised the rents go to the heir as real estate. *Townley v. Bedwell*, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206. So when land is not specifically devised, but there is a bare power of sale. *Lent v. Howard*, 89 N. Y. 169.

1. Where a will directs the conversion of the realty after the death of the testator's widow. After that occurs, the trustees must make the conversion; but when made, it usually relates back to the death of the testator. *Hancox v. Wall*, 28 Hun (N. Y.), 214; *Brothers v. Cartwright*, 2 Jones Eq. (N. Car.) 113; s. c., 64 Am. Dec. 563. See also *Moncrief v. Ross*, 50 N. Y. 431; *McClure's Appeal*, 72 Pa. St. 414; *McWilliam's Appeal* (Pa.), 9 Cent. Rep. 773; *Taylor v. Johnson*, 63 N. Car. 381. But compare *Jones v. Caldwell*, 97 Pa. St. 42; *Reading v. Blackwell, Baldw.* (U. S.) 166; *Rhinehart v. Harrison, Baldw.* (U. S.) 177; *Loftis v. Glass*, 15 Ark. 680.

Accordingly it has been held that a devise of lands to be sold after a life estate arising under the will, and the proceeds distributed to certain persons, is a pecuniary bequest to those persons vesting from

the death of the testator. *Kline v. Fairly*, Penn. (N. J.) 551; *Reading v. Blackwell, Baldw.* (C. C.) 166; *Rinehart v. Harrison, Baldw.* (C. C.) 177.

2. Land directed to be converted into money goes to the personal representatives. *Elliot v. Fisher*, 12 Sim. Eng. Ch. 505; *Wurts v. Page*, 19 N. J. Eq. 365; *Jacobus v. Jacobus*, 36 N. J. Eq. 248; *Tickel v. Quinn*, 1 Demarest (N. Y.), 425; *Kane v. Gott*, 24 Wend. (N. Y.) 641; s. c., 35 Am. Dec. 641; *Hood v. Hood*, 85 N. Y. 561; *Ferguson v. Stuart*, 14 Ohio, 140; *Smithers v. Hooper*, 23 Md. 274; *Ex parte McBee*, 63 N. Car. 332. Compare *Page's Estate*, 75 Pa. St. 87.

It will not pass under a general devise of land or of real estate. *Elliot v. Fisher*, 12 Sim. 505; *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291.

It will pass under a general gift, transfer, or bequest of personalty, or under a residuary bequest of property. *Blake v. Blake*, L. R. 15 Ch. Div. 481; *Fisher v. Banta*, 66 N. Y. 468; *Dobson's Estate*, 11 Phila. (Pa.) 81; *Croom v. Herring*, 4 Hawks (N. Car.), 398; *Brothers v. Cartwright*, 2 Jones's Eq. (N. Car.) 113; s. c., 64 Am. Dec. 563.

And when land is directed by will or other instrument to be sold at some future time, and the proceeds divided, the sale cannot take place till that time; but when it does take place the conversion relates back to the death of the testator, or the execution of the instrument, and the proceeds of the sale will be distributed as personalty. *Loftis v. Glass*, 15 Ark. 680. And if one of the parties dies before an actual sale, or before the expiration of a life estate created by the instrument, the fund will go to his personal representatives as money. *Eby's Appeal*, 84 Pa. St. 241; *Hunt v. Fisher*, 1 Har. & G. (Md.) 88; *Loftis v. Glass*, 15 Ark. 680; *Smith v. McCrary*, 3 Ired. Eq. (N. Car.) 204; *Pratt v. Taliaferro*, 3 Leigh (Va.), 419; *Rhinehart v. Harrison, Baldw.* (C. C.) 177.

And also the interest acquired in the land under such an instrument is not such an interest as can be bound by the lien of

VI. Effect of Failure of the Purposes of the Conversion.—Where the purposes for which the conversion of land into money, or money into land, was directed by will, contract, or other instrument *inter vivos* totally fails before the instrument directing the conversion comes into operation, no conversion takes place; the property thus directed to be converted remains in its original condition, and will result in its original unchanged form to the testator, or settlor, or his heirs, or personal representatives, as the case may be.¹

But where the purpose fails only partially, the case is more difficult. When the conversion of land into money is directed by will, the lands must be sold to satisfy the purposes which remain effective. The surplus resulting from the sale results to the heir,²

a judgment, and consequently a sale of his interest under an execution against the land passes nothing to a purchaser at sheriff's sale. *Brolasky v. Gally*, 51 Pa. St. 509; *Roland v. Miller*, 100 Pa. St. 47.

So an alien can take the proceeds of land directed to be sold, though incapable of taking the land itself. *Du Hourmelin v. Sheldon*, 1 Beav. 79; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *De Barante v. Gott*, 6 Barb. (N. Y.) 492.

So of corporations. *Dodge v. Williams*, 46 Wis. 70; *Gould v. Asylum*, 46 Wis. 106.

So the purchase-money of land contracted to be sold during the lifetime of a decedent, whether paid before his death or afterwards, is part of his personal estate. *Henson v. Ott*, 7 Ind. 512; *Hawley v. James*, 5 Paige (N. Y.), 318; *Drenkle's Estate*, 3 Pa. St. 377.

But this nominal conversion is not to be understood as being a real conversion. It is held that it is a conversion only so far as is necessary for the purposes of the instrument. The conversion of land held for partnership purposes into personal property is distinctly held in many cases to be a conversion, only so far as the interest of the partners and creditors of the partnership require. *Sprague Mfg. Co. v. Hoyt*, 29 Fed. Rep. 421; *Allen v. Withrow*, 110 U. S. 119; *Foster's Appeal*, 74 Pa. St. 391; *Lindley v. Davis* (Mont.), 14 Pac. Rep. 17; *Lenow v. Fones* (Ark.), 4 S. W. Rep. 56; *In re Codding*, 9 Fed. Rep. 849. And it is treated as personalty till all partnership business is settled. *Logan v. Greenlaw*, 25 Fed. Rep. 299; *Paige v. Paige*, 71 Iowa, 318; *Mallory v. Russell*, 71 Iowa, 63; *King v. Remington*, 36 Minn. 15; *Sherley v. Thomasson* (Ky.), 1 S. W. Rep. 530.

So it has been held that an equitable conversion is not to be presumed beyond the purposes of the will. *Orrick v. Boehm*, 49 Md. 72; *Hilton v. Hilton*, 2 MacArthur (D. C.), 70; *Brome v. Pembroke*, 66 Md.

193; *Chamberlain v. Taylor*, 105 N. Y. 185; s. c., 7 Cent. Rep. 288.

For other limitations of the doctrine see *Brook v. Badley*, L. R. 3 Ch. 674; *Franks v. Bollans*, L. R. 3 Ch. 718. And compare *Siter v. McClenadian*, 2 Gratt. (Va.), 280.

Personal property directed to be converted will descend to the heir. *Hawley v. James*, 5 Paige (N. Y.), 318, 443; *Gott v. Cook*, 7 Paige (N. Y.), 521; *Collins v. Champ*, 15 B. Mon. (Ky.), 118; s. c., 61 Am. Dec. 179. It will pass under a general devise of real estate. *Green v. Stephens*, 17 Ves. 64. It will not be included in a bequest of money or personal property. *Biddulph v. Biddulph*, 12 Ves. 164.

If the heir die intestate before the purchase has been made, the fund will descend to his heir. *Scudamore v. Scudamore*, Prec. Chan. 543; *Gillies v. Longlands*, 4 De G. & Sm. 372. And the money of a married woman directed to be laid out in land is liable to her husband's curtesy. *Sweetapple v. Bindon*, 2 Vern. 536.

1. *Bispham's Eq.* (4th ed.) 376; 3 *Pomero's Eq. Jur.* 138; *Clarke v. Franklin*, 4 K. & I. Eng. Ch. 257; *Smith v. McCrary*, 3 Ired. Eq. (N. Car.) 204; *Commonwealth v. Martin*, 5 Munf. (Va.) 117; *Morrow v. Brenizer*, 2 Rawle (Pa.), 185; *Davis's Appeal*, 83 Pa. St. 348; *Slocum v. Slocum*, 4 Edw. Ch. (N. Y.) 613; *McCarthy v. Deming*, 4 Lans. (N. Y.) 440; *Giraud v. Giraud*, 58 How. Pr. (N. Y.) 175; *Rizer v. Perry*, 58 Md. 112; *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291. Compare *Evan's Appeal*, 63 Pa. St. 183.

2. The leading case is *Ackroyd v. Smithson*, 1 Bro. Ch. C. 503; s. c., 1 *Leading Cases in Eq.* (4th Am. ed.) 1171. In *Craig v. Leslie*, 3 Wheat. (U. S.) 563, *Washington, J.*, said (p. 581), that it was settled that "land devised to trustees to sell for the payment of debts and legacies is to be deemed as money. That the heir-at-law has a resulting trust in such land, so far as it is of value after the debts and legacies

but it results to him as personal property.¹ Where money is directed by will to be laid out in land, and the purpose fails only in part, the rule as to the surplus is the same as when the purpose fails entirely; and the surplus goes as personal estate to the personal representatives, for it could go to them in no other form.²

Where the conversion of land into money is directed by deed or other instrument *inter vivos*, and the purpose partially fails, the author of the instrument takes the undisposed of part of the surplus in his lifetime as personal property, and it descends as part of his personal estate, or it goes to his personal representatives as personal property;³ and similarly, under a deed directing the conversion of money into land, under the same circumstances, the surplus results to the author, or his heir, as land.⁴

VII: Reconversion: Definition.—Reconversion is that imaginary process by which a prior constructive conversion is annulled, and the converted property restored in contemplation of law to its original state.⁵

are paid. . . . The whole of this doctrine rests upon a doctrine which is incontrovertible, that where the testator merely directs the real estate to be converted into money for purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident which prevents the devise from taking effect) results to the heir-at-law."

On the same principle it was held in *Martin v. Morris*, 62 Wis. 418, that the surplus remaining after the sale of partnership land for the settlement of the partnership estate, was, in equity, land, not money. See also *Spencer v. Wilson*, L. R. 16 Eq. 501; *McCarthy v. Deming*, 4 Lans. (N. Y.) 440; *Newby v. Skinner*, 1 Dev. & B. (N. C.) Eq. 488; *North v. Valk*, Dudley's Eq. (S. Car.) 212; *McAvoy's Estate*, 12 Phila. (Pa.) 83.

But it is otherwise, if the obvious intention of the will is to stamp upon the land described to be sold the quality of personality, not only for the purposes of the will, but to all intents. *Yeates v. Compton*, 2 P. Wms. 308; *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 583; *Morrow v. Brenizer*, 2 Rawle (Pa.), 185; *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291; *Sharpley v. Forwood*, 4 Harr. (Del.) 336.

And so of the surplus remaining after a judicial sale, which is to be distributed as money, not as land. *Squire's Estate*, 13 Phila. (Pa.) 304.

1. *Smith v. Claxton*, 4 Mad. Ch. 492; *Bagster v. Fackerell*, 26 Beav. 469; *Wall v. Colthead*, 2 Deg. & J. 683; *Newby v. Skinner*, 1 Dev. & B. Eq. (N. Car.) 488.

2. 3 Pomeroy's Eq. Jur. 141; Snell's

Eq. (1st Am. ed.) 184; *Bispham's Eq.* (4th ed.) 378; *Cogan v. Stephens*, 1 Beav. 482, n.; *Hawley v. James*, 5 Paige (N. Y.), 318.

3. 3 Pomeroy's Eq. Jur. 141; *Snell's Eq.* (1st Am. ed.) 188; *Clarke v. Franklin*, 4 K. & J. (Eng. Ch.) 257.

4. 3 Pomeroy's Eq. Jur. 142; *Snell's Eq.* (1st Am. ed.) 188; *Lechmere v. Lechmere*, Cas. temp. Talb. 80; *Palteney v. Earl of Darlington*, 1 Bro. Ch. 223.

5. *Rapalje & Lawrence's Law. Dict.*

Thus if real estate is devised to A. in trust to sell, and pay the proceeds to B., the realty by virtue of this absolute trust is constructively converted into personal estate; but if B., before the property is sold, elects to take it as land, it is then said to be reconverted, and A. is bound to convey the land to him accordingly. *Rapalje & Lawrence's Law. Dict.*; *Haynes Eq.* 390; *Snell's Eq.* (1st Am. ed.) 190; 3 Pomeroy's Eq. Jur. 142. "In other words, a reconversion is where the direction to reconvert is countermanded by the parties entitled to the property, or by act of law." *Bispham's Eq.* (4th ed.) 382. "The rationale of this doctrine is clearly found in the right which every absolute owner or donee has to dispense with, or forbid the execution of any trust in the performance of which he alone is interested. Reconversion is the result of an election expressly made or inferred by a court of equity. It depends wholly upon the right of election held by the person entitled to the property, to choose whether he will take the property in its converted condition, or in its original and unconverted form. The whole discussion consists of answers to the questions, Who may thus elect? and how may such an election be made?" 3 Pomeroy's Eq. Jur. 143.

VIII. Who may elect and to what Extent. — In general, all persons who are *sui juris*,¹ or at least are not under any incapacity which prevents them from dealing effectively with their own property, and are absolute owners in fee simple in possession of the property elected to be converted, may elect to take the property in whatever form they choose.² And such persons, owning only an undivided share or partial interest, can elect only when such election cannot affect the rights of their co-owners, life-tenants, remaindermen, reversioners, and the like.³

1. 3 Pomeroy's Eq. Jur. 143; Prentice v. Janssen, 79 N. Y. 478.

Accordingly, infants cannot elect. Seely v. Jago, 1 P. Wms. 389; *In re Harrop*, 3 Drew. 726, 734; Burr v. Sim, 1 Whart. (Pa.) 252; Foreman v. Foreman, 7 Barb. (N. Y.) 215; Scull v. Jermigan, 2 Dev. & Bat. (N. Car.) 44. Nor can his guardian. Burr v. Sim, 1 Whart. (Pa.) 252.

But the court may do so for them if it seems to their best interest. Robinson v. Robinson, 19 Beav. 494; Turner v. Street, 2 Rand. (Va.) 404; Pratt v. Saliaferro, 3 Leigh (Va.) 419, 428. Nor can an alien. Commonwealth v. Martin, 5 Munf. (Va.) 117, 126. Nor a lunatic. Ashby v. Palmer, 1 Meriv. 296; *In re Barker*, L. R. 17 Ch. D. 241.

In regard to married women, the old rule was that they could only elect by means of a fine, or by a consent in open court. Oldham v. Hughes, 2 Alk. 452. But under the statute 3 & 4, William IV., c. 74, s. 77, a married woman is permitted by deed executed in compliance with its provisions, to make her election to take or dispose of money directed to be laid out in land. Forbes v. Adams, 9 Linn. 462.

In the *United States*, a married woman can doubtless elect by means of any instrument sufficient to enable her to convey real estate. 3 Pomeroy's Eq. Jur. 143, n.; Snell's Eq. (1st Am. ed.) 195; Barker v. Copenbarger, 15 Ill. 103; s. c., 58 Am. Dec. 600.

In *Virginia* her husband cannot elect for her, but she may make a valid election, under a commission from the court of chancery, directing her examination separate and apart from her husband. Pratt v. Taliaferro, 3 Leigh (Va.), 419, 429, 432; Litter v. McClanahan, 2 Gratt. (Va.) 280, 296; Turner v. Dawson, 80 Va. 841, 849.

In *Kentucky*, where a testator's will has made a conversion of land into money, the husband of a *femme covert* cannot have the property conveyed to him so as to deprive his wife of her equity to a settlement. Samuel v. Samuel, 4 B. Mon. (Ky.) 245, 257.

In *Pennsylvania*, on the other hand, where land is directed to be sold, and the pro-

ceeds given to a *femme covert*, the right of election is in the husband. But the fee vests in the wife, not in the husband. Hannah v. Swarner, 3 W. & S. (Pa.) 223; s. c., 38 Am. Dec. 756; Beal v. Stehley, 21 Pa. St. 376; Shallenberger v. Ashworth, 25 Pa. St. 152.

2. To the effect that a married woman can make no election, see High v. Worley, 33 Ala. 196.

See note to Fletcher v. Ashburner, 1 Ldg. Cas. Eq. (4th Am. ed.) 1169.

Sisson v. Giles, 3 De G. J. & Sm. 614; Prentice v. Janssen, 79 N. Y. 478; Beadle v. Beadle, 2 McCrary (U. S.), 586.

Accordingly, an election can only be made by all the parties interested. A part cannot without the co-operation of the rest change the character of the property, which the testator has fixed upon the property. Pratt v. Taliaferro, 3 Leigh (Va.), 419; Beatty v. Byers, 18 Pa. St. 105; Evan's Appeal, 63 Pa. St. 183; Hannah v. Swarner, 3 W. & S. (Pa.) 223; s. c., 38 Am. Dec. 756; Barker v. Copenbarger, 15 Ill. 103; s. c., 58 Am. Dec. 600; Ridgeway v. Underwood, 67 Ill. 419; Heslet v. Heslet, 8 Bradw. (Ill.) 22; High v. Worley, 33 Ala. 196.

And they cannot make such election without showing that the absence of debts renders administration unnecessary. High v. Worley, 33 Ala. 196.

And where a conversion "out and out" is directed, no election can be made even by all those beneficially interested. Proctor v. Ferebee, 1 Ired. Eq. (N. Car.) 143; s. c., 36 Am. Dec. 34.

3. When money is directed to be turned into land, the owner, or owners, of separate, undivided parts may elect to reconvert as to his share. Seeley v. Jago, 1 P. Wms. 389.

But, on the other hand, where the direction is to turn land into money, the co-owner cannot elect to keep his share of the land, the reason being that the others are entitled to have their shares sold so as to receive the money; and plainly the sale of an undivided share would produce a comparatively less amount than would result from the sale of the whole. 3 Pom. Eq.

IX. Manner of making Reconversion.—A reconversion may be effected by express direction, or by any act or writing indicating an unequivocal intention to possess the property in its original condition.¹

X. Reconversion by Operation of Law is where the property originally directed to be converted comes into the possession of a person absolutely entitled to dispose of it, and is left by him in its original condition without any declaration of his intention regarding it.²

Jur. 144, n.; *Holloway v. Radcliffe*, 23 Beav. 163; *Fletcher v. Ashburner*, 1 Bro. Ch. 497; s. c., 1 Ldg. Cas. Eq. (4th Am. ed.) 1118; *Barker v. Copenbarger*, 15 Ill. 103; s. c., 58 Am. Dec. 600; *Ridgeway v. Underwood*, 67 Ill. 419; *Heslet v. Heslet*, 8 Bradw. (Ill.) 22. See preceding note.

A remainderman cannot elect so as to affect the interest of prior estates, although he may make an election binding upon his own real and personal representatives. *Walrond v. Rosslyn*, L. R. 11 Ch. D. 640; *Cookson v. Cookson*, 12 Clark & F. 121; *Prentice v. Janssen*, 79 N. Y. 478.

1. *Snell's Eq. (1st Am. ed.) 195 et seq.*; 3 *Pomeroy's Eq. Jur.* 144; *Bispham's Eq. (4th ed.) 382*. By agreement see *Baily v. Bank*, 104 Pa. St. 425.

But it has been doubted whether a parol agreement would be sufficient. *Bradish v. Gee*, Amb. 229. But see *Pulteney v. Darlington*, 1 Bro. Ch. 237; *Wheldale v. Partridge*, 8 Ves. 236.

The expression of intention must be unequivocal. *Beatty v. Byers*, 18 Pa. St. 105; *Evan's Appeal*, 63 Pa. St. 183.

No inference can be drawn from mere lapse of time. *Beatty v. Byers*, 18 Pa. St. 105; *Kirkman v. Miles*, 13 Ves. 337; *Foreman v. Foreman*, 7 Barb. (N. Y.) 215. But compare *Griesbach v. Freemantle*, 17 Beav. 314; *Dixon v. Gayfer*, 17 Beav. 314.

It is sufficient to show an intention to take the property in its actual condition. *Prentice v. Janssen*, 79 N. Y. 478; *Beatty v. Byers*, 18 Pa. St. 105.

Where lands were directed to be sold, and the proceeds to be held in trust for A., he got possession of the title deeds as well as of the land, and remained in possession till his death; held, that he thereby declared his intention to take the estates as land. *Davies v. Ashford*, 15 Sim. 42. So, where the person to whose use the proceeds of a house and lot directed to be sold were to be applied, granted a lease of the house. *Muttow v. Begg*, L. R. 1 Ch. D. 385. So where three of those interested made an agreement to reconvert, and the fourth acquiesced, and continued in the ownership of it as real estate. *Prentice v. Janssen*, 79 N. Y. 478.

2. *Rapalje & Lawrence's Law Dict.*

In *Chichester v. Bickerstaff*, 2 Vern. 295, *Chichester* on his marriage with the daughter of *Bickerstaff*, covenanted to advance 1,500*l.* within three years, to be laid out in land, of which the ultimate limitation was to his right heirs. Within a year after the marriage the wife died childless, and *Chichester* died within a few days after his wife, by his will making *Bickerstaff* his executor, and his sister his residuary legatee. His heir-at-law then filed a bill against *Bickerstaff*, claiming that as the 1,500*l.* was to have been laid out in land, it ought to go to him under the limitations in the settlement. But *Lord Somers* said that the money, though once bound by the articles, when the wife died without issue became free again; in other words, that it was to be considered *at home* in *Chichester's* hands. The bill was therefore dismissed. *Bispham's Eq. (4th ed.) 384*.

In an American case it was said, "When the law has impressed real properties and uses upon moneys, it is necessary, in order to put an end to that impression, that it be shown, either that the party entitled to the property and having a right to elect in what shape he will take it, has declared that election, or done some act denoting his intention in relation thereto, or the property must, according to the expression used in some other cases, *be at home*; that is, the person being the absolute owner must have in himself the entire qualification of heir and executor. He must not only have the *jus in re*, but no other person must have an outstanding *jus ad rem*. In that case, if he makes no declaration of his intention in relation to it, it shall go according to the quality in which it was left at his death." *Per Mason, J.*, in *Foreman v. Foreman*, 7 Barb. (N. Y.) 215, 220. See also *Snell's Eq. (1st Am. ed.) 197*; *Wheldale v. Partridge*, 8 Ves. 235; *Pulteney v. Darlington*, 1 Bro. Ch. 223; *Walrond v. Rosslyn*, L. R. 11 Ch. Dev. 640.

Authorities.—*Pomeroy's Equity Jurisprudence*; *Snell's Equity (1st Am. ed.)*; *Bispham's Equity (4th ed.)*; Note to *Fletcher v. Ashburner*, 1 *Leading Cases in Equity (4th Am. ed.)*, 1118.

EQUITABLE ESTATE — EQUITABLE MORTGAGES.

EQUITABLE ESTATE. — See USES, TRUSTS, AND POWERS.

EQUITABLE MORTGAGES.

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I. Definition. — An equitable mortgage is one which, by want of some formality, can only be given effect as a mortgage in equity. By this is not meant merely those instruments intended as mortgages, but which, by reason of some defect, cannot have such operation without the aid of equity, but a very great variety of transactions or documents, to numerous of which equity attaches such character without regard to the intention of the parties.

The term is also applied to mortgages of an equitable estate or interest.

II. Absolute Conveyance intended as Mortgage. — One of the most notable instances of an equitable mortgage is that of an absolute conveyance intended as security for a debt, and to have the effect of a mortgage. Such an instrument can have no operation as a mortgage in a court of law;¹ but in a court of equity it may be shown, even by parol evidence,² unless forbidden by

1. *Benton v. Jones*, 8 Conn. 186; *Reading v. Weston*, 8 Conn. 120; *Bryant v. Crosby*, 36 Me. 562; *Bailey v. Knapp*, 79 Me. 205; *Hogel v. Lindell*, 10 Mo. 483; *Webb v. Rice*, 6 Hill (N. Y.), 219; *Farley v. Goocher*, 11 Iowa, 570; *McClane v. White*, 5 Minn. 178; *Belote v. Morrison*, 8 Minn. 87; *Bragg v. Massie*, 38 Ala. 89; *Parish v. Gates*, 29 Ala. 254; *Moore v. Wade*, 8 Kan. 380; *Ellis v. Higgins*, 32 Me. 34. See, however, *Coates v. Woodworth*, 13 Ill. 654; *Miller v. Thomas*, 14 Ill. 428; *Tillson v. Moulton*, 23 Ill. 648; *Wilcox v. Bates*, 26 Wis. 465; *Odenbaugh v. Bradford*, 67 Pa. St. 96; *Kenton v. Vandergrift*, 42 Pa. St. 339; *McClurken v. Thompson*, 69 Pa. St. 305; *Fessler's Appeal*, 75 Pa. St. 483; *Moreland v. Barnhart*, 44 Tex. 275; *Ruffier v. Womack*, 30 Tex. 332.

2. *Peugh v. Davis*, 96 U. S. 332; *Russell v. Southard*, 12 How. (U. S.) 139; *Morris v. Nixon*, 1 How. (U. S.) 113; *Sprigg v. Bank*, 14 Pet. (U. S.) 201, 208; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Jenkins v. Eldredge*, 3 Story (U. S.), 181; *Taylor v. Luther*, 2 Sumn. (U. S.) 228; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Wyman v. Babcock*, 2 Curtis (U. S. C. C.), 386; *Amory v. Lawrence*, 3 Cliff. (U. S.) 523; *Phillips v. Craft*, 42 Ala. 477; *Johnson v. Clark*, 5 Ark. 321; *Scott v. Henry*, 13 Ark. 112;

McCarron v. Cassidy, 18 Ark. 34; *Anthony v. Anthony*, 23 Ark. 479; *Pierce v. Robinson*, 13 Cal. 116; *Johnson v. Sherman*, 15 Cal. 287, 291; *Cunningham v. Hawkins*, 24 Cal. 403; *Lodge v. Furman*, 24 Cal. 390; *Kuhn v. Rumpp*, 46 Cal. 299; *Vance v. Lincoln*, 38 Cal. 586; *Farmer v. Grose*, 42 Cal. 169; *Chaires v. Brady*, 10 Fla. 133; *Matthews v. Porter*, 16 Fla. 466; *Sutphen v. Cushman*, 35 Ill. 186; *Knowles v. Knowles*, 86 Ill. 1; *Hancock v. Harper*, 86 Ill. 445; *Sharp v. Smitherman*, 85 Ill. 153; *Block v. Walter*, 70 Ill. 416; *Heath v. Williams*, 30 Ind. 495; *Butcher v. Stultz*, 60 Ind. 170; *Graham v. Graham*, 55 Ind. 23; *Landers v. Beck*, 92 Ind. 49; *Berberick v. Fritz*, 39 Iowa, 700; *Johnson v. Smith*, 39 Iowa, 549; *Roberts v. McMahan*, 4 Greene (Iowa), 34; *McAnnulty v. Seick*, 59 Iowa, 586; *Moore v. Wade*, 8 Kan. 380; *Skinner v. Miller*, 5 Litt. (Ky.) 86; *Blanchard v. Kenton*, 4 Bibb. (Ky.) 451; *Murphy v. Trigg*, 1 Mon. (Ky.) 72; *Stapp v. Phelps*, 7 Dana (Ky.), 296; *Knapp v. Bailey*, 9 Atl. Rep. (Me. 1887) 122; *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; s. c., 3 Md. Ch. 508; *Baughner v. Merryman*, 32 Md. 185; *Price v. Gover*, 40 Md. 102; *Campbell v. Dearborn*, 109 Mass. 130; *McDonough v. Squire*, 111 Mass. 217; *Pond v. Eddy*, 113 Mass. 149; *Emerson v. Atwater*,

statute,¹ that it was given as a security merely, when it will be speedily declared to be a mortgage;² and this is the doctrine of the English as well as of the American cases.³

1. *Right of Creditor to show.*—While the grantee, as to third parties, may generally exercise the rights of an absolute owner regarding the property,⁴ nevertheless a judgment creditor of the grantor is entitled, with him, to show the true nature of the transaction.⁵

7 Mich. 12; *Swetland v. Swetland*, 3 Mich. 482; *Curtiss v. Sheldon*, 47 Mich. 262; *Wadsworth v. Lorange*, Har. Ch. (Mich.) 113; *Weide v. Gehl*, 21 Minn. 449; *Phoenix v. Gardner*, 13 Minn. 430; *Klein v. McNamara*, 54 Miss. 90; *Littlewort v. Davis*, 50 Miss. 403; *Freeman v. Wilson*, 51 Miss. 329; *Oneill v. Capelle*, 62 Mo. 202; *Schade v. Bessinger*, 3 Neb. 140; *Cookes v. Culbertson*, 9 Nev. 199; *Saunders v. Stewart*, 7 Nev. 200; *Carlyon v. Lannan*, 4 Nev. 156; *Sweet v. Parker*, 22 N. J. Eq. 453, 457; *Crane v. DeCamp*, 21 N. J. Eq. 414; *Vandegrift v. Herbert*, 18 N. J. Eq. 466; *Condit v. Tichenor*, 19 N. J. Eq. 43; *King v. Warrington*, 2 N. Mex. 318; *Horn v. Keteltas*, 46 N. Y. 605, 609; *Brown v. Clifford*, 7 Lans. (N. Y.) 46; *McDonald v. McLeod*, 1 Ired. Eq. (N. Car.) 221; *Sellers v. Stalcup*, 7 Ired. Eq. (N. Car.) 13; *Elliot v. Maxwell*, 7 Ired. Eq. (N. Car.) 246; *Stell v. Black*, 3 Jones, Eq. (N. Car.) 427; *Stall v. City of Cincinnati*, 16 Ohio St. 169; *Cotterell v. Long*, 20 Ohio, 464; *Miami Ex. Co. v. U. S. Bank, Wright (Ohio)*, 249, 252; *Hurford v. Harned*, 6 Oregon, 362; *Odenbaugh v. Bradford*, 67 Pa. St. 96; *McClurkan v. Thompson*, 69 Pa. St. 305; *Hartley's Appeal*, 103 Pa. St. 23; *Michols v. Reynolds*, 1 R. I. 30; *Taylor v. Luther*, 2 Sumn. (R. I.) 228; *Arnold v. Mattison*, 3 Rich. Eq. (S. Car.) 153; *Ruggles v. Williams*, 1 Head (Tenn.), 141; *Nichols v. Cabe*, 3 Head (Tenn.), 92; *Guinn v. Locke*, 1 Head (Tenn.), 110; *Hinson v. Partee*, 11 Humph. (Tenn.) 587; *Yarbrough v. Newell*, 10 Verg. (Tenn.) 376; *Gibbs v. Penny*, 43 Tex. 560; *Moreland v. Barnhart*, 44 Tex. 275; *Mead v. Randolph*, 8 Tex. 191; *Crosby v. Leavitt*, 50 Vt. 239; *Ross v. Norvell*, 1 Wash. (Va.) 14; *Snively v. Pickle*, 29 Gratt. (Va.) 27; *Miller v. Ausenig*, 2 Wash. 22; *Klinck v. Price*, 4 W. Va. 4, 9; *Wilcox v. Bates*, 26 Wis. 405. See also the statutes of California, Colorado, Dakota, Florida, and Illinois. But see *Osgood v. Thompson Bank*, 30 Conn. 27; *Spence v. Steadman*, 49 Ga. 133, 139. And the statutes of Georgia provide, that, unless fraud be alleged, parol evidence shall not be admitted to prove an absolute deed accompanied with possession of the property a mortgage only.

Where parol testimony is received for the purpose of showing a deed absolute in

form to have been intended as a mortgage, the conditions may likewise be proved by parol testimony,—conditions superadded by the parties after the execution of the mortgage, as well as those contemporaneous with its execution. *Walker v. Walker*, 17 S. Car. 329.

1. It is provided in New Hampshire that no absolute deed shall be defeated, nor any estate incumbered by any agreement, unless it is made a part of the conveyance, and states the sum to be secured, or other thing to be performed.

2. *Cullen v. Cary*, 5 N. Eng. Rep. (Mass. 1888) 560; *Osgood v. Thompson Bank*, 30 Conn. 27; *Belton v. Avery*, 2 Root (Conn.), 279; *French v. Lyon*, 2 Root (Conn.), 69; *Shear v. Robinson*, 18 Fla. 379; *Hurst v. Beaver*, 50 Mich. 612; *Reed v. Reed*, 75 Me. 264; *Loring v. Milliken*, 59 Tex. 423; *Madigan v. Mead*, 31 Minn. 94. This is the provision of the statutes in California, Colorado, Dakota, Florida, and Illinois. And see *Broach v. Barfield*, 57 Ga. 601, 604; *Biggers v. Bird*, 55 Ga. 650, 652; *Lackey v. Bostwick*, 54 Ga. 45; *Richardson v. Woodbury*, 43 Me. 206; *Howe v. Russell*, 36 Me. 115.

On the principle that "he who seeks equity must do equity," it has been held that this remedy will not be extended to one who has made the conveyance to defraud his creditors. *Hassam v. Barrett*, 115 Mass. 256; *Arnold v. Mattison*, 3 Rich. Eq. (S. Car.) 153; *May v. May*, 33 Ala. 203; *Miller v. Marckle*, 21 Ill. 152.

3. *Sevier v. Greenway*, 19 Ves. 413; *Allenby v. Dalton*, 5 L. J. K. B. 312; *Cripps v. Jee*, 4 Bro. C. C. 472; *Manlove v. Bale*, 2 Vern. 84; *Lincoln v. Wright*, 4 De G. & J. 16; *Whitfield v. Parfitt*, 15 Jur. 852; *England v. Codrington*, 1 Eden, 169; *Card v. Jaffray*, 2 Sch. & Lef. 374; *Dixon v. Parker*, 2 Ves. Sen. 219; *Irnham v. Child*, 1 Bro. C. C. 92.

4. *Fiedler v. Darrin*, 59 Barb. (N. Y.) 651; *McCarthy v. McCarthy*, 36 Conn. 177.

The grantor in an action for rent of the premises cannot show that he is a mortgagor merely. *Abbott v. Hanson*, 24 N. J. L. 493.

5. *Christie v. Hale*, 46 Ill. 117; *Dwen v. Blake*, 44 Ill. 135; *De Wolf v. Strader*, 26 Ill. 225; *Allen v. Kemp*, 29 Iowa, 452;

2. *Grounds of Evidence.* — In holding that a deed absolute upon its face may nevertheless be shown to be a mortgage, the courts are practically unanimous; but a conflict exists as to when, or upon what grounds, parol evidence may be introduced for such purpose. Some hold that it may be only on the ground of fraud, accident, or mistake;¹ but though it may have been otherwise formerly, the great majority now hold to the broader doctrine, that it is admissible on the ground of showing what the contract between the parties really is, and of promoting the policy of the law by denying effect to that which the parties did not intend, and giving effect to that which they did intend.²

Judge v. Reese, 24 N. J. Eq. 387; Clark v. Condit, 17 N. J. Eq. 358; Vandegrift v. Herbert, 18 N. J. Eq. 466; Van Buren v. Olmstead, 5 Paige (N. Y.), 9.

1. English v. Lane, 1 Port. (Ala.) 328; Crews v. Threadgill, 35 Ala. 334; Parish v. Gates, 29 Ala. 254; Locke v. Palmer, 26 Ala. 312; Wells v. Morrow, 38 Ala. 125; French v. Burns, 35 Conn. 359; Mills v. Mills, 26 Conn. 213; Collins v. Tillon, 26 Conn. 368; Bacon v. Brown, 19 Conn. 29; Chaires v. Brady, 10 Fla. 133; Matthews v. Porter, 16 Fla. 466; Skinner v. Miller, 5 Litt. (Ky.) 86; Blanchard v. Kenton, 4 Bibb. (Ky.) 451; Bank of Westminster v. Whyte, 1 Md. Ch. 536; Baugher v. Merriam, 32 Md. 185; Conwell v. Evill, 4 Blackf. (Ind.) 67; McDonald v. McLeod, 1 Ired. Eq. (N. Car.) 221; Elliot v. Maxwell, 7 Ired. Eq. (N. Car.) 246.

But the fraud or mistake may be inferred from the facts and circumstances of the case. Thompson v. Banks, 2 Md. Ch. 430; Brogden v. Walker, 2 H. & J. (Md.) 285; Davis v. Banks, 3 Md. Ch. 138; Hassam v. Barrett, 115 Mass. 256.

2. Anthony v. Anthony, 23 Ark. 479; Pierce v. Robinson, 13 Cal. 116; Roberts v. McMahan, 4 Greene (Iowa), 34; Berberick v. Fritz, 39 Iowa, 700; Moore v. Wade, 8 Kan. 380; Campbell v. Dearborn, 109 Mass. 130; Emerson v. Atwater, 7 Mich. 12; Weide v. Gehl, 21 Minn. 449; Freeman v. Wilson, 51 Miss. 329; Kline v. McNamara, 54 Miss. 90; Oneill v. Capelle, 62 Mo. 202; Cookes v. Culbertson, 9 Nev. 199; Sweet v. Parker, 22 N. J. Eq. 453; Strong v. Stewart, 4 Johns. Ch. (N. Y.) 167; Horn v. Keteltas, 46 N. Y. 605, 609; Cotterell v. Long, 20 Ohio, 464; Hurford v. Harned, 6 Oregon, 362; Kerr v. Gilmore, 6 Watts (Pa.), 405, 414; Taylor v. Luther, 2 Sumn. (R. I.) 228; Nichols v. Reynolds, 1 R. I. 30; Arnold v. Mattison, 3 Rich. Eq. (S. Car.) 153; Nichols v. Cabe, 3 Head (Tenn.), 92; Hinson v. Partee, 11 Humph. (Tenn.) 587; Mead v. Randolph, 8 Tex. 191; Carter v. Carter, 5 Tex. 93; Moreland v. Barnhart, 44 Tex. 275; Wright v. Bates, 13 Vt. 341; Ross v. Norvell, 1

Wash. (Va.) 14; Klink v. Price, 4 W. Va. 4, 9; Russell v. Southard, 12 How. (U. S.) 139; Peugh v. Davis, 96 U. S. 332.

In Pierce v. Robinson, *supra*, Mr. Justice Field says, "Unless parol evidence can be admitted, the policy of the law will constantly be evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a trifling amount compared with the value of the property; and the equity of redemption will elude the grasp of the court, and rest in the simple good faith of the creditor. A mortgage, as I have observed, is in form a conveyance of the conditional estate; and the assertion of a right to redeem from a forfeiture involves the same departure from the terms of the instrument as in the case of an absolute conveyance executed as security. The conveyance upon condition by its terms purports to invest the entire estate upon the breach of the condition, just as the absolute conveyance does in the first instance. The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident."

This rule seems to be founded on the principle, that, in such case, the proof raises an equity, which does not contradict the writing, or affect its validity, but simply varies its import so far as to show the true intention and object of the parties without a written defeasance, and establish the trust purpose for which the deed was executed. Schade v. Bessinger, 3 Neb. 140.

It is the fraudulent use of the deed which equity interposes to detect and prevent; and, for this purpose, parol proof is admissible, not to vary the deed, but to maintain the equity which attaches to the transaction inherently, and which the deed or contract of the parties does not create, and cannot destroy. If an equity of redemption really attaches to the transaction itself, any attempt to defeat that equity by

3. *Does not violate Statute of Frauds.* — The admission of parol evidence for this purpose does not violate the statute of frauds.¹

4. *Nor conflict with Rules of Evidence.* — Nor does it violate the rule which excludes parol evidence to contradict or vary the terms of a written instrument.²

5. *What considered.* — In determining the question as to whether a deed absolute upon its face is in fact a mortgage, the verbal agreement of the parties at the time of its execution may be proved,³ as may various matters, — such as the conduct and declarations of the parties,⁴ the existence of a debt,⁵ inadequacy

setting up the deed as absolute is fraudulent. *Rogan v. Walker*, 1 Wis. 527.

In *Ruckman v. Alwood*, 71 Ill. 155, it is said, referring to former cases in the same court, "It will be perceived that in none of these cases did the court attempt to range the jurisdiction to turn an absolute deed into a mortgage by parol evidence, under any specific head of equity, such as fraud, accident, or mistake; but the rule seems to have grown into recognition as an independent head of equity. Still, it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance taken for the mutual benefit of both parties has been appropriated solely to the use of the grantee."

1. *Carr v. Carr*, 52 N. Y. 251; *Sewell v. Price*, 32 Ala. 97; *Klein v. McNamara*, 54 Miss. 90; *Moore v. Wade*, 8 Kan. 380, 387; *Campbell v. Dearborn*, 109 Mass. 130; *Maffitt v. Rynd*, 69 Pa. St. 380, 387; *Houser v. Lamont*, 55 Pa. St. 311; *Raynor v. Lyons*, 37 Cal. 452; *Lee v. Evans*, 8 Cal. 424; *Oneill v. Capelle*, 62 Mo. 202; *Russell v. Southard*, 12 How. (U. S.) 139.

2. *Peugh v. Davis*, 96 U. S. 332.

3. *Anding v. Davis*, 38 Miss. 574; *Anthony v. Anthony*, 23 Ark. 479; *Reigard v. McNeil*, 38 Ill. 400.

4. *Russell v. Southard*, 12 How. (U. S.) 139; *Freeman v. Wilson*, 51 Miss. 329; *Tibeau v. Tibeau*, 22 Mo. 77; *Crane v. Bonnell*, 2 N. J. Eq. 264; *Daubenspeck v. Platt*, 22 Cal. 330; *Lodge v. Furman*, 24 Cal. 385; *Ross v. Brusie*, 64 Cal. 245; *Purviance v. Holt*, 8 Ill. 394; *Williams v. Bishop*, 15 Ill. 553; *Whitcomb v. Sutherland*, 18 Ill. 578; *Reigard v. McNeil*, 38 Ill. 400; *Bartling v. Brasuhn*, 102 Ill. 441; *Prewett v. Dobbs*, 13 S. & R. (Pa.) 431; *Cole v. Bolard*, 22 Pa. St. 431; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Overton v. Bigelow*, 3 Yerg. (Tenn.) 513; *Eiland v. Radford*, 7 Ala. 724; *Carter v. Carter*, 5 Tex. 93; *McIntyre v. Humphreys*, 1 Hoffm. (N. Y.) 31; *Bentley v. Phelps*, 2 Woodb. & M. (U. S.) 426.

But the uncorroborated declarations of the parties is not sufficient. *Todd v. Campbell*, 32 Pa. St. 250; *Brothers v. Harrill*, 2 Jones, Eq. (N. Car.) 209; *Glisson v. Hill*, 2 Jones, Eq. (N. Car.) 256; *Edwards v. Wall*, 79 Va. 321.

5. *Ruffier v. Womack*, 30 Tex. 332; *Eaton v. Green*, 22 Pick. (Mass.) 526, 530; *Klein v. McNamara*, 54 Miss. 90; *Westlake v. Horton*, 85 Ill. 228; *Ennor v. Thompson*, 46 Ill. 214; *Sutphen v. Cushman*, 35 Ill. 186; *Wynkoop v. Cowing*, 21 Ill. 570; *Williams v. Bishop*, 15 Ill. 555; *Montgomery v. Spect*, 55 Cal. 352; *Farmer v. Grose*, 42 Cal. 169; *Davis v. Demming*, 12 W. Va. 246.

"One principle has universally been recognized, — that, in order to convert a conveyance absolute upon its face into a mortgage, or security merely, there must be a debt to be secured. Some of the cases go so far as to hold that there must be a debt in such form that it can be enforced by action against the debtor, while others have denied it. We have no occasion now to decide whether the debt must be such that it could be enforced by action against the debtor: the tendency of later cases seems to be against it. But all agree that there must be a debt or loan to be secured, that the relation of debtor and creditor must exist between the grantor and grantee, in order to lay the foundation for converting an absolute deed in form into a mere security. In this case there was no note or bond, or other evidence of debt, executed by the defendants; and though this is by no means conclusive, still it is a circumstance favorable to the orator, as, if the parties intended the conveyance merely as a security for a loan or debt, it would have been natural that the ordinary evidence of a debt should have been required and given." *Chief Justice Poland* in *Rich v. Doane*, 35 Vt. 125.

It is not essential that there be written evidence of the debt. *Robinson v. Farrelly*, 16 Ala. 472; *Campbell v. Dearborn*, 109 Mass. 130; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Brown v. Dewey*, 1 Sandf. Ch. (N. Y.) 56; *Russell v. Southard*, 12

of price,¹ possession by the grantor,² long delay in asserting the mortgage,³ the payment of interest on the amount,⁴ and other circumstances of the case which tend to show the relation between the parties, and the true nature of the transaction.⁵

6. *Degree of Proof required.*—The degree of proof should be that of certainty, or, as it has been expressed, should be clear, convincing, and satisfactory.⁶

How. (U. S.) 139; Ennor v. Thompson, 46 Ill. 214.

But a pre-existing debt is not conclusive of the instrument being a mortgage. It may be what it purports to be, and may have been given in satisfaction of such debt. Ford v. Irwin, 18 Cal. 117; Baisch v. Oakeley, 68 Pa. St. 92; Todd v. Campbell, 32 Pa. St. 250; Hogarty v. Lynch, 6 Bosw. (N. Y.) 138; Snively v. Pickle, 29 Gratt. (Va.) 27; Baxter v. Willey, 9 Vt. 276; Bigelow v. Topliff, 25 Vt. 273; Toler v. Pender, 1 Dev. & B. Eq. (N. Car.) 445; Slee v. Manhattan Co., 1 Paige (N. Y.), 48; Conler v. Williams, 23 La. Ann. 281; Hooper v. Bailey, 28 Miss. 328; West v. Hendrix, 28 Ala. 226; Zane v. Fink, 18 W. Va. 693.

"It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed." *Mr. Justice Wells*, in Campbell v. Dearborn, 109 Mass. 130.

It is not essential that the conveyance be made by the debtor. It may be by another for his benefit. Barnett v. Nelson, 46 Iowa, 495; Hidden v. Jordan, 21 Cal. 92; Smith v. Knoebil, 82 Ill. 392; Strong v. Shea, 83 Ill. 575.

1. Wilson v. Patrick, 34 Iowa, 362; Trucks v. Lindsey, 18 Iowa, 504; Bridges v. Linder, 60 Iowa, 190; Davis v. Stone-street, 4 Ind. 101; Klein v. McNamara, 54 Miss. 90; Matthews v. Porter, 16 Fla. 466; Gibbs v. Penny, 43 Tex. 560; Overton v. Bigelow, 3 Yerg. (Tenn.) 513; Crews v. Threadgill, 35 Ala. 334; West v. Hendrix, 28 Ala. 226; Davis v. Demming, 12 W. Va. 246.

2. Crews v. Threadgill, 35 Ala. 334; Ruffier v. Womack, 30 Tex. 332; Daubenspeck v. Platt, 22 Cal. 330; Strong v. Shea, 83 Ill. 575; Thompson v. Banks, 2 Md. Ch. 430; Steel v. Black, 3 Jones, Eq. (N. Car.) 427; Streater v. Jones, 3 Hawks (N. Car.),

423; Sellers v. Stalcup, 7 Ired. Eq. (N. Car.) 13; Kemp v. Earp, 7 Ired. Eq. (N. Car.) 167; Wilson v. Patrick, 34 Iowa, 362; Trucks v. Lindsey, 18 Iowa, 504; Hills v. Loomis, 42 Vt. 562, and many other Vermont cases; Davis v. Demming, 12 W. Va. 246; Hoffman v. Ryan, 21 W. Va. 415; Lincoln v. Wright, 4 De G. & J. 16. But see Edwards v. Wall, 79 Va. 321.

3. De France v. De France, 34 Pa. St. 385; Connor v. Chase, 15 Vt. 764; Anding v. Davis, 38 Miss. 574; Tull v. Owen, Y. & C. 192; Hancock v. Harper, 86 Ill. 445.

4. Sweet v. Parker, 22 N. J. Eq. 453, 557. In this case *Vice Chancellor Dodd* says, "Any means of proof may be used to show it to be the latter (a mortgage).—the declarations of the parties; the relations subsisting between them; the possession of the premises retained by the complainant; the value of the property compared with the money paid; the understanding that the sums advanced should be repaid; and the payment of interest, meanwhile, on the amount."

5. Moore v. Wade, 8 Kan. 380; Weide v. Gehl, 21 Minn. 449; Phoenix v. Gardner, 13 Minn. 430; Freeman v. Wilson, 51 Miss. 329; Snively v. Pickle, 29 Gratt. (Va.) 27, and many other Virginia cases; Hoffman v. Bryan, 21 W. Va. 415; Davis v. Brewster, 59 Tex. 93; Horbach v. Hill, 112 U. S. 144; Stephens v. Allen, 11 Oregon, 188; Wilhelm v. Woodcock, 11 Oregon, 518; Sutphen v. Cushman, 35 Ill. 186; Darst v. Murphy, 119 Ill. 343.

6. Bartling v. Brasuhn, 102 Ill. 441; Hancock v. Harper, 86 Ill. 445; Jones v. Brittan, 1 Woods (U. S.), 667; Cadman v. Peter, 118 U. S. 73; Bingham v. Thompson, 4 Nev. 224; Pierce v. Traver, 13 Nev. 526; Conwell v. Evill, 4 Blackf. (Ind.) 67; Williams v. Cheatham, 19 Ark. 278; Matthews v. Porter, 16 Fla. 466; Arnold v. Mattison, 3 Rich. Eq. (S. Car.) 153; Elliot v. Maxwell, 7 Ired. Eq. (N. Car.) 246; Moore v. Ivery, 8 Ired. Eq. (N. Car.) 192; Williams v. Stratton, 18 Miss. 418; Woodworth v. Carman, 43 Iowa, 504; Zuver v. Lyons, 40 Iowa, 510; Crawford v. Taylor, 42 Iowa, 260; Knight v. McCord, 63 Iowa, 429; Miller v. Stokely, 5 Ohio St. 194; Stall v. Cincinnati, 16 Ohio St. 169; Miami Ex. Co. v. U. S. Bank, Wright (Ohio), 249, 252; Todd v. Campbell, 32 Pa. St. 250;

Slight or indefinite evidence will not avail.¹

7. *Grantor may redeem.* — It follows from what has been stated, that the grantor of a deed intended as a mortgage may maintain a bill to redeem;² but in seeking this relief, or a reconveyance of the premises, he must pay the amount due, or discharge the undertaking which the deed was given to secure.³ He may, however, have released or waived his right of redemption, in which case it cannot, of course, be exercised.⁴

8. *Rights of Purchaser.* — A purchaser of premises, the subject of an equitable mortgage, of this sort, is subject in his rights to those of the mortgagor, if at the time of the purchase he had notice thereof, express or implied;⁵ but otherwise not.⁶

III. Informal Mortgages. — Mortgages, intended as such, but which lack some formality essential to their validity at law, may in very many instances be given their intended effect in equity.⁷

Plumer v. Guthrie, 76 Pa. St. 441; *McClurkin v. Thompson*, 69 Pa. St. 305; *Haynes v. Swann*, 6 Heisk. (Tenn.) 560; *Nickson v. Toney*, 3 Head (Tenn.), 655; *Lane v. Dickerson*, 10 Yerg. (Tenn.) 373; *Rogan v. Walker*, 1 Wis. 527; *Butler v. Butler*, 46 Wis. 430; *Whitsett v. Kershaw*, 4 Colo. 419; *Coburn v. Anderson*, 62 How. Pr. (N. Y.) 268; *Cochrane v. Price*, 8 Atl. Rep. (Md. 1887) 361.

It should make out the case beyond a reasonable doubt. *Tilden v. Streeter*, 45 Mich. 533.

One witness is not sufficient unless his testimony be corroborated by the circumstances of the case. *Moreland v. Barnhart*, 44 Tex. 275, 583, and cases cited. Overruled in *Pierce v. Fort*, 60 Tex. 464.

1. *Hancock v. Harper*, 86 Ill. 445; *Knowles v. Knowles*, 86 Ill. 1; *Sharp v. Smitherman*, 85 Ill. 153; *Magnusson v. Johnson*, 73 Ill. 156; *Smith v. Cremer*, 71 Ill. 185; *Price v. Karnes*, 59 Ill. 276; *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138.

"It will not avail to show that the grantor understood the instrument to be a mortgage." *Phoenix v. Gardner*, 13 Minn. 430; *Holmes v. Fresh*, 9 Mo. 201; *Jones v. Brittan*, 1 Woods (U. S.), 667.

But when it is admitted that the deed was intended merely as security for a debt, the burden is upon the grantee to prove its amount. *Freytag v. Hoeland*, 23 N. J. Eq. 36.

2. *Westlake v. Horton*, 85 Ill. 228; *Campbell v. Dearborn*, 109 Mass. 130; *McDonough v. Squire*, 111 Mass. 217.

The maxim, "Once a mortgage, always a mortgage," applies to these as well as to formal mortgages, and the right of redemption may be exercised until it is either released or barred by the statute of limitations. *Elliott v. Wood*, 53 Barb. (N. Y.) 285; *Marks v. Pell*, 1 Johns. Ch. (N. Y.) 594,

and numerous other New York cases. And the release or waiver must be subsequent to the execution of the deed. *Peugh v. Davis*, 96 U. S. 332.

The right to redeem and the right to foreclose are, however, reciprocal: where one right is barred by the statute of limitations, the other is barred also. *Taylor v. McClain*, 60 Cal. 651.

3. *White v. Lucas*, 46 Iowa, 319; *Westfall v. Westfall*, 16 Hun (N. Y.), 541; *Cowling v. Rogers*, 34 Cal. 648; *Heacock v. Swartwout*, 28 Ill. 291.

4. *Maxfield v. Patchen*, 29 Ill. 39; *Carpenter v. Carpenter*, 70 Ill. 457; *Woodworth v. Carman*, 43 Iowa, 504.

The release or waiver must be clear, must be founded upon sufficient consideration, and must be subsequent to the execution of the deed. *Peugh v. Davis*, 96 U. S. 332.

5. *Hurst v. Beaver*, 50 Mich. 612; *Smith v. Knoebel*, 82 Ill. 392; *Houser v. Lamont*, 55 Pa. St. 311, and cases cited; *Graham v. Graham*, 55 Ind. 23; *French v. Burns*, 35 Conn. 359; *Kuhn v. Rumpff*, 46 Cal. 299; *Amoy v. Lawrence*, 3 Cliff. (U. S.) 523; *Williams v. Thorn*, 11 Paige (N. Y.), 459.

6. *Jenkins v. Rosenberg*, 105 Ill. 157; *Pancake v. Cauffman*, 7 Atl. Rep. (Pa. 1886) 67; *Sweetzer v. Atterbury*, 100 Pa. St. 18.

Contra, where purchaser takes by quitclaim. *Schradski v. Albright*, 93 Mo. 42.

Where a deed absolute in form was claimed to have been given as a mortgage, and the original owner swore that he so notified one who subsequently bought the property at its full market price from the grantee, which the purchaser flatly denied, *held*, that notice to such purchaser was not proved, and he would not be declared to hold as mortgagee. *Frink v. Adams*, 36 N. J. Eq. 485.

7. *Daggett v. Rankin*, 31 Cal. 321; *Flagg*

Thus, should a seal be omitted by mistake,¹ or should the instrument not be acknowledged² or witnessed as required,³ or the name of the grantee omitted,⁴ equity might nevertheless enforce it.⁵

So there are many instruments not always intended as mortgages, not having the usual form of mortgages, and which the law does not recognize as such, which will be so construed in equity.⁶

Thus, an assignment of a lease for the purpose of securing a

v. Mann, 2 Sumn. (U. S.) 486; *Jones v. Brewington*, 58 Mo. 210; *Payne v. Wilson*, 74 N. Y. 348.

1. *Harrington v. Fostner*, 58 Mo. 468; *Dunn v. Raley*, 58 Mo. 134; *McClurg v. Phillips*, 49 Mo. 315; *Gill v. Clark*, 54 Mo. 415; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Eaton v. Green*, 22 Pick. (Mass.) 526; *Kelleran v. Brown*, 4 Mass. 443; *Woods v. Wallace*, 22 Pa. St. 171.

A loan of money, and a deed given as security therefor, with a contract, not under seal, showing the transaction, will be regarded as an equitable mortgage. *Lewis v. Small*, 71 Me. 552.

2. *Black v. Gregg*, 58 Mo. 565.

3. *Lake v. Doud*, 10 Ohio, 415; *Abbott v. Godfrey*, 1 Mich. 198. See, however, *Thompson v. Morgan*, 6 Minn. 292; *Parret v. Shaubhut*, 5 Minn. 323; *Harper v. Barsh*, 10 Rich. Eq. (S. Car.) 149.

4. *Burnside v. Wayman*, 49 Mo. 356; *McQuie v. Peay*, 58 Mo. 56.

5. So where an agent or officer having authority to execute a mortgage for the principal by mistake, executes it in his own name, it will be held to be binding on the principal in equity. *Love v. Sierra Nevada, etc., M. Co.*, 32 Cal. 639; *Miller v. Rutland, etc., R. Co.*, 36 Vt. 452.

Equity will not, however, extend a remedy where the mortgagor has not signed. *Goodman v. Randall*, 44 Conn. 321.

6. For examples, see *Newlin v. McAfee*, 64 Ala. 357; *Parks v. Parks*, 66 Ala. 326; *Turner v. Wilkinson*, 72 Ala. 361; *Remington v. Higgins*, 54 Cal. 620; *Carey v. Rawson*, 8 Mass. 159; *Moors v. Albrow*, 129 Mass. 9; *Vliet v. Young*, 34 N. J. Eq. 15; *Blizzard v. Craigmiles*, 7 Lea (Tenn.), 693; *Starks v. Redfield*, 52 Wis. 349; *Hoile v. Bailey*, 58 Wis. 434; *Radford v. Folsom*, 58 Iowa, 473; *Hall v. Hall*, 50 Conn. 104; *Beatty v. Brummett*, 94 Ind. 76; *Brown v. Brown*, 103 Ind. 23; *Voss v. Eller*, 10 N. E. Rep. (Ind. 1887) 74; *Bearss v. Ford*, 108 Ill. 16; *Union Mut. Life Ins. Co. v. Slee*, 110 Ill. 35; *Ferris v. Wilcox*, 51 Mich. 105; *Joseph Smith Co. v. McGuinness*, 14 R. I. 59; *Stewart v. Hutchins*, 13 Wend. (N. Y.) 485.

Any instrument pledging land for a debt is an equitable mortgage, without regard to

its form. *Wayt v. Carwithen*, 21 W. Va. 516; *Dunman v. Coleman*, 59 Tex. 199; *Overstreet v. Baxter*, 30 Kan. 55; *McDonald v. Kellogg*, 30 Kan. 170; *Mellon v. Lemmon*, 111 Pa. St. 56. See also *Beatty v. Snook*, 5 Mich. 231; *Cross v. Hepner*, 7 Ind. 359; *Marshall v. Stewart*, 17 Ohio, 356; *Read v. Gaillard*, 2 Desau. (S. Car.) 552; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75.

A deed of land, with a power of sale to secure the payment of a debt, whether made to a creditor or a third person, is, in equity, essentially a mortgage, if there is left a right to redeem on payment of such debt. *Shillaber v. Robinson*, 97 U. S. 68.

An instrument securing a single creditor on property which by its terms can be disposed of only to pay the secured debt, is an equitable mortgage. *Parsell v. Thayer*, 39 Mich. 467.

Any transaction by which money is lent on the security of real estate granted to the person making the loan, is treated in equity as a mortgage, though the borrower incurs no personal obligation, and the grant is made by the holder of the legal title for the benefit of a borrower having merely a right of redemption. *Fisk v. Stewart*, 24 Minn. 97.

Where the grantees in a deed executed an instrument providing that, if the grantor paid for certain legal services rendered by them, the land was to be reconveyed to him, *held*, that this constituted a mortgage. *Scott v. Mewhirter*, 49 Iowa, 487.

A lease made as security to the lessee for his support by the lessor, is a mortgage. *Lanfair v. Lanfair*, 18 Pick. (Mass.) 299.

Where the grantee of a deed absolute upon its face executed a declaration of trust acknowledging that the money to be paid by him to the grantor was the proper money of certain creditors of the grantor, *held*, that such declaration was not in the nature of a defeasance, and did not, with the deed, constitute a mortgage. *Frick's Appeal*, 87 Pa. St. 327.

If A. conveys land to B. by a deed in form absolute, and B. gives a bond for a reconveyance on payment of a certain sum at a certain time, this, *prima facie*, is a conditional sale. *Buse v. Page*, 32 Minn. 111.

debt, with an agreement for a re-assignment on payment thereof, is viewed in equity as a mortgage.¹ So an assignment of the rents and profits of leased premises for a like purpose has been said to be of like effect in equity.² Likewise, an assignment of a contract for the purchase of land by the vendee as security for a debt, is treated as a mortgage,³ as is a reservation in a deed of a lien upon the land conveyed as security for the unpaid purchase-money,⁴ or an agreement to give a mortgage.⁵

At law, the defeasance must be to the grantor himself, but in equity it may be in favor of a third party.⁶

1. *Jackson v. Green*, 4 Johns. (N. Y.) 186.

2. *Willis, ex parte*, 1 Ves. Jr. 162. But see *Alexander v. Berry*, 54 Miss. 422.

A stipulation in a lease that buildings erected by the lessee are mortgaged as security for the rent, is an equitable mortgage. *Barroilhet v. Battelle*, 7 Cal. 450.

A written contract to apply the proceeds or rents and profits of a portion of a tract of land to the payment of a debt, creates an equitable lien on such portion. *Smith v. Patton*, 12 W. Va. 541.

3. *Smith v. Lackor*, 23 Minn. 454; *Fitzhugh v. Smith*, 62 Ill. 486; *Brockway v. Wells*, 1 Paige (N. Y.), 617; *Fessler's Appeal*, 75 Pa. St. 483; *Purdy v. Bullard*, 41 Cal. 444.

Even though the contract be conditional. *Curtis v. Buckley*, 14 Kan. 449.

This is also true of the assignment of a bond for a deed as security. *Jones v. Lapham*, 15 Kan. 540; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Bull v. Shepard*, 7 Wis. 449; *Button v. Schroyer*, 5 Wis. 598; *Newhouse v. Hill*, 7 Blackf. (Ind.) 584; *Alderson v. Ames*, 6 Md. 52; *Fenno v. Sayre*, 3 Ala. 458; *Neligh v. Michenor*, 3 Stock. (N. J.) 539; *Christy v. Dana*, 34 Cal. 548.

Indeed, the effect of the bond itself has been said by some courts to be that of a mortgage from the vendee to the vendor. *Lewis v. Booskins*, 27 Ark. 61; *Smith v. Robinson*, 13 Ark. 533; *Shall v. Biscoe*, 18 Ark. 142; *Tanner v. Hicks*, 4 S. & M. (Miss.) 294; *Smith v. Moore*, 26 Ill. 504; *Smith v. Price*, 42 Ill. 399; *Button v. Schroyer*, 5 Wis. 598; *Scroggins v. Hoadley*, 56 Ga. 165; *Relfe v. Relfe*, 34 Ala. 504; *Lingam v. Henderson*, 1 Bland, Ch. (Md.) 236; *Irvine v. Muse*, 10 Heisk. (Tenn.) 477; *Cleveland v. Martin*, 2 Head (Tenn.), 128; *Richards v. Fisher*, 8 W. Va. 55; *Merritt v. Judd*, 14 Cal. 59; *Purdy v. Bullard*, 41 Cal. 444; *Dukes v. Turner*, 44 Iowa, 575.

So it is true of the assignment as security of a certificate of purchase of public land, — *Hill v. Eldred*, 49 Cal. 398; *Stover v. Bounds*, 1 Ohio St. 107; *Case v. McCabe*,

35 Mich. 100; *Hays v. Hall*, 4 Port. (Ala.) 374; *Ross v. Mitchell*, 28 Tex. 150; *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Wis. 307; *Dodge v. Silverthorn*, 12 Wis. 644, — or of the certificate issued after making final proof under the homestead act, and becoming entitled to a patent. *Jones v. Yoakam*, 5 Neb. 265.

4. *Davis v. Hamilton*, 50 Miss. 213; *Moore v. Lackey*, 53 Miss. 85; *Heist v. Baker*, 49 Pa. St. 9; *White v. Downs*, 40 Tex. 226; *Masterson v. Cohen*, 46 Tex. 520; *Markoe v. Andras*, 67 Ill. 34; *Carpenier v. Mitchell*, 54 Ill. 126; *King v. Young Men's Ass'n*, 1 Woods (C. C.), 386; *Thompson v. Heffner*, 11 Bush (Ky.), 353; *Parsons v. Hoyt*, 24 Iowa, 154; *Hall v. Mobile, etc., Ry. Co.*, 58 Ala. 10; *Dingley v. Ventura Bank*, 57 Cal. 467. Or a provision that the title shall not pass until the purchase-price is paid. *Pugh v. Holt*, 27 Miss. 461; *Carr v. Holbrook*, 1 Mo. 240.

If the deed be recorded, or he has other notice of its conditions, a purchaser of the property, or a judgment creditor, will be subject in his rights to such a condition or reservation. *Davis v. Hamilton*, 50 Miss. 213; *Stucklin v. Cooper*, 55 Miss. 624; *Parsons v. Hoyt*, 24 Iowa, 154; *Radford v. Folsom*, 58 Iowa, 473; *Thompson v. Heffner*, 11 Bush (Ky.), 353. See, however, *Strauss's App.* 49 Pa. St. 353; *Hiester v. Green*, 48 Pa. St. 96; *Pierce v. Gardner*, 83 Pa. St. 211.

A lien reserved on land in the deed thereof is not waived by accepting other security, — *Lusk v. Hopper*, 3 Bush (Ky.), 179; *Price v. Lauve*, 49 Tex. 74; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *Bozeman v. Ivey*, 49 Ala. 75; *McCaslin v. The State*, 44 Ind. 151; *Strickland v. Somerville*, 55 Mo. 164; *Lewis v. Pusey*, 8 Bush (Ky.), 615; *Dunlap v. Shanklin*, 10 W. Va. 662; *Hurley v. Hollyday*, 35 Md. 469, — or other notes, — *Chitwood v. Trimble*, 58 Tenn. 78; *Bradford v. Harper*, 25 Ala. 337; *Bozeman v. Ivey*, 49 Ala. 75.

5. *Payne v. Wilson*, 74 N. Y. 348.

6. *Reigard v. McNeil*, 38 Ill. 400; *Ryan v. Dox*, 34 N. Y. 307; *Barton v. May*, 3 Sandf. Ch. (N. Y.) 450; *Sahler v. Signer*,

1. *What considered in construing.*—In construing these informal documents, courts, as in receiving evidence that a deed absolute upon its face is in fact a mortgage, take into consideration the intention of the parties, their relations, inadequacy of price, the possession of the grantor, and the other circumstances of the case.¹

IV. Mortgages by Deposit of Title-deeds.—In England it is a generally recognized and thoroughly established doctrine that an equitable mortgage may be created by a deposit of the title-deeds as security for a debt.²

There, no general system of registration of title papers exists: title to lands is made to mainly depend upon the possession of the original documents, and there would therefore seem to be good reason for the doctrine there. But its adoption in the United States would be in conflict, both with the universally established system of public registration and the statute of frauds; and the courts have therefore generally rejected it,³ though some have adopted it.⁴

However, where a written agreement is entered into, and deposited with the title-deeds, stating the purpose of the deposit, it has been considered that the objections are removed, and that the transaction constitutes an equitable mortgage.⁵

EQUITY. See, for subjects not fully treated herein, the various titles and sub-titles of the following analysis.

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2. *Russel v. Russel*, 1 Bro. C. C. 269; *Whitbread v. Jordan*, 1 Y. & C. 303; *Pye v. Daubuz*, 2 Dick. 759; *Lacon v. Allen*, 3 Drew, 579, 582; *Kensington, ex parte*, 2 V. & B. 79. And for details of the subject, see *Pryce v. Bury*, 2 Drew, 41;

Spoule v. Whayman, 20 Beav. 607; *Langston, ex parte*, 17 Ves. 227; *Baynard v. Woolley*, 20 Beav. 586; *Roberts v. Croft*, 24 Beav. 223; *Hockley v. Bantock*, 1 Russ. 141; *Hooper, ex parte*, 1 Mer. 7; *Lucas v. Darrien*, 1 Moo. 29.

3. *Meador v. Meador*, 3 Heisk. (Tenn.) 562; *Gothard v. Flynn*, 25 Miss. 58; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 438.

4. *Gale v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 N. J. Eq. 104. And see *Hackett v. Reynolds*, 4 R. I. 512; *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9; *Jarvis v. Dutcher*, 16 Wis. 307.

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I. Definition. — 1. *Its Broadest, most Literal Sense.* — The word "equity" is used in three different senses. In its first and broadest sense it is synonymous with natural justice;¹ but this use of the word is far different from its use in modern law.² Although natural justice often furnishes a guide to the courts of equity in their administration of relief,³ it would be impossible for those courts to take cognizance of purely moral rights and obligations; so that in this sense, equity belongs to the science of morals rather than that of jurisprudence.⁴

1. Bouvier's Law Dict. (15th ed.); Burrill's Law Dict. (2d ed.). "Taken broadly and philosophically, equity means to do to all men as we would that they should do unto us — by the Justinian Pandects *honeste vivere, alterum non laedere, suum cuique tribuere*." Wharton's Law Lex. (6th ed.); 1 Story's Eq. Jur. (13th ed.) § 1.

2. Wharton's Law Lex. (6th ed.); Burrill's Law Dict. (2d ed.).

3. See the following maxims: Equality is equity. He that seeks equity must do equity. He that comes into equity must come with clean hands. Equity imputes an intention to fulfil an obligation.

4. Wharton's Law Lex. (6th ed.) 344; 1 Burrill's Law Dict. (2d ed.) 551; Smith's Man. of Eq. (13th ed.) 3, § 3. "Equity is not synonymous with natural justice, but has a narrower signification; for not only does the court (in order that it may have

some rule to proceed by, and not leave the rights of individuals to depend solely on the particular opinion of the party holding the great seal) strictly adhere to principles which have been successively enunciated by its various judges, in adjudicating on the causes which have been brought before them, notwithstanding the enforcement of such principles may, in particular instances, occasion injustice, but it also leaves many matters of natural justice to be disposed of *foro conscientia*, from the impossibility of framing general rules respecting them, and from the mischief and inconvenience which would arise from attempting judicially to enforce such moral duties as charity, gratitude, or kindness, or even positive engagements which are not founded on a good or valuable consideration." Roberts' Prin. of Eq. To the same effect, see 1 Story's Eq. Jur. (13th ed.) 2, § 2.

2. *Its Ancient Meaning.* — In a second and less universal sense, equity is used in contradistinction to strict law.¹ This is the ancient rather than the modern meaning of the word, and is that of which not only the civilians, but also the common-law writers, are most accustomed to speak; and it is this which has led to the erroneous impression that such is the character of modern equity, and the jurisdiction of the courts of chancery. It assumes that equity is bound by no fixed principles, that it lies entirely within the jurisdiction of the chancellor, that it is higher than the law, with power to reject, modify, or enlarge the latter to meet the exigencies of each particular case.² It is, however, manifest that

1. Bouvier defines this sense of the word thus: "In a more limited application, it denotes equal justice between contending parties. This is its moral signification in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction, it has a more restrained and limited signification." *Law Dict.* (15th ed.). See also Wharton's *Law Lex.* (6th ed.)

"In a stricter sense, the application of the principles of natural right and reason in the actual administration of justice, either by applying rules for cases not provided for by the positive law, by mitigating the rigor of the law itself by a liberal and rational interpretation of its rules, or by adapting its remedies more exactly to the exigencies of particular cases; otherwise termed civil equity." *Burrill's Law Dict.* (2d ed.).

2. This was the sense in which Aristotle used the word when he defined it as "the correction of the law where it is defective by reason of its universality." This definition is followed by Grotius, *De Aequitate*, § 3, and by Blackstone, *Com. Intro.* 61. The latter author subsequently (3 *Bl. Com.* 429) says, "Equity, then, in its true and genuine meaning, is the soul and spirit of all law: positive law is construed, and rational law is made, by it. In this equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule."

The most obvious application of this use of the word "equity" is in the impossibility of providing for every possible predicament in the express words of a statute. This fault is neither in the law nor the legislature, but in the very nature of the thing itself. When, therefore, a matter arises somewhat different from the case provided for in the statute, the court will supply the deficiency in the law, as the legislator would himself direct were he present, or as he would have included in the law if he had anticipated the matter. This is what is meant by the equity of a statute; i.e., the reason and spirit of the statute, and not its

strict letter. Wharton's *Law Lex.* (6th ed.) 344.

Many other definitions have been given by the older writers to the same effect. Thus, *Bacon* — *Bac. Speech*, 4; *Bac. Works*, 488 — says, "Chancery is ordained to supply the law, and not to subvert the law." *Finch* — *Law*, p. 20 — says, that "the nature of equity is to amplify, enlarge, and add to the letter of the law." *Lord Kairns* — *Eq. Intro.* p. 12 — holds the same doctrine, and is followed by *Sir John Trevor*, who goes so far as to say, — *Dudley v. Dudley*, *Preced. in Chancery*, 241, — "Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth. It does also assist the law where it is defective and weak in the constitution (which is the life of the law), and defends the law from the crafty evasions, delusions, and mere subtleties, whereby such as have undoubted right are made remediless." *Francis* — *Maxims of Equity*, preface to the first edition — strongly advocates this view. After reciting the objection that, "not being bound by any established rules or orders, nor circumscribed within the limits of positive laws," the judgments of courts of equity must be arbitrary, he continues, —

"But to this objection it may be answered in general, that where conscience is to direct the judge, that court cannot, with any propriety of sense or speech, be said to be arbitrary. The judge knows, and is sensible, that he sits there, not to dictate according to his will and pleasure, but to be guided by that infallible monitor within his own breast, and surely he who is bound to determine according to the original and eternal rules of justice, is no more arbitrary than he that is bound to judge according to positive laws and statutes; since the one has no more power to alter his own conscience, than the other has to change the law."

For a full discussion of this use of the word "equity," see *Pomeroy*, *Eq. Jur.* § 43-46 and notes; 1 *Story's Eq. Jur.* (13th ed.) pp. 3-19, §§ 3-23.

such an exercise of power by the court of chancery would be little short of legislation; and, as a matter of fact, the jurisdiction of the court of chancery was always bound by certain legal restrictions. In the very essence of equity, it took cognizance of many matters over which the law could not or would not exercise jurisdiction, and in such cases gave remedies where none were given by the common law. But where there was a direct and positive rule of law, equity was obliged to follow it. That equity is largely influenced by the law, and is concurrent with, rather than superior to, the latter, is evidenced by two of its important maxims; viz., "Equity follows the law;" and, "Between equal equities the law must prevail."¹

3. *The Modern Meaning of Equity as a System of Jurisprudence.* — But it is in its third and most restricted sense that the word "equity" is used in modern jurisprudence; namely, a particular system of jurisprudence, administered in England by the courts of chancery, in some of the United States by separate courts called courts of chancery, and in others by the courts of common law, according to the course and practice of chancery. In some States, however, the difference between actions at law and in equity has been abolished. This jurisdiction, as administered in the courts of the United States, is based upon the jurisdiction and practice of the High Court of Chancery in England. It is there of gradual growth, the distinction between it and the common law being his-

1. Blackstone (3 Bl. Com. 429), after giving the definition quoted in the preceding note, says, "But the very terms 'court of equity' and 'court of law,' as contrasted with each other, are apt to confound and mislead us: as if one judged without equity, and the other was not bound by the law," proceeds showing conclusively that the courts of equity had no power to correct or mitigate the law; that a court of equity is governed by the same rules of interpretation as a court of law, and that courts of equity are bound by precedents. 1 Pomeroy, Eq. Jur. §§ 43-60; Adams, Equity (7th Am. ed.), Introduction.

To ascribe to the court of chancery such great power as is here intended, would be attended with great danger. Selden says (Table Talk, title "Equity"), Equity is a roguish thing. For law we have a measure, and know what to trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure, the chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same with the chancellor's conscience."

Francis, on the other hand, holding this idea of equity in its most extreme form, justifies it, as follows: —

"The judges in our courts of law are bound by their oaths to observe the strict rules of law; and, therefore, as upright judges, they must determine according to the known customs and statutes of the realm, although they are sensible, that even in so judging, they do an act of manifest injustice. On the other hand, the judge in a court of equity is not bound to suffer an act of injustice to prevail, though it be warranted by the forms and proceedings at law; and therefore he moderates the rigor of several penalties; relaxes the strict ties of unreasonable conditions; aids against unavoidable losses, clandestine frauds and the like; and thence it is that judgment shall be given in the same case against a man on one side of Westminster Hall, and quite contrary for him on the other; and yet both these agreeable to justice. The narrow-minded person who labors under his great affection for form and order, cannot see the beauty of this contrivance, whereby justice is produced from such jarring jurisdictions; and what neither strict form and order, or absolute latitude in judging, can separately produce, is effected by the excellent temperature of both together. This hath been judiciously compared to the mingling of two herbs, which of themselves are poison, but together make a wholesome medicine." Francis. Maxims of Eq., Preface to 1st ed.

toric rather than philosophic.¹ Hence, in order to a thorough understanding of the word, a study of the history of the rise of the High Court of Equity in England is absolutely essential.²

1. Abbott's Law Dict.; Haynes, Eq. § 1.

2. The definitions of equity, in the sense here intended, may be classified into two divisions. The first embraces those which define it by reference to the particular court, and to its historic character: the second includes those which attempt the definition by reference to the essential characteristics of equity, and without reference to the court.

Of the first class, the following are some of the best:—

"Equity is that system of justice which was administered by the High Court of Chancery in England, in the exercise of its extraordinary jurisdiction." Bispham's Eq. (4th ed.) 1.

"A branch of remedial justice by and through which relief is afforded to suitors in courts of equity. . . . The study of equity jurisprudence, therefore, comprises an inquiry into the origin and history of the courts of equity; the distinctive principles upon which jurisdiction in equity is founded; the nature, character, and extent of the jurisdiction itself; its peculiar remedies; the rules and maxims which regulate its administration, its remedial process and proceedings; and modes of defence; and its rules of evidence and practice." Bouvier's Law Dict. (15th ed.) 596.

"Equity is the phrase commonly used to designate that portion of the law which is administered by the courts of chancery in Lincoln's Inn and at the Rolls. Equity in this sense is wider than law, and narrower than natural justice or natural equity, in the extent of the matters which are the subjects of its jurisdiction. Equity cannot be defined in its content otherwise than by an enumeration of its various subject-matters, being trusts, mortgages, administrations, etc." Brown's Law Dict. 139.

"A system of jurisprudence administered in courts of equity, supplemental to law, properly so called, and complementary of it, — the object of which is to supply the deficiencies of the courts of law, and render the administration of justice more complete, by affording relief where the courts of law, in consequence of imperfections in their machinery, or of their too rigid adherence to peculiar forms, are incompetent to give it, or to give it with effect, whereby certain classes of rights become excluded from the benefit of their protection." — *Webster*.

Story's definition, or rather description, distinguishes very clearly between common law and equity, saying, —

"In England and in the American States,

which have derived their jurisprudence from that parental source, equity has a restrained and qualified meaning. The remedies for the redress of wrongs, and for the enforcement of rights, are distinguished into two classes: first, those which are administered in the courts of common law; and secondly, those which are administered in courts of equity. Rights which are recognized and protected, and wrongs which are redressed by the former courts, are called legal rights and legal injuries. Rights which are recognized and protected, and wrongs which are redressed by the latter courts, only are called equitable rights, and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies therefore are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies therefore are remedies in equity. Equity jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." 1 Story, Eq. Jur. (13th ed.) § 25.

Of the second class of definitions, the most complete is that of Smith (*Man. of Eq.* 13th ed. 3):—

"Equity jurisprudence in the specific and technical sense of the term, as contradistinguished from natural, abstract, and universal equity, and from law and the statutory jurisprudence of the courts, may be described to be a portion of justice or natural equity, not embodied in legislative enactments or in the rules of the common law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights, in respect whereof relief is sought, come within some general class of rights enforced at law, or may be enforced without detriment or inconvenience to the community, but where, as to such particular rights, the courts of law could not, or originally did not, afford any relief or adequate relief, at least not without circuity of action, or multiplicity of suits, or did not make such restrictions, adjustments, compensations, qualifications, or conditions, as might be necessary in order to take due care of the rights of all who were interested in the property in litigation."

See also Wharton's Law Lex. (6th ed.) 344; 1 Rap. and L. Law Dict. 451; Chute, Eq. 4; Roberts, Prin. of Eq. p. 134.

II. Rise of the High Court of Chancery in England.—Although after the Norman Conquest the local tribunals which had existed under the rule of the Anglo-Saxon kings were retained, yet the supreme judicial power was vested in the king, assisted by his councils.¹ Of these there were two,—the Great Council, which, in the reign of Edward I., obtained the settled name of Parliament; and a council always attendant on the king, which acted as his adviser on matters political and judicial during the intervals between the sessions of the great council, but which appears to have formed part of the latter when in session.²

This council was composed of certain officers of the palace, as the constable, marshal, steward, chamberlain; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants, etc., as were to pass under that authority; and the lord high treasurer, the king's adviser in matters relating to the revenue. It was presided over by the king in person, or by some person delegated by him when absent, originally the chief justiciary of the kingdom.³ This council, or *curia regis*, appears to have become, as early as the reign of Henry I., the regular court of ultimate appeal from all the courts of ordinary jurisdiction.⁴ Out of this royal court, or council, courts of justice (properly so called) of original jurisdiction gradually arose.

The oldest court whose existence can be distinctly traced is that of the exchequer, which seems to have been set up by William the Conqueror as part of the *curia regis*, and regulated and reduced to its present order by Edward I., and intended to order the revenues of the crown, and to recover the king's debts and duties. At first the chief justiciary presided; but subsequently two knights, two clerks, and two men learned in the law, were assigned to hear and determine matters arising in this court. In time suits between

This last sense is the one which has been laid down in the few cases in which the word has been defined by the courts in our own country. Thus, the Supreme Court of Maine defines it thus:—

"Equity is not the chancellor's sense of moral right, or his sense of what is equal and just, but is a complex system of established law; and an equitable maxim—as equality is equity—can only be applied according to established rules." *Savings Institution v. Makin*, 23 Me. 360

So in Georgia "the word 'equity' in the oath administered to the special jury on appeals in common-law cases, under the statute of Georgia, is synonymous with law, meaning a system of jurisprudence governed by established rules, and bound down by fixed precedents. The special jury is sworn to try the cause according to equity and the opinion they entertain of the evidence, and not their opinion of

equity, as well as of the evidence." *Thorn-ton v. Lane*, 11 Ga. 459. And similarly in a later case. Equity as used in the Georgia relief act of 1868, providing that the jury, under certain circumstances, may reduce the plaintiff's claim, according to the equities between the parties, does not mean a whim of the jury, or mere mercy, but that fair and honest duty which each owes to the other, growing out of the contract, or arising between them since. *Butler v. Weathers*, 39 Ga. 524.

Courts of equity have no power to enforce any vague equities which involve no rules or interests protected by the rules of justice. *Hendricks v. Toole*, 29 Mich. 340.

1. *Bispham's Eq.* (4th ed.) 3.

2. 1 *Spence, Eq.* 328; *Bispham's Eq.* (4th ed.) 3.

3. 3 *Bl. Com.* 37; 1 *Spence, Eq.* 329; *Bispham's Eq.* (4th ed.) 4.

4. 1 *Spence, Eq.* 107.

subject and subject came to be brought before the Barons of the Exchequer, as they were called.¹

The ambulatory character of the *curia regis* was found to be very burdensome on suitors, since, the court following the king, wherever he might be, they were compelled to travel to different parts of the kingdom to obtain redress. Therefore it was provided by Magna Charta that the common pleas should be held in some certain place, which was afterwards established at Westminster; and hence the Court of Common Pleas arose as a distinct tribunal.²

The county courts, which, as has been stated, were retained after the conquest, had originally jurisdiction in both civil and criminal cases. They were presided over by the sheriffs of the various counties, who were appointed by the king. It was customary to appoint these sheriffs from among the justices in attendance on the *curia regis*, and at times men learned in the law were sent down by special commission to hold these courts. "But one other step was necessary to constitute a distinct tribunal of general jurisdiction; namely, that, before the judge went down to try the cause, the exact matters in dispute should be settled, and the matters of law separated and determined. Hence the king's justices who met for this purpose, and who were afterwards despatched into the different counties to preside over the trial of issues thus made up, came to constitute a distinct tribunal, the King's Bench.³

The presiding officer of the *curia regis* was, until the office was discontinued in the reign of Henry III., the chief justiciary of England, the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence.⁴

The chancellor was the secretary of the king, the keeper of the great seal, having many high dignities aside from his judicial capacity in the court of chancery. In this court there were two tribunals,—the one ordinary, being a court of common law; the other extraordinary, being a court of equity.⁵ The ordinary court is the more ancient. Its jurisdiction extended to cases in which the crown was concerned. From the office of this court issued the writs permitting subjects to bring their actions before the king's courts; for, in the ordinary course of justice, no suits could be brought in the king's court but such as concerned the king. Causes between subject and subject were originally to be determined in the hundred or county courts; but when dissatisfaction began to be felt with regard to the decisions of those tribunals, and suitors began to desire to have their causes determined by the

1. 3 Bl. Com. 33; 1 Spence, Eq. 102; 4. 3 Bl. Com. 38; Bispham's Eq. (4th ed.) 6.
Bispham's Eq. (4th ed.) 5.

2. 3 Bl. Com. 38; Spence, Eq. 113; Bispham's Eq. (4th ed.) 5. 5. 3 Bl. Com. 47; Bispham's Eq. (4th ed.) 7.

3. Bispham's Eq. (4th ed.) 6.

king's court, they applied to the office of the chancellor for a writ applicable to their cases, on obtaining which a fine was paid.¹

But cases constantly arose in which there was no mode of redress in the ordinary courts; and as the council still retained its general supremacy, and had, even as early as the time of Henry I., taken cognizance generally of those cases which the ordinary judges were incapable of determining,² applications were frequently made to that body. In these cases the advice of the chancellor was generally followed, principally because, as out of his office the writs issued in common-law actions, he was naturally best able to tell whether any particular action came under the forms already in use, or called for the exercise of the extraordinary jurisdiction still held in reserve.

It is to be remembered that the jurisdiction of the ordinary courts was circumscribed. There was no elasticity in their practice. Certain strict and rigid forms existed; and where an action did not conform to one of these, there was no remedy. For these injuries the only resource left to the suitor was to seek his remedy from the council, in the exercise of its extraordinary jurisdiction. The circumstances which tended to increase this extraordinary jurisdiction were of a twofold nature: first, those arising from the nature and practice of the courts of common law; namely, the "rigidity of their rules, by reason of the deference paid to precedents, and the refusal of the courts to follow that part of the Roman law which may be called equitable, as distinguished from that which is merely *stricti juris*;"³ and secondly, those arising from the desire to increase the dignity of the office of chancellor.⁴

To meet the difficulty caused by the inflexibility of the common law in the matter of writs, the statute of Westminster the second was passed, authorizing the issuing of writs in *consimile casu*. The clerks of chancery, by their unwillingness or inability to avail themselves of the provisions of this statute to any considerable extent, and the strictness of the judges in the construction of it, prevented its extending the jurisdiction of the courts of common law so as to cover the whole field of remedial justice, and still rendered it necessary for the suitor to apply elsewhere for equitable relief.

These petitions, at first addressed to the council, were afterwards addressed to the chancellor alone; although just at what time the practice commenced, is a matter involved in doubt.⁵

1. 3 Bl. Com. 48; Bispham's Eq. (4th ed.) 7.

2. 1 Spence, Eq. 330.

3. Bispham's Eq. (4th ed.) 8.

4. 3 Bl. Com. 49; Bispham's Eq. (4th ed.) 8; 1 Spence, Eq. 206.

5. Spence says, "In the reign of Edward I. we begin to observe unequivocal marks of an extraordinary jurisdiction exercised in the chancery in civil cases. It was a cus-

tom with this monarch to send certain of the petitions addressed to him praying extraordinary remedies, to the chancellor and master of the rolls, or the chancellor, or the master of the rolls alone, by writ under the privy seal (which was the usual mode by which the king delegated the exercise of his prerogative to the council), directing them to give such remedy as should appear consonant to honesty (*honestati*). There is

The ground for invoking the aid of the chancellor was, that there was no remedy in the courts of common law, either from the failure of those courts to recognize a right, or their inability to enforce it. This seems to have been the case under the Anglo-Saxon kings,¹ and is, at the present day, the ground for asking equitable relief. To the first class of cases, those in which the common-law courts failed to recognize a right, must be referred the subject of trusts; to the second class, those in which those courts were unable to enforce a right which they recognized, must be referred those numerous cases in which "the petitioner was unable to obtain redress, owing to the position or powerful connections of his adversary."² There were also numerous other cases which called for the exercise of the extraordinary jurisdiction of the chancellor.³

This growing jurisdiction of the chancellor was watched very jealously by the commons, who from time to time in the reigns of Richard II., Henry IV., Henry V., and Henry VI., presented petitions complaining of the encroachments of the chancellor on the domains of the common law, and inveighing against the writ

reason to believe that this was not a novelty. Considering what was the constitution of the council, great inconvenience and uncertainty must have resulted from leaving the correction and extension of the law in civil cases to such a tribunal; though it would appear from an ordinance issued in 8 Edward I., that the chancellor was not necessarily the person to whom the exercise of the prerogative of grace, even in matters purely civil, was committed. When the chancellor administered relief independently of the council, it was by express delegation from the king, and given, as it would seem, by the advice of the council." 1 Spence, Eq. 335.

Bispham, — Prin. of Equity (4th ed.), 10, — after quoting the ordinance mentioned by Spence, continues as follows: "A more direct recognition of the chancellor as the proper person by whom the extraordinary jurisdiction in matters of grace was to be administered, is contained in a writ of Edward III., addressed to the sheriffs of London, whereby suitors are specially enjoined to prosecute those affairs which are of grace before the chancellor or the keeper of the privy seal. In this reign the court of chancery ceased to follow the king."

"The natural consequences of these efforts on the part of the king to delegate this branch of judicial authority to the chancellor, would be that petitions for relief would come in time to be addressed directly to that officer. This result, in fact, shortly followed; and in the reign of Richard II. the practice of presenting a petition to the chancellor in the first instance was firmly established."

1. 1 Spence, Eq. 77.

2. Bispham's Eq. (4th ed.) 11.

3. The following cases, taken from the chancery calendar, are cited by Bispham — Prin. of Equity (4th ed.), 11 — "as illustrative of the nature and extent of the extraordinary jurisdiction of the High Court of Chancery during the period which extended from the termination of the reign of Edward III. to the reign of Henry VIII.: Specific performance of a contract; specific delivery of a ship and cargo wrongfully detained (which appears to have been by virtue of the former jurisdiction of the chancellor in admiralty, long since obsolete); delivery for cancellation of documents obtained by force; relief against a forged power of attorney; injunction to restrain a nuisance, said nuisance being the stoppage of a water-course; for an injunction to stay proceedings at law; to recover deeds and other evidence, unjustly retained by the defendant in his possession; for permission to go on with a suit at law from which the plaintiff had been restrained by an injunction; because the plaintiff is disturbed in his manor by the defendant falsely claiming an annuity charged on the land; to restrain a defendant from the use of witchcraft; to assign dower to a poor widow; because the defendant had, through envy, thrown down the plaintiff's house; for relief against maintenance; for quiet possession; for discovery; to set aside a conveyance obtained from the complainant while intoxicated; for tithes; to restrain harassing litigation; to set aside a release obtained by a trick, and to enjoin the defendant from using it in an action at law.

of subpœna; but under the support of the council, and under the shield of their clerical character, the chancellors persisted in upholding this branch of the prerogative.¹

III. Jurisdiction of the Courts of Equity. — 1. *Generally.* — The jurisdiction of the courts of equity has been remodelled in England by statute; and in the courts of most of the States of the United States, as well as in the federal courts, it depends upon special statutory enactments.²

In general it may be said, however, that equity will not take jurisdiction where a plaintiff has a complete and adequate remedy at law.³ Accordingly, a court of equity will not take jurisdiction

1. 1 Spence, Eq. 343; Bispham's Eq. (4th ed.) 17.

In the reign of James I. arose that notable dispute between Lord Ellesmere and Sir Edward Coke, at that time chief justice of the Court of King's Bench. "An action was tried before Coke in which the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He then had recourse to the chancery to compel the defendant to answer on his oath, which the latter refused to do, and was committed for contempt. Coke then had indictments preferred against the parties to the bill, their counsel and solicitors, for suing in another court after judgment obtained at law, which was alleged to be contrary to the statute of *præmunire*." The matter was brought before the king, was by him referred to his counsel for advice and opinion, who reported so strongly in favor of the courts of equity, that the king gave judgment in their behalf. The Earl of Oxford's Case, 1 Ch. Rep. 1; s. c., 2 Lead. Cases Eq. 504; 3 Bl. Com. 53; Bispham's Eq. (4th ed.) 17. After that time there was no interference with the jurisdiction of the court of chancery until the entire constitution of the English courts was changed by the Supreme Court Judicature Act. 36 & 37 Vict. ch. 66; L. R. 8 Stat. 306.

2. See *infra*, § 3 (4), and notes.

3. **Remedy at Law.** — Knight v. Ashland, 61 Wis. 246; Denison Co. v. Robinson Co., 74 Me. 116; Galveston, etc., R. Co. v. Hume, 59 Tex. 47; Perkins v. Hendryx, 23 Fed. Rep. 418; Sultan of Turkey v. Tool Co., 23 Fed. Rep. 572; McAlpine v. Tourtelotte, 24 Fed. Rep. 69; Jenkins v. Hannan, 26 Fed. Rep. 657; Allen v. Halliday, 28 Fed. Rep. 261; M., etc., R. Co. v. Woodruff, 26 Ark. 649; Seago v. Harrison, 42 Ga. 189; Huff v. Ripley, 58 Ga. 11; Cavedo v. Billings, 16 Fla. 261; Youngblood v. Youngblood, 54 Ala. 486. But compare Smith v. Griswold, 6 Oregon, 440.

And particularly where questions as to a married woman's separate estate, specific performance, the execution of trusts, or the prevention of frauds, are involved, a

suit is properly brought in equity. Bolman v. Overall (Ala.), 2 So. Rep. 624.

So even if fraud is charged. Green v. Spaulding, 76 Va. 411; Youngblood v. Youngblood, 54 Ala. 486; Huff v. Ripley, 58 Ga. 11. But compare Smith v. Griswold, 6 Oregon, 440.

Adequacy. — The remedy at law must be complete and adequate. Hartford v. Chipman, 21 Conn. 488; Scott v. Scott, 33 Ga. 102; Church v. Church, 26 How. Pr. (N. Y.) 72.

The adequate remedy at law which is the test of the jurisdiction in the federal courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress; and hence a change in the State laws creating a remedy at law in cases of the nature of a bill of *quia timet*, cannot of itself curtail the equity jurisdiction of the federal courts in such cases. McConihay v. Wright, 121 U. S. 201.

In Hunt v. Dantorth, 2 Curt. (U. S. C. C.) 592, it was held that the provision in the judiciary act (1 Stat. at Large, 82, § 16), that a suit in equity shall not be sustained when there is a plain, adequate, and complete remedy at law, is only declaratory of what would otherwise be held in equity. And in this case it was further held that a *feme covert* has not such a remedy at law to recover money held for her separate use.

The remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity, to take away the plaintiff's right to the latter in a federal court. Bunce v. Gallagher, 5 Blatchf. (U. S.) 481.

That the same rule applies in the courts of the several States, see Wilter v. Arnett, 8 Ark. 57; McDaniels v. Lee, 37 Mo. 204; Morris v. Thomas, 17 Ill. 112.

Equitable jurisdiction does not depend on the want of a common-law remedy; for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the parties. Hence,

of cases arising out of torts,¹ to prevent a mere trespass,² in matters of crime,³ of questions of damages pure and simple,⁴ and many other similar cases.⁵ But where the jurisdiction has once been properly acquired by a court of equity, it will retain the case, and settle matters between the parties which do not afford original ground of jurisdiction.⁶ And it may be said in general

the exercise of chancery powers must often depend upon the sound discretion of the court. Appeal of Brush Electric Light Co., 114 Pa. St. 574.

1. **Torts.** — *Meres v. Chrisman*, 7 B. Mon. (Ky.) 422; *Brown v. Wabash Ry. Co.*, 96 Ill. 297.

2. **Trespass.** — *Bank v. Debolt*, 1 Ohio St. 591; *Foundry v. Ryall*, 62 Cal. 416; *Scott v. Means*, 80 Ky. 460; *Kennedy v. Guise*, 62 Ga. 171.

3. **Crime.** — *State v. Uhrig*, 14 Mo. App. 413. In this case the court refused to restrain the keeping of an unlicensed dramshop, although a public nuisance.

4. **Damages.** — *Stanford v. Lyon*, 37 N. J. Eq. 94.

And this is true, even though the plaintiff might have to resort to equity for a satisfaction of his judgment, if he should obtain one. *Brown v. Wabash Ry. Co.*, 96 Ill. 297.

So a court of equity has no jurisdiction of a claim for damages, although such claim may have been introduced in an action for an account. *Osborne v. O'Reilly*, 42 N. J. Eq. 467.

And where damages are the sole object of the bill, equity has refused to take cognizance of a suit for damages arising out of fraud. *Ferson v. Sanger, Daveis* (U. S.), 252.

But where other relief is sought by the bill, which can be obtained only in equity, and damages are claimed as incidental to the relief asked, equity will proceed to determine the whole cause. *Ferson v. Sanger, Daveis* (U. S.), 252; *White v. Fratt*, 13 Cal. 521.

5. **Other Cases.** — The court of chancery will not entertain a suit brought by the assignee of a debt or chose in action which is a mere legal demand, unless special circumstances make it necessary to prevent a failure of justice. *Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596.

So insolvency alone is no ground for equitable interference. *Heilman v. Canal Co.*, 37 Pa. St. 100.

A court of equity will not take jurisdiction of a bill for the mere purpose of settling disputed boundaries. *Wolcott v. Robbins*, 26 Conn. 236; *Doggett v. Hart*, 5 Fla. 215; *Dickerson v. Stott*, 8 N. J. Eq. 294; *Topp v. Williams*, 7 Humph. (Tenn.) 569; *Bresler v. Pitts*, 58 Mich. 347.

Of a bill against a *bona fide* purchaser, *Behn v. Young*, 21 Ga. 207.

Where *habeas corpus* is an adequate remedy in the question as to the custody of a child. *Massee v. Snead*, 29 Ga. 51.

For a debt for goods sold and delivered. *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24.

To annul or revoke charters. *Turnpike Co. v. Jewell*, 8 B. Mon. (Ky.) 140.

To create liens on real estate to secure debts established against the person. *Perkins v. Perkins*, 16 Mich. 161.

Of a suit to declare a forfeiture of real estate for breach of condition subsequent. *Raley v. Umatilla County* (Oregon), 13 Pac. Rep. 890.

To enforce merely the title to land. *Lanier v. Alison*, 31 Fed. Rep. 100. And see *Leonard v. Hart* (N. J.), 7 Atl. Rep. 865.

Of a suit for the recovery of damages sustained by the plaintiff through a fraudulent conspiracy to cheat him out of his interest in an original invention. *Ambler v. Choteau*, 107 U. S. 586.

Of partition between tenants in common land, whereof partition can be made at law. *Husband v. Aldrich*, 135 Mass. 317.

6. **Jurisdiction once attached retained.** — *Hawley v. Simons* (Ill.), 14 N. E. Rep. 7; *Pool v. Docker*, 92 Ill. 501; *Blakey v. Blakey*, 9 Ala. 391; *Pearson v. Darrington*, 21 Ala. 169; *Martin v. Tidwell*, 36 Ga. 332; *Keeton v. Spradling*, 13 Mo. 321; *Sounder's Appeal*, 57 Pa. St. 498; *Sanborn v. Kirtledge*, 20 Vt. 632; *Barnes v. Dow*, 59 Vt. 530; *McMurray v. Van Gilder*, 56 Iowa, 605; *Bouldin v. Reynolds*, 50 Md. 171.

A court of equity will, therefore, decide all questions of law in the controversy before it, and will not give the party leave to bring an action, where it entertains no reasonable doubt on the legal question. *Dodge v. Pond*, 23 N. Y. 69.

But this principle has never been adopted by the court of chancery in New Jersey. *Little v. Cooper*, 10 N. J. Eq. 273. And accordingly in that State, where, after the dissolution of an injunction, the facts alleged to give jurisdiction to a court of equity are not proved, the jurisdiction of the court over all questions properly of law, which remain in the case, is lost. *Little v. Cooper*, 11 N. J. Eq. 224. But compare the later cases of *Trotter v. Hecksher*, 42 N. J. Eq. 254; and *Collins v. Colley* (N. J.), 11 Atl. Rep. 118; which, though they do not

that equity will not interfere after judgment at law, except upon some special equitable ground.¹

in terms overrule the cases first cited, are certainly inconsistent with them.

And an action of a purely legal nature will not be retained for the sole purpose of giving damages which the plaintiff does not demand. *Stevenson v. Buxton*, 15 Abb. Pr. (N. Y.) 352; *McFarlan v. Morris Canal & Banking Co.*, 34 N. J. Eq. 369. But compare *Barlow v. Scott*, 24 N. Y. 40; *Chambers v. Cannon*, 62 Tex. 693.

So equity has jurisdiction to enforce the performance of a contract to deliver a policy of insurance, and, having taken jurisdiction for that purpose, will, in case there has been a loss or death, retain it for the purpose of decreeing payment of the policy. *Hebert v. Ins. Co.*, 8 Sawyer (U. S.), 198. And see *Hayden v. Snow*, 14 Fed. Rep. 70.

And when the pleadings in an action present an equitable issue, and equity has taken cognizance of the case, it will not refuse to grant equitable relief, though it appears from the facts found on the trial that a remedy could have been had in an action at law. *Whiting v. Root*, 52 Iowa, 292.

It has also been decided that a court of chancery may, in the exercise of its general jurisdiction, take upon itself the administration of estates. In doing so, it will take the entire administration into its hands, and administer the estate, as provided in the statute, modified in some cases by the principles of equity. But this jurisdiction will not be taken except in extraordinary cases. *Wood v. Johnson*, 13 Ill. App. 548.

On the same principle, where a suit to foreclose a chattel mortgage is properly cognizable in a court of equity, a party who claims to be the owner of a part of the property mortgaged may intervene in the suit, though he would have a remedy in an action at law. *Osborne v. Barge*, 30 Fed. Rep. 805.

1. Judgment at Law.—Equity, therefore, will not interfere to relieve against a judgment at law where the party seeking relief has been guilty of laches. *Howell v. Motes*, 54 Ala. 1; *Barber v. Rukeyser*, 39 Wis. 590; *Richmond v. Robinson*, 24 Gratt. (Va.) 548. Nor merely because the judgment at law is inequitable. *Stinnett v. Bank of Mobile*, 9 Ala. 120. Nor because of irregularities in the proceedings of the court of law. *Shepard v. Akers*, 3 Tenn. Ch. 215; *Glenn v. Maguire*, 3 Tenn. Ch. 695; *Thompson v. Meek*, 3 Sneed (Tenn.), 271. Accordingly, in *Stinnett v. Bank of Mobile*, 9 Ala. 120, it was held that, while a court of equity will not grant relief against a judgment at law merely because it is inequitable, it may so relieve when he shows the exercise of ordi-

nary diligence to discover the defence, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. And see *Cairo, etc., R. Co. v. Titus*, 27 N. J. Eq. 102.

So in *Endicott v. Penny*, 22 Miss. (14 Sm. & M.) 144, it was held that if after judgment at law, the party against whom it was rendered apply for relief to equity, and the defence be of such a character that a court of equity would have had original jurisdiction, concurrently with a court of law, the neglect of the party to avail himself of the defence at law will not oust the jurisdiction of chancery, if the defendant answer over to the merits, and neglect to rely on the judgment at law, by demurrer to the bill.

So it has been held that a court of chancery will not set aside a verdict on an issue at law, when the judge before whom the case was tried certifies that he is satisfied with the verdict. *Prudden v. Lindsley*, 31 N. J. Eq. 436.

A judgment rendered without jurisdiction is void, and may be attacked collaterally, in any proceeding in which its validity may be called in question. It is clearly within the jurisdiction of courts of equity to enjoin or vacate such judgments. *Follansbee v. South American Mortgage Co.*, 7 Ill. App. 486.

Equity will relieve against an inequitable judgment at law, where the judgment defendant was ignorant, pending the legal action, of the facts showing such judgment to be contrary to equity; or they could not have been set up as a defence; or he was prevented from availing himself of them by fraud, accident, or the acts of the other party, without negligence or fault on his own part. *Barber v. Rukeyser*, 39 Wis. 590.

And the decision of the secretary of the interior, upon mixed questions of law and fact properly presented for his decision, cannot be reviewed in a court of equity, fraud or mistake not being alleged. *Sparks v. Brown*, 2 Wash. Ter. 426.

Where, however, even after a judgment at law, there is nothing in the record adjudging the order of liability as between the defendants, equity may inquire into that order, so as to fix the rights of the debtors between themselves, and may re-adjust them in a suit directed to that end. *Winham v. Crutcher*, 3 Tenn. Ch. 666.

But compare *Tutwiler v. Lane* (Ala.), 3 So. Rep. 104, where it is held that the court had no jurisdiction to correct mistakes of a court of law, which might have been reviewed on appeal.

2. *Jurisdiction in England. — Supreme Court Judicature Act.* — The system of two sets of courts, administering justice on so widely differing, and often conflicting, rules, has been abolished in England by the Supreme Court Judicature Act of Aug. 5, 1873,¹ which consolidated the courts which were then separately existing into one Supreme Court of Judicature, and provides that equitable relief shall be administered therein as it was in the court of chancery before the passage of the act, thereby making the principles of justice, as administered in the latter court, to pervade the whole mass of English jurisprudence.²

3. *Jurisdiction of the Federal Courts.* — Under the Constitution³ the judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or to be made, under their authority.⁴

And also *Simon v. Townsend*, 27 N. J. Eq. 302, where it was held that a defendant to an action at law, who, by pleading therein, has submitted himself to the common-law tribunal, does not thereby forfeit his claim to relief in equity.

1. 36 & 37 Vict. ch. 66; L. R. 8 Stat. 306.

2. *Bispham's Eq.* (4th ed.) 19.

The act went into effect Nov. 2, 1874. It provided that, after that time, "the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and shall constitute . . . one Supreme Court of Judicature in England" (§ 3).

The court consists of two divisions, "Her Majesty's High Court of Justice," and "Her Majesty's Court of Appeal" (§ 4). The number of judges of the former is not to exceed twenty-one (§ 5). The court of appeal was to consist of five *ex officio* judges, "and also so many ordinary judges (not exceeding nine at any one time) as her majesty shall from time to time appoint." The *ex officio* judges are the lord chancellor, the lord chief justice of England, the master of the rolls, the lord chief justice of the common pleas, and the lord chief baron of the exchequer. ("By statute 38 & 39 Vict. c. 77 [1875]; L. R. 10 Stat. 759, the constitution of the court of appeal was changed, and that tribunal was made to consist of the five *ex officio* judges already named, and as many ordinary judges, not exceeding three, as should be from time to time appointed. By the act of 1876 [39 & 40 Vict. c. 59], § 15, L. R. 11 Stat. 384, three additional judges of appeal may be appointed, and an appeal lies from the court of appeal to the House of Lords. The positions of lord chief justice of the common pleas, and

lord chief baron of the exchequer, are now abolished." *Bispham's Eq.* [4th ed.] 19, note.)

The act further provides (§ 24) that in every civil cause commenced in the high court of justice, law and equity shall be administered by the courts according to certain rules laid down.

(1) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief, upon any equitable ground, or to any relief founded upon a legal right, the "said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the court of chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this act."

(2) "If the defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground, . . . or alleges any ground of equitable defence, . . . the said courts respectively, and every judge thereof, shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of such plaintiff or petitioner as the court of chancery ought to have given if the same or like matters had been relied on by way of defence in any suit or proceeding instituted for the same or like purpose before the passing of this act."

§§ 3-7 inclusive direct the court to recognize equitable titles and rights, and to substantially apply equitable remedies.

3. Art. iii. § 2.

4. The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States and their power, and rules of decision are the same in all the States. *Noonan v. Lee*, 2 Black. (U. S.) 499.

The federal courts, therefore, have equity jurisdiction, as thus conferred, subject to further statutory regulations. In reference to chancery practice, the Supreme Court has provided that the practice of the English High Court of Chancery shall form the basis of the equity practice of the courts of the United States.¹ But this jurisdiction is not to be exercised in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.²

1. Eq. Rule 90.

2. Rev. Stat. U. S. § 723, p. 137. But this enactment is merely declaratory of the existing law. *Boyce v. Grundy*, 3 Pet. (U. S.) 210. See *Bispham's Prin. of Eq.* (4th ed.) 21, and note. The language "plain, adequate, and complete remedy at law," has been held to refer to the common law, and not to the statutes of the States. *Gordon v. Hobart*, 2 Sum. 401; *Dodge v. Woolsey*, 18 How. (U. S.) 331. But to prevent the jurisdiction of the courts of equity, the remedy at law must be speedy, practical, and efficient. *Wright v. Ellison*, 1 Wall. (U. S.) 16; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355; *Hungerford v. Sigerson*, 20 How. (U. S.) 156; *Oelrichs v. Spain*, 15 Wall. (U. S.) 211. If the remedy at law can only be made available by a multiplicity of actions, a bill may be filed in equity. *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 812. See *Field's Federal Courts*, 433, note.

District Courts.—The judiciary act and its supplements give the district courts of the United States jurisdiction of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest; and of all suits at law or in equity authorized to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof. Rev. Stat. U. S. § 563, pp. 94, 95.

Circuit Courts, Original.—The circuit courts have original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State where suit is brought, and a citizen of another State, of all suits in equity where the matter in dispute, exclusive of costs, exceeds the value of five hundred dollars, and the United States are petitioners; of

all suits at law or in equity arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within the admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws; and of all suits at law or in equity arising under the patent and copyright laws of the United States. Rev. Stat. U. S. § 629, pp. 109, 110.

Circuit Court, Appellate.—The appellate jurisdiction of the circuit court is as follows: "From all final decrees of a district court in causes of equity, . . . where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear, and determine such appeal." Rev. Stat. (U. S.) § 631, p. 112.

Such an appeal must be made within one year, unless the party entitled to prosecute it is an infant, *non compos mentis*, or imprisoned, when such writ of error may be taken within one year exclusive of the term of such disability. Rev. Stat. § 635, p. 112. And on such appeal, copies of proofs, and of such entries and papers on file as may be necessary, may be certified up to the appellate court. Rev. Stat. U. S. § 632, p. 112.

Circuit and District Courts open as Courts of Equity.—Both the circuit and district courts as courts of equity are always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing on their merits of all causes pending thereon; and any judge of either court may, upon reasonable notice to the parties, make in chambers, or at the clerk's office, in vacation as well as term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court. Rev. Stat. U. S. § 574, p. 101; § 638, p. 113.

Supreme Court.—An appeal shall be

4. *Jurisdiction of the Courts of the Several States.*—In considering the equity powers and jurisdiction of the courts of the several States, the States of the Union may be divided into three groups or classes. The first embraces those in which distinct courts of chancery exist, and includes New Jersey, Kentucky, Delaware, Tennessee, Mississippi, Alabama, Vermont, Virginia, and Arkansas.¹ The second includes those States in which

allowed to the Supreme Court from all final decrees of any circuit court, or of any district court acting as a circuit court in cases of equity, . . . where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and the Supreme Court is required to receive, hear, and determine such appeals. Rev. Stat. U. S. § 692, p. 128.

But from any final decree in equity of circuit or district courts, in cases touching copyrights or patent rights, and in cases brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States, the Supreme Court may exercise appellate jurisdiction without regard to the sum or value in dispute. Rev. Stat. § 699, p. 130.

1. The classification is that of Bispham's Eq. (4th ed.) § 15. This and the following note are based upon, and largely taken from, Bispham's Eq. (4th ed.) 23-28.

States in which Separate Chancery Courts exist.—*New Jersey.*—In New Jersey a court of chancery is created by art. vi. sec. i. of the constitution; and sec. iv. of the same article provides that "the court of chancery shall consist of a chancellor." In 1871 the office of vice-chancellor was created, and in 1881 the appointment of a second vice-chancellor was authorized. P. L. 119. See Rev. Stat. N. J. 1877, pp. 104-127, and Supplement to Rev. Stat. of 1877, pp. 85-91.

Kentucky.—In Kentucky, courts of chancery are established in certain districts. Gen. Stats. of Kentucky, 1881, pp. 295-299.

Delaware.—In Delaware the constitution, by article vi. secs. 1, 2, and 5, provides that there shall be a chancellor of the State, and that he shall hold the court of chancery.

By the Revised Code, 1874, the court of chancery shall have full power to hear and decree all matters and causes in equity, and the proceedings shall be as heretofore, by bill, answer, and other proper pleadings; and the chancellor shall have power to issue subpoenas, and all other process to compel defendants to answer suits there, to award commissions for taking answers and examining witnesses, to grant injunctions for staying suits at law, and to prevent

waste, as there may be occasion, according to the course of chancery practice in England, with powers to make orders and award process, and do all things necessary to bring causes to hearing, and to enforce obedience to decrees in equity by imprisonment of the body or sequestration of lands.

Provided, that the chancellor shall not have the power to determine any matter wherein sufficient remedy may be had by common law or statute before any other court or jurisdiction of this State; but where matters determinable at common law shall be brought before him in equity, he shall remit the parties to the common law; and when matters of fact, proper to be tried by a jury, shall arise in any cause depending in chancery, the chancellor shall order such facts to trial by issue at the bar of the Superior Court. Chap. 95, sec. 1, p. 568. See also Stats. of 1883, pp. 511, 512.

Tennessee.—In Tennessee, by the Constitution of 1870, art. 6, sec. 1, the judicial power of the State is vested "in one Supreme Court, and in such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish." The chancery courts are held by the chancellor.

They have original exclusive jurisdiction of all cases of an equitable nature where the debt or demand exceeds fifty dollars, unless otherwise provided by this code, — Code of Tennessee (Milliken & Vertrees, 1884), sec. 5023, — and all the powers incident to a court of equity, sec. 5022; to aid a creditor, by judgment or decree, to subject the property of the defendant which cannot be reached by execution to the satisfaction of the judgment or decree under the provisions of the code, sec. 5025; to set aside fraudulent conveyances in certain cases, sec. 5034.

They have concurrent jurisdiction over the persons and estates of idiots, lunatics, and other persons of unsound mind, sec. 5041; over the persons and estates of infants, and of the appointment and removal of guardians, sec. 5042; of all civil actions triable at law, except for injuries to person, property, or character, involving unliquidated damages, sec. 5043; for the abatement and recovery of usury, sec. 5044; in all proceedings for divorce, sec. 5044; for

chancery powers are exercised by the judges of the common-law courts, but according to the course and practice of chancery. These States are Maine, New Hampshire, Massachusetts, Rhode

partition of estates; for sales of estates by personal representatives, guardians, heirs, or tenants in common; for sales of lands of decedents at the instance of creditors, for the payment of debts; and for the allotment of dower, sec. 5045; in arbitration and agreed cases, sec. 5046; and, in some cases, in the appointment of administrators, sec. 5047.

Mississippi.—In Mississippi, it is provided by the constitution, that chancery courts shall be established in each county of the State, with full jurisdiction in all matters of equity, and of divorce and alimony; in matters testamentary, and of administration; in minors' business and allotment of dower; and in cases of idiocy, lunacy, and persons *non compos mentis*. Art. vi. sec. 16. And that the legislature shall divide the State into a convenient number of chancery districts. Chancellors shall be appointed in the same manner as the judges of the circuit courts. Art. vi. sec. 17, as amended by the Third Amendment.

These courts have, in addition to general equity powers, concurrent jurisdiction to change the names of those petitioning for it; to restrain the collection of taxes, levied, or attempted to be levied, without authority of law; to issue attachments, and to remove clouds upon title. Rev. Code, 1880, secs. 1829-1833.

Alabama.—Chancery courts are established by art. vi. sec. 1 of the constitution, and by sec. 7 are given original and appellate powers.

The powers and jurisdiction of courts of chancery extend,—

1. To all civil cases in which a plain and adequate remedy is not provided in other judicial tribunals.

2. To all cases founded on a gambling consideration so far as to sustain a bill of discovery, and grant relief.

3. To subject the equitable title or claim to real estate to the payment of debts.

4. To such other cases as may be provided for by law.

Chancellors may exercise the extraordinary jurisdiction granted to that office by the common law in cases of necessity, when adequate provision has not been made for its exercise by some other officer, or in other courts; and with the exceptions, limitations, and additions imposed by the laws of this State. Code of Alabama, 1886, secs. 720-721.

By the Code of 1886, courts of chancery have power to settle disagreements between connecting railroads, secs. 1166-1172; to dissolve corporations, and settle their af-

fairs, secs. 1683-1693; to execute a power when a trustee with right of selection dies, leaving power unexecuted, sec. 1860; to assign dower to widow, sec. 1910; of a contest of a will after admission to probate, secs. 2000-2002; to decree divorces *a vinculo*, and from bed and board, secs. 2322-2340; to relieve infants from the disabilities of non-age, secs. 2357-2363; to decree custody and control of children in case of voluntary separation, secs. 2368-2369; to protect estates of intemperate persons, secs. 2502-2506; to enforce mechanics' liens, sec. 3048; to partition lands, sec. 3262; to issue writs of *ne exeat*, sec. 3498; of injunctions, secs. 3520-3533; to appoint receivers, secs. 3534-3535; to correct errors in settlements of personal representatives and guardians, secs. 3536-3538; of creditors' bills, secs. 3540-3546; and of trusts and trustees, secs. 3549-3584.

Vermont.—The Constitution, chap. ii. § 5, provides that the legislature may establish a court of chancery with such powers as are usually exercised by that court, or as shall appear for the interest of the Commonwealth.

Accordingly such a court is established, "There shall be a court of chancery, the powers of which shall be vested in a chancellor; and the powers and jurisdiction of such court shall be the same as those of the court of chancery in England, except as modified by the Constitution and laws of the State." Rev. Laws, 1880, § 695. And by § 698 it is provided that each judge of the Supreme Court shall be a chancellor throughout the State, and may exercise the power of a court of chancery.

Virginia.—In Virginia, although it properly belongs to the second class of States, there is a special chancery court for the city of Richmond, with exclusive jurisdiction as to the probate and recording of wills; trustees; recording of deeds, etc.; of all suits and proceedings cognizable by law in the circuit courts of the Commonwealth, except such as are specially cognizable in the circuit of Richmond; and it shall have all such powers as may be conferred upon the circuit courts of the Commonwealth, except as to matters of common law and criminal jurisdiction. Code of Va. 1887, § 3070. See also following note, *Virginia*.

Arkansas.—There is a similar state of affairs in Arkansas. Dig. of Stats. 1884, §§ 5398-5419. The constitution authorizes the legislature to establish separate chancery courts. Art. vii. sec. 15. See following note, *Arkansas*.

Island, Connecticut, Pennsylvania, Maryland, Virginia, West Virginia, Georgia, Illinois, Texas, Florida, Michigan, Iowa, Arkansas, and Oregon, and the Territory of New Mexico.¹ The third class

1. States in which Equitable Relief is administered by Common Law Courts, under Equitable Forms. — *Maine.* — In Maine the judicial power is vested in the Supreme Judicial Court, and such other courts as the legislature shall from time to time establish. Const. art. vi. sec. 1.

The Supreme Judicial Court has jurisdiction as a court of equity in the following cases: —

1. For the redemption of estates mortgaged.

2. For relief against penalties and forfeitures, civil and criminal.

3. To compel the specific performance of written contracts.

4. For relief in cases of fraud, trusts, accident, or mistake.

5. In cases of nuisance or waste.

6. In cases of partnership and part owners.

7. The construction of wills and administration of trusts.

8. Discovery in the cases before named, and in cases where the power is especially given by statute.

9. For regulation of taxes by counties, townships, etc.

10. In suits for the redelivery of goods secreted so that they cannot be replevied; and bills by creditors to reach property that cannot be reached at law.

11. In all other cases where there is not a full and complete remedy at law. Rev. Stat. 1883, p. 627, sec. 6. See also p. 628.

Writs of injunction may be issued in cases of equity jurisdiction, and when specially authorized by statute. Rev. Stat. 1883, p. 632, sec. 32.

New Hampshire. — The constitution vests all judicial power in the General Court, giving it power to erect and constitute judicatories for all necessary purposes. Part Second, secs. 3, 4.

It is provided by statute that the Supreme Court shall have the power of a court of equity in all cases cognizable in such court, and may hear and determine according to the course of equity in cases of charitable uses, trusts, fraud, accident, or mistake; of the affairs of copartners, joint tenants or owners or tenants in common; of the redemption and foreclosure of mortgages; of the assignment of dower; of contribution; of waste or nuisance; of specific performance of contracts; of discovery, where discovery may be had according to the course of proceedings in equity; and in all other cases where there is not a plain, adequate, and complete remedy at law, and such remedy may be had by proceedings

according to the course of equity; and may grant writs of injunction whenever the same are necessary to prevent frauds or injustice.

When goods or chattels are unlawfully withheld from the owner, proceedings in equity may be had for a discovery, for a restoration of the property, and for such other relief as the nature of the case and justice may require.

When any estate, property, interest, right, or credit, legal or equitable, of a debtor against whom execution has been issued and returned unsatisfied, is alleged to be so holden that it cannot be reached to be taken on execution by levy or by suit on the judgment, that it has been conveyed by him in fraud of his creditors, or is held by others for his use, proceedings in equity may be had for a discovery and for a relief; and the court shall make proper decrees and orders, and issue proper process to compel a discovery, to prevent the transfer of such estate, property interest, right or credit, and to make application of so much thereof as in justice ought to be applied in satisfaction of the debt.

The provisions of the preceding section shall not apply to property exempt by statute, or to trust property where the trust has been created by a party other than the debtor, and the application would be inconsistent with the trust. General Laws, 1878, pp. 488, 489.

Massachusetts. — In Massachusetts the Supreme Judicial Court has original and exclusive jurisdiction of every original process, whether by bill, writ, petition, or otherwise, in which relief in equity is prayed for, except when a different provision is made; and may issue all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations and individuals, when necessary to secure justice and equity.

The court may hear and determine in equity all cases where the parties have not a plain, adequate, and complete remedy at common law; that is to say, —

Suits to redeem or foreclose mortgages; trusts; specific performance of contracts; suits to compel the redelivery of chattels withheld in such a manner that they cannot be replevied, contributions, and other cases of adjustment; suits between copartners, joint tenants and tenants in common, with authority to appoint receivers, and between joint trustees, co-executors, and co-administrators; waste and nuisance; accounts which cannot conveniently be adjusted at law; creditors' bills, fraud and convey-

includes those in which the distinction between actions at law and suits in equity does not exist. The States are New York, North

ances, in the nature of mortgages; accident and mistake; discovery; and full equity jurisdiction; according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate, and complete remedy at law. Public Statutes, 1882, p. 837, ch. 151, secs. 1-4.

And by act of 1883,—Acts and Resolves of Massachusetts, 1883, ch. 223, p. 510,—it is provided that the Superior Court shall have original and concurrent jurisdiction with the Supreme Judicial Court in all matters in which relief or discovery in equity is sought, and the proceedings are regulated.

Rhode Island.—The constitution vests the judicial power in one Supreme Court, and such other courts as may be established by law, and declares that chancery powers may be vested in the Supreme Court, but in no other court to a greater extent than is now allowed by law. Art. x. secs. 1, 2. And, by statute, the Supreme Court shall have exclusive cognizance of all suits and proceedings whatsoever in equity, with full power to make and enforce all orders and decrees therein, and to issue all process therefor according to the course of equity. Public Stat. 1882, title 25, ch. 192, secs. 8.

Connecticut.—All causes in equity where the matter in demand does not exceed five hundred dollars, shall be brought in the court of common pleas; or, if there be no court of common pleas in the county, then to the district court, if there be one having jurisdiction, or otherwise to the Supreme Court. Gen. Stat. Rev. 1875, p. 413, sec. 2. The Superior Court shall have jurisdiction of all suits in equity, which are not within the sole jurisdiction of other courts. Gen. Stat. Rev. 1875, p. 40, sec. 1, and p. 413, sec. 2. Courts having jurisdiction in equity shall proceed according to the rules, usages, and practice of chancery; and shall take cognizance only of such matters in which adequate relief cannot be had in the ordinary course of law. Gen. Stat. Rev. 1875, p. 413, sec. 5. Special provisions exist upon the subjects of accounts, p. 414, sec. 9; injunctions, pp. 477-479, secs. 1-15; receivers of corporations and partnerships, pp. 482, 483, secs. 1-7; and partition, p. 480, secs. 1-8.

Pennsylvania.—The constitution—art. v. sec. 20—provides that the courts of common pleas shall have and exercise within their respective districts, subject to such changes as shall be made by law, such chancery powers as are now vested by law in the several courts of common pleas, or as may hereafter be conferred upon them. These powers had been conferred by several statutes. The act of 1836—P. L. 789,

Brightley's Purdon's Digest, 1883, p. 689—conferred upon these courts the jurisdiction and powers of a court of chancery, so far as relates to—

The perpetuation of testimony;
The obtaining of evidence from places not within the State;

The care of the persons and estates of those who are *non compos mentis*;

The control, removal, and discharge of trustees, and the appointment of trustees, and the settlement of their accounts;

The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations or partnerships;

The care of trust money and property, made liable to the control of said courts;

Discovery, interpleader, injunction to restrain acts contrary to law and prejudicial to the interests of the community and rights of individuals;

Specific relief when recovery in damage is inadequate. Various other statutes collected in 1 Br. Purds. Dig. 1883, pp. 691, 692, extend the jurisdiction to the following cases; viz., Fraud (actual or constructive); accident and mistake; account; dower; partition, p. 694, secs. 22-27; disputed boundaries, p. 695, secs. 28-30; corporation mortgages, p. 695, secs. 31-35; mines, p. 696, secs. 36-39; apportionment of wharfage and dockage, p. 697, secs. 40, 41; plank roads, p. 696, sec. 42; impurities in gas and water, P. L. 1881, 112; disposition of property of unincorporated societies, P. L. 1883, p. 133. The Supreme Court has no original jurisdiction save in cases of injunction where a corporation is a party defendant.

Maryland.—Art. 56, Const. of 1776, provides that "one person of integrity and sound judgment in the law be appointed chancellor." Subsequent statutes gave him the general powers and jurisdiction of the chancellor in England. See Dorsey's Laws of Maryland, 1840, vol. 3, pp. 2493-2546. The Constitution of 1851 provides—art. iv. sec. 8—that the State shall be divided into eight judicial circuits, in each of which one person shall be elected as circuit judge, and that the said circuit judges, in their "respective circuits, shall have and exercise all the power, authority, and jurisdiction of the present court of chancery in Maryland." The Constitution of 1867 enlarges the number of circuit judges to three for each circuit, and confers upon the court "all the power, authority, and jurisdiction, original and appellate, which the circuit courts of this State now have and exercise, or which may hereafter be prescribed by law." Art.

Carolina, South Carolina, Ohio, Wisconsin, Minnesota, Indiana, Missouri, Nevada, Nebraska, California, Colorado, Kansas, Lou-

iv. secs. 20, 21. See also Rev. Code Maryland, 1878, art. 65, secs. 1-108, pp. 629-651.

Virginia.—The circuit courts shall have original and general jurisdiction of all cases in chancery. . . . Code of Va. 1887, sec. 3058. The proceedings on the equity side are according to the course and practice of chancery, and the jurisdiction is based on that of the High Court of Chancery in England,—see Royall's Virginia Digest, title "Equity,"—and various equitable remedies are provided by statute. See Code of Va. 1887. And see previous note, *Virginia*.

West Virginia.—By the constitution,—art. viii. sec. 12,—the circuit courts of the State have jurisdiction of all cases in equity. The Code of 1887 confers on those courts, besides the general equity powers conferred by the constitution, special powers in the following cases; viz, To dissolve corporations, p. 499, sec. 57; to appoint receivers, p. 500, sec. 58; in suits for divorce, p. 598, secs. 7-13; of matters between guardians and wards, p. 657, sec. 13; of the estates of infants, lunatics, etc., p. 657, secs. 1-18; of transferring property outside of the State, p. 661, secs. 1-9; of the administration of real estate, p. 668, secs. 1-11; of trustees, p. 670, secs. 1-34.

Georgia.—By the Code of Georgia, of 1882,—secs. 3080, 3081,—equity jurisdiction is vested in the Superior Courts of the several counties, and established and allowed for the protection and relief of parties where, from circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong, or relieving from injuries done. Many equitable maxims are made the subject of express enactment. Secs. 3083-3087, and 3090. Special provisions also exist in reference to discovery, secs. 3101-3104; perpetuation of testimony, secs. 3108-3111; accident and mistake, secs. 3116-3128; accounts and set-offs, secs. 3130-3141; administration of assets, secs. 3142-3154; charities, secs. 3155-3160; election, secs. 3161-3165; execution of powers, secs. 3166-3171; fraud, secs. 3172-3182; partition, secs. 3183-3185; specific performance, secs. 3186-3192; trusts and trustees, sec. 3193; injunction, secs. 3210-3225; *ne exeat*, secs. 3226-3231; bills *quia timet*, sec. 3232; of peace and of interpleader, secs. 3233-3237.

See also upon the subjects of the chancery powers of the courts in this State, Williams v. McIntyre, 8 Georgia, 34; Walker v. Morris, 14 Ga. 323; Rutherford v. Jones, 14 Ga. 521.

Illinois.—In Illinois the circuit courts have jurisdiction as courts of chancery,—

Const. art. vi. sec. 12; Rev. Stat. 1887, p. 183, sec. 1,—and also the Superior Court of Cook County. Rev. Stat. 1887, p. 183, sec. 1. Elaborate regulations for practice in these courts are made by statute. See Rev. Stat. 1887, ch. 22, pp. 183, *et seq.* Special jurisdiction is given by the Rev. Stat. 1887, in cases of the creditors' bills, p. 193, sec. 49; bills to quiet title, p. 194, sec. 50; in partition, p. 1048, sec. 1; p. 1054, sec. 39; suits against stockholders, p. 332, sec. 25; contesting wills, p. 1536, sec. 7; dower, p. 522, sec. 19; enforcement of mechanics' lien, p. 927, sec. 4; enforcement of contract of deceased or insane person, p. 303, sec. 2; divorce, p. 545, secs. 4 & 6; account, p. 45, sec. 22, and a few other minor cases.

Texas.—Subject to certain limitations, the district courts are authorized to hear and determine any cause which may be cognizable by courts of law or equity, and to grant any relief which could be granted by either of such courts. Sayles, Civil Stats. 1888, art. 1122. See Voigtlander v. Brotze, 59 Tex. 286. As to the conflict between art. v. sec. 8 and art. v. sec. 16 of the constitution, in regard to the jurisdiction of county and district courts, see Railway Co. v. Rambolt, 67 Tex. 654. The jurisdiction of the county courts is similar to that of the district courts, the distinction being principally in the amount in controversy. Sayles, Civil Stats. 1888, art. 1169. And see Railway Co. v. Rambolt, 67 Tex. 654.

There are special statutes in regard to equity powers to subject property to execution, arts. 2288, 2296; in regard to receivers, art. 1470; injunctions, art. 2898; partition, art. 3490.

Florida.—The circuit courts shall have original jurisdiction in all cases of equity. Const. art. v. sec. 8.

By statute it is provided that no writ of injunction or *ne exeat* shall be granted until a bill be filed praying for such writ, except in the special cases in which such writs are authorized by the practice of the courts of the United States exercising equity jurisdiction. McClellan's Dig. 1881, p. 156, sec. 14.

The issuing of writs of injunction to stay proceedings at law, and of writs of *ne exeat*, is also made the subject of regulation. McClellan's Dig. p. 156, sec. 15; p. 157, sec. 18. Equity jurisdiction is also given to the circuit courts to restrain the sale of property legally exempt from forced sale; to set aside homestead exemptions, and exemptions of personal property, from forced sale; and to enjoin the sheriff from

isiana, and the Territories of Dakota, Idaho, Arizona, Wyoming, Montana, Utah, and Washington.¹

setting aside as exempt property that is not actually exempt. McClellan's Dig. p. 166, secs. 53-55.

Michigan.—In Michigan the office of chancellor is now abolished, and the several circuit courts of the State are constituted courts of chancery. Their powers and jurisdiction in and for the respective counties are co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions, and limitations created and imposed by the constitution and laws of this State. Howell's Annotated Stats. secs. 6592, 6593, & 6611. The court shall dismiss every suit concerning property, excepting suits between partners, and suits for the enforcement of mechanics' liens and of mortgages, where the matter in dispute shall not exceed a hundred dollars with costs. The court may also enforce mining options. How. Ann. Stat. sec. 6613. On the latter see also Acts of 1883, pp. 58 & 59. Jurisdiction is also given and regulated in the case of creditors' bills, discovery, set-off, receivers, bills to quiet title, and waste. How. Ann. Stat. secs. 6614, 6616, 6617, 6624, 6626, 7947; Alimony Laws, 1885, p. 169. Lien of taxes, Laws, 1885, 209.

Iowa.—In Iowa it is provided that judicial power shall be vested in the Supreme Court, district court, and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish. Const. art. v. sec. 1.

The chancery jurisdiction of the Supreme Court is appellate only. Const. art. v. sec. 4.

The district courts are courts of law and equity. Const. art. v. sec. 6.

There are two kinds of action,—ordinary and equitable. The plaintiff may pursue his action by equitable proceedings in all cases where, before the adoption of the code, equity had jurisdiction, and *must* so proceed in all cases where jurisdiction was exclusive.

Action on a note, together with a mortgage or deed of trust for the foreclosure of the same, shall be by equitable proceeding; so of the action for mechanics' lien; so of the action for a divorce; but no cause of action, save for alimony, shall be joined therewith. Miller's Rev. Code, 1884, secs. 2507-2511.

Arkansas.—The legislature may establish chancery courts, but, until it does so, the circuit courts have equity jurisdiction. Const. art. vii. sec. 15. The jurisdiction and practice are regulated. Dig. of Stats. 1884, secs. 947-958; 6521-6526; 6544-6547. And see previous note, *Arkansas*.

Oregon.—In Oregon the enforcement or protection of a private right, or the prevention of or redress for any injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law. Gen. Laws, 1872, p. 189, sec. 1.

The courts are a supreme, circuit, and county courts, having general jurisdiction. Const. art. vii. secs. 1-15.

New Mexico.—In all the courts of this Territory, the common law, as recognized in the United States of America, shall be the rule of practice and decision. Comp. Laws, 1884, § 1823. Jurisdiction of partition is given to the district court, the proceeding to be by petition in chancery. Comp. Laws, 1884, §§ 2274-2281.

So of bills to quiet title, in which case the proceeding is to be conducted as other proceedings on the chancery side of the court, §§ 2214-2218. There are also provisions for the perpetuation of testimony, §§ 2111-2129.

1. States in which there is no Distinction between Actions at Law and Suits in Equity.

—*New York.*—The distinction between actions at law and suits in equity, and the forms of those actions and suits, is abolished by Code of Civil Procedure, § 3339, Rev. Stat. N. Y. (Banks & Bro. 7th ed.) vol. 4, p. 693.

Temporary injunctions may be granted by order. Practice regulated, Code of Civ. Proc. §§ 602-630; Rev. Stat. N. Y. B. & Bro. 7th ed. vol. 4, pp. 119-123; receivers may be appointed, Code of Civ. Proc. §§ 713-716; Rev. Stat. N. Y. (Banks & Bro. 7th ed.) vol. 4, p. 139; and specific performance may be enforced, Code of Civ. Proc. §§ 1323 & 1874; Rev. Stat. N. Y. B. & Bro. 7th ed. vol. 4, pp. 266 & 375, by common-law forms of action.

North Carolina.—The distinction between actions at law and suits in equity, and the forms of all such suits, is abolished by Const. art. iv. § 1.

The Code of 1883 provides for the granting of injunctions, §§ 338-346; appointment of receivers, §§ 379, 668-670, 494-497.

South Carolina.—The Code of Civil Procedure, 1882, establishes but one form of action for the enforcement of civil rights, § 89; and provides that in case of a conflict between the rules of common law and equity in regard to the same matter, the rules of equity shall prevail, § 453. The justices of the Supreme Court may issue writs of injunction, Gen. Stat. 1882, § 2093; and the probate court has jurisdiction in matters testamentary and of administration, minors' business, dower, idiots,

etc., with appeals to the Circuit and Supreme Courts. Code of Civ. Proc. 1882, §§ 37, 55, 56.

Ohio.—There shall be but one form of action which shall be known as a civil action. Rev. Stat. 1884, § 4971. The court is to be regarded as a court of law or a court of equity, and the petition a declaration or a bill in chancery, according to the nature of the case. *Hager v. Reed*, 11 Ohio St. 626. And when the facts entitle a party to relief, the mere form of the action is disregarded. *Neilson v. Fry*, 16 Ohio St. 552; *Jones v. Timmons*, 21 Ohio St. 596. Rights and liabilities, legal and equitable, as distinguished from the mode of procedure, are unaffected. *Dixon v. Caldwell*, 15 Ohio St. 412.

Wisconsin.—Rev. Stat. 1878, § 2600, abolishes the distinction between actions at law and suits in equity, and all difference in the forms of such actions and suits. But this has not abolished the essential differences between them. *Bonesteel v. Bonesteel*, 28 Wis. 245; *Anderson v. Case*, 28 Wis. 505.

Minnesota.—The district courts have original jurisdiction of all civil cases, both in law and equity. Const. art. vi. § 5. And by the Stats. of Minn. 1878, p. 707, § 1, the distinction between actions at law and suits in equity is abolished, and there is but one form of action for the enforcement and protection of private rights to be known as a civil action. By Stats. 1878, p. 633, § 2, the district courts have original jurisdiction in equity; and all suits or proceedings for equitable relief are to be commenced, prosecuted, and conducted to a final decision and judgment, by the like process, pleadings, trial, and proceedings, as in civil actions. By p. 633, § 3, the said courts have power, *inter alia*, to issue writs of injunction and *ne exeat*.

Indiana.—The distinction is abolished by Rev. Stat. 1881, § 249. But the rules of law, as to the rights of the parties, have not been changed thereby. *Maltock v. Todd*, 25 Ind. 128.

Missouri.—The various courts have jurisdiction in civil actions. There is but one form of civil action. *Clark v. Clark*, 86 Mo. 114. Equitable relief is, however, administered under statutory forms. *Bauer v. Gray*, 18 Mo. App. 164; *Joyce v. Murnaghan*, 17 Mo. App. 11. As to injunctions, see Rev. Stat. 1879, §§ 2700–2722; receivers, §§ 428–431, 2358, 2359, 3660–3662, p. 3116.

Nevada.—The district courts have original, and the Supreme Court has appellate, jurisdiction in cases of equity. Const. art. v. §§ 4 & 6. There is, however, but one form of civil action. Comp. Laws 1873, § 1064.

Nebraska.—The district courts have both chancery and common-law jurisdiction.

Const. art. vi. § 9. The distinction between actions at law and suits in equity, and the form of such actions, is abolished, Code Civ. Proc. § 2; Comp. Stat. 1885, p. 629. Sec. 469 of this code, Comp. Stat. 1885, p. 683, provides that judgment may be given for or against one or more several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. That the distinction between law and equity is not abolished, see *Cropsey v. Wiggenhorn*, 3 Neb. 108, 115; *Wilcox v. Saunders*, 4 Neb. 569, 587; and for a statement of the distinction, see *Hall v. Vanier*, 6 Neb. 85.

California.—There is but one form of civil action. Codes & Stats. of Cal. § 10307. Certain equitable remedies are provided for: injunctions, § 3199, §§ 8420–8423, §§ 10525–10529; partition, §§ 10752–10801; quieting title, §§ 10738–10744; receivers, §§ 10304, 10564–10569; specific performance, §§ 8384–8395.

Colorado.—The judicial power of the State, both as to matters of law and equity, is vested in a supreme court, district courts, county courts, justices of the peace, and such other courts as may be created by law. Const. art. vi. § 1. The code (of 1883) abolished all distinctions between legal and equitable actions, and substituted therefor the one action by complaint. The rules and principles of equity jurisprudence still obtain and apply in the adjudication of causes in their nature equitable, but equity practice, *eo nomine*, no longer exists. *Blatchley v. Coles*, 6 Colo. 82. And certain equitable maxims are enforced in the courts. *Nutter v. O'Donnell*, 6 Colo. 253.

Kansas.—There is but one form of civil action. Dassler's Comp. Laws, 1885, § 3803. Equitable relief is, however, administered under statutory forms. See Kansas Digest, Dassler. There are special provisions in regard to the perpetuation of testimony, Dassler's Comp. Laws, 1885, §§ 4199–4205; injunction, §§ 4047–4063; receivers, §§ 4064–4070; partition, §§ 4431–4446; specific performance, §§ 3842 and 2581; and some minor equitable rights and remedies.

Louisiana.—By the Code of Practice, art. 98, the proceedings in civil actions are ordinary, executory, and summary. By the Civil Code, art. 21, "In all civil matters where there is no express law, the judge is bound to proceed and to decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Dakota.—The distinction between actions at law and suits in equity is abolished

IV. Maxims in Equity.—Maxims in equity are general precepts or principles underlying the whole system of equity. They are of constant tacit and sometimes of express reference in most of the discussions of equity, and form a component part of its jurisprudence.¹

The principal of these maxims are the following: Equity follows the law; Equity regards that as done which ought to have been done; Equity looks at the intent rather than at the form; Equality is equity; He who seeks equity must do equity; He who comes into equity must come with clean hands; Where there are equal equities, the first in time shall prevail; Where there are equal equities, the law must prevail; Equity aids the vigilant, not those who sleep on their rights; Equity imputes an intention to fulfil an obligation; Equity will not suffer a wrong to be without a remedy; Equity acts *in personam*; and, Equity acts specifically.²

by Code of Civil Procedure, § 33. He that seeks equity must do equity, enacted in Civil Code, § 809.

Idaho.—Rev. Stat. 1887, § 4020, provides for the abolition of the distinction in form between actions at law and suits in equity, and that where there is a conflict between the rules of equity jurisprudence and the rules of the common law, with reference to the same matter, the rules of equity shall prevail.

Arizona.—Code of Civ. Proc. 1887 provides that all civil suits in courts of record shall be commenced by complaint, § 649, and subsequent sections regulate the procedure. It also provides that rules of equity practice are to govern receivers, § 893; that the general principles of equity are applicable in injunctions, § 2144; and that partition by rules of equity is not to be affected by the statute, § 2399.

Wyoming.—The distinctions between actions at law and suits in equity is abolished. Rev. Stat. 1887, § 2366.

Montana.—There is but one form of civil action, Code Civ. Proc. § 1, Rev. Stat. 1879, p. 41; § 231, p. 81, provides that judgment may be given for or against one or more of several plaintiffs, or one or more of several defendants, and it may, when the justice of the case demands it, determine the ultimate rights of the parties on each side as between themselves. There are in the Code of Civil Procedure special provisions as to injunctions, §§ 170-178; nuisance, waste, §§ 349-353; partition, §§ 364-396; specific performance, § 164, and 236-246; and receivers, §§ 221-226.

Utah.—There is but one form of civil action. Comp. Laws, 1876, p. 401, § 1. Jurisdiction is given in cases of injunctions, pp. 428-431; partition, pp. 330-33-, 479-487.

Washington Territory.—There is but one form of civil action. Code 1881, § 2. Juris-

diction is given in cases of injunctions, §§ 153-173; receivers, 193-199; partition, 552-599; waste and nuisance, 600-604; nuisance, 605-608; specific performance, 623-634; *ne exeat*, 636-643.

1. Story, Eq. Jur. (13th ed.) 60; 1 Pomeroy, Eq. Jur. 103. The latter author says (p. 104), "The principles in themselves are of the highest importance to an accurate understanding of equity as a whole; they are the unailing fountains whence flow the various streams of right and justice; the perennial sources of practical rules applicable to the ever-changing events of social life; the foundation-stones upon which the beautiful structure of equity has been erected. The student who has made all these principles a part of his mental habit, who has, as it were, incorporated them into his very intellectual being, has already mastered the *essence* of equity, and has made the acquisition of its particular rules an easy and delightful labor." And again (vol. 1, p. 390), "These maxims are, in the strictest sense, the *principia*, the beginnings out of which has been developed the entire system of truth known as equity jurisprudence. They are not the practical and final doctrines or rules which determine equitable rights and duties of individual persons, and which are constantly cited by the courts in their decisions of judicial controversies: they are rather the fruitful germs from which these principles and rules have grown by a process of natural evolution." Bispham's Eq. (4th ed. p. 53) defines maxims thus: "A maxim is the embodiment of a general truth in the shape of a familiar adage. There are in equity several of these maxims, in which the general principles of chancery jurisdiction, and the methods by which they are applied, are thus succinctly expressed."

2. 1 Pomeroy, Eq. Jur. 393; Story, Eq.

1. *Equity follows the Law.*—This maxim, though largely quoted by the earlier chancellors, is true in a very narrow and restricted sense in two meanings: first, equity follows the law in the sense of obeying it, conforming to its general rules and policy;¹ and secondly, in applying legal rules to equitable estates.²

2. *Equity regards that as done which ought to have been done.*—This maxim is one of very wide application, and one on which nearly all, if not all, the species of equitable property, equitable interests, and equitable estates, depend.³ It involves the notion

Jur. (13th ed.) vol. 1, pp. 60-68; Bisham, Prin. of Eq. (4th ed.) 53. Spence's enumeration is, "Equity follows the law; Equity will not interfere where there is a complete and satisfactory remedy at law; Equity will not permit a man to be vexed with double suits; He who applies for equity must do equity; and, Equity will protect *bona fide* purchasers." Eq. Jur. of the Court of Chancery (1st Am. ed.), 419-424. Francis gives the following list: "He that will have equity done to him, must do it to the same person; He that hath committed iniquity, shall not have equity; Equality is equity; It is equity that should make satisfaction, which received the benefit; It is equity that should have satisfaction, which sustained the loss; Equity suffers not a right to be without a remedy; Equity relieves against accidents; Equity prevents mischief; Equity prevents multiplicity of suits; Equity regards length of time; Equity will not suffer a double satisfaction to be taken; Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made; Equity regards not the circumstance but the substance of the act; Where equity is equal, the law must prevail." Francis, Maxims (1st Am. ed.), 1.

1. *Scope.*—1 Story, Eq. Jur. (13th ed) 60. Where a rule of law is direct, and governs the particular case, courts of law are bound by it. See Bl. Com. book 3, p. 429. Equity follows the law in regard to the interpretation of statutes, and in the construction of wills and other instruments. Sharswood, Note to Bl. Com. Introd. p. 61. And yet in some cases equity will control a legal title of an heir when it would be deemed absolute at law, and, so far from following the law, openly abandons it. Story gives as an illustration, "If an heir-at-law should by parol promise his father to pay his sisters' portions if he would not direct timber to be felled to raise them, although discharged at law, he would in equity be deemed liable to pay them in the same way as if they had been charged on land." Dalton v. Poole, 1 Vent. R. 318.

Lord Chancellor Talbot, in Heard v. Stamford, Cas. Temp. Talb. 173, clearly
6 C. of L.—45

states the meaning of the principle thus: "There are instances, indeed, in which a court of equity gives a remedy, where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and to extend it farther than the law allows." And see Thornton v. Campbell, 3 Iowa, 221.

Lord Hardwicke, in Paget v. Gee, Amb. App. 810, went so far as to say, "When this court finds the rules of law right, it will follow them; but then it will likewise go beyond them." Such a power is clearly legislative; and Lord Talbot's statement, which is approved by Pomeroy and Story, enunciates the correct principle.

Illustrations.—Equity follows the law as to statutes of limitation. See *infra* Maxim 9, "Equity aids the vigilant," etc.

And it has been held, that, in cases of concurrent jurisdiction, equity as well as law obeys the statute; and in other cases it generally follows the analogy of legal titles. Wright v. Leclair, 3 Iowa, 221.

And courts of equity have no jurisdiction to dispense with the plain requirements of a statute. Stone v. Gardner, 20 Ill. 304.

2. *Trust Estates.*—In general the courts of equity are governed by the same rules as to trust estates as the courts of law are in regard to legal estates. Thus a trust was held to descend according to the same rules as a legal estate in fee. The husband was entitled to curtesy in his wife's trust estate. But this rule is limited in its application. Probably the only important rules of law generally adopted to regulate equitable estates were those concerning descent and inheritance. It is certain that trust estates were free from the feudal incidents of legal estates. 1 Pomeroy, Eq. Jur. 467; 1 Story, Eq. Jur. (13th ed.) 62; Bispham's Eq. (4th ed.) 58; Cowper v. Cowper, 2 P. Wms. 753; Kemp v. Pryor, 7 Ves. 249; Wright v. Leclair, 3 Iowa, 221.

3. *Scope.*—1 Pomeroy, Eq. Jur. 364. "Some writers have failed to apprehend the full significance of this maxim, and have described its effects in altogether a too narrow and partial manner. Others have

of an equitable obligation resting on one of the parties, and a corresponding equitable right on the other, and, even when this right exists, will consider that as done which in good conscience ought to have been done, only in favor of such as have a right to pray that the act might be done,¹ and even then will not be applied against the interests of third persons.²

3. *Equity looks to the Intent rather than to the Form* is a maxim of great importance in equity jurisprudence. It is to be taken in conjunction with the second maxim, and forms the basis on which the latter acts.³

correctly looked upon it as the very foundation of distinctively equitable property rights, of all equitable estates and interests both real and personal;" and on p. 411, after a full discussion of the maxim, he says, "It is no exaggeration therefore to say that the principle lies at the very foundation of the department of equity jurisprudence which deals with equitable estates, property, and interests analogous to property." In this description of the scope of this maxim, Pomeroy follows Adams (Eqs. 6th Am. ed. 256) and Spence (2 Spence, Eq. Jur. 253). Bispham, to a limited extent, adopts the same view, saying (Prin. of Eq. 4th ed. 64), "The maxim will be found running through the whole system of equity jurisprudence." See also *Crabtree v. Bramber*, 3 Atk. 687.

Story, followed by Snell, gives the maxim a much narrower scope. He says (1 Eq. Jur. (13th ed. 68), "The true meaning of this maxim is, that equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them. . . . And the rule is not in other respects of universal application. . . . The most common cases of the application of the rule are under agreements." See also Snell, Eq. 37; *Burgess v. Wheate*, 1 W. Black. 123.

Doctrines derived from. — The most important doctrine of equity based on this principle is that of conversion, q. v. So in the case of agreements, all agreements which are made for a valuable consideration are considered as performed, in favor of persons entitled to insist upon their performance, at the time when, according to the tenor thereof, they ought to have been performed. 1 Story Eq. Jur. (13th ed.) 68; *Felch v. Hooper*, 119 Mass. 52. Thus, where a contract is made for the sale of land, equity will regard the vendor as trustee of the land for the benefit of the vendee, and the vendee as trustee of the purchase-money for the benefit of the vendor, since, by the terms of the contract,

the land ought to be conveyed to the vendee, and the purchase-money transferred to the vendor. So also when in a will, land is directed to be sold, or money to be invested in land, equity will on the same principle regard the land as money in the first case, and the money as land in the second case, from the death of the testator. *Craig v. Leslie*, 3 Wheat. (U. S.) 563; and see *Merriman v. Bush*, 116 Pa. St. 276.

1. 1 Pomeroy, Eq. Jur. 396; 1 Story, Eq. Jur. (13th ed.) 68; *Burgess v. Wheate*, 1 W. Bl. 123.

2. *Casey v. Cavaroc*, 96 U. S. 467.

3. **Scope.** — 1 Pomeroy, Eq. Jur. 412. "The principle involved in this maxim, which is one of great practical importance, pervades and affects to a greater or less degree the entire system of equity jurisprudence, and is inseparably connected with that which forms the subject of the preceding section. [Equity considers that as done which ought to have been done.] In fact, it is only by looking at the intent rather than at the form, that equity is able to treat that as done which ought to have been done. . . . The two principles act together, and aid each other; and it is by their universality and truth that much of equity jurisprudence, which is peculiar and distinctive in contrast with the law, has been developed."

Doctrines derived from. — It is the source of every species of equitable property, estate, or interest, and of equitable lien so far as these exist by the doctrines of equity; the jurisdiction of equity in the cases of penalties and forfeitures, mortgages, and defective execution of powers. 1 Pomeroy's Eq. Jur. 413-418.

Francis expresses the maxim thus: "Equity regards not the circumstances but the substance of the act," and gives as the cases for its application the following: "Equity will enforce the performance of agreements in specie; defects of circumstances in conveyances are frequently supplied in equity, as in the case of defect of livery and seisin; defects of circumstances in the execution of powers are supplied in equity, as in cases of powers of revocation;

5. *Equality is Equity*, or, as otherwise expressed, "Equity delighteth in equality," is a principle only less extended in its scope and application than the two preceding ones. Aside from being the source of several important equitable doctrines, it is a guide to courts of equity in the administration of equitable relief, unless it comes in conflict with some established rule of law.¹

5. *He who seeks Equity must do Equity*, is also a principle of wide application, but only applies to the party who is seeking relief.²

defects of circumstances in the performance of conditions are supplied in equity." Francis, Maxims (1st Am. ed.), 62-71. See *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 577.

1. *Scope of the Maxim.*—Of the meaning and scope of this maxim, Pomeroy says (1 Eq. Jur. 444), "It is the immediate and conceded source of several important and distinctive doctrines of the equity jurisprudence. But this is not all. It furnishes a practical rule for the guidance of equity courts in their administration of equitable reliefs, whenever they obtain jurisdiction over a great variety of cases, unless some compulsory dogma of the law stands in the way."

Doctrines derived from it.—Among the equitable doctrines which have their source in this maxim are those of contribution, marshalling of assets, exoneration. So, under this maxim, in the case of joint purchasers the leaning of courts of equity is against the right of survivorship, and where it is possible will hold the ownership to be in common, and the purchasers have interests in proportion to the amount they have respectively contributed. (*Lake v. Gibson*, 1 Lead. Cas. Eq. 177.) And so, the *pro rata* abatement of legacies and apportionment of liens. 1 Pomeroy, Eq. Jur. 444-453; 1 Story, Eq. Jur. (13th ed.) 67; Bispham's Eq. (4th ed.) 60.

Illustrations.—Other illustrations may be given. Where, in the case of a power in trust, the donee of the power who has the option of selecting out of a class has failed to exercise his discretion, if there is more than one intended beneficiary, equity will divide the property equally among all. Bispham's Eq. (4th ed.) 60.

So, if goods are thrown overboard in stress of weather, or in danger, or in just fear of an enemy, in order to save the ship and the rest of the cargo, that which is saved shall contribute to a reparation of that which is lost, and the owners of the ship shall be contributors in proportion. Francis, Maxims (1st Am. ed.), 22.

2. *Illustration.*—The usual illustration of this maxim is the case of a borrower of money upon usurious interest, who seeks the aid of a court of equity to have the transaction set aside. The court will not

give him the relief sought for unless upon the terms that he will repay the amount borrowed with lawful interest. Bispham's Eq. (4th ed.) 62; 1 Story, Eq. Jur. (13th ed.) 65; 1 Spence, Eq. Jur. 422.

What Equity he must do.—The "equity" which he who seeks equity "must do," is not arbitrary, but "consists in the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, though not, perhaps, by those of the common law." 1 Pomeroy, Eq. Jur. 422. See also *Finch v. Finch*, 10 Ohio St. 501, 508. *infra*.

Must arise from the Same Matter.—And the equity must arise from the same matter as that from which the plaintiff seeks to obtain equity. Thus, in *Finch v. Finch*, 10 Ohio St. 501, it was said (p. 507), "It seems to be well settled that this maxim cannot apply, unless the mutual equities which the maxim supposes arise out of the subject-matter of the suit, and are such as have a foundation in established rules of law or equity, and are capable of enforcement. As where a party asks an account on equitable principles, he must submit to a counter-account on similar principles; or where he asks the specific performance of a contract, he must perform the conditions of that contract on his own part. The maxim invests courts of equity with no arbitrary discretion." And see *N. Y., etc., R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534; *Comstock v. Johnson*, 46 N. Y. 615.

Applications.—The most frequent application of the doctrine of the maxim is in the case of the "wife's equity to a settlement," which was, where a husband came into a court of equity for the purpose of getting in his wife's equitable property, where he had made no settlement upon her, he could not have the aid of the court, until he made a proper settlement. 1 Pomeroy, Eq. Jur. 425, and numerous cases there cited; 1 Story, Eq. Jur. (13th ed.) 66; Bispham's Eq. (4th ed.) 62; Francis, Maxims (1st Am. ed.), 3; *Bosvil v. Brander*, 1 P. Wms. 459; *Howard v. Moffatt*, 2 Johns. Ch. (N. Y.) 206. See also title "Trusts for Married Women."

In *Richardson v. Linney*, 7 B. Mon. (Ky.)

6. *He who comes into Equity must do so with Clean Hands*, or, as otherwise expressed, "He that hath committed iniquity shall not have equity,"¹ is, like the preceding maxim, rather a guide to the courts of equity in their administration of equitable relief, than the foundation of any of the equitable doctrines, estates, or interests.²

570, a contract was made between Linney and his guardian, Richardson, by which the former transferred to the latter all his estate in consideration of two hundred dollars to be paid shortly afterward, and a thousand dollars when the former should come of age, and confirm the contract. The two hundred dollars was paid in accordance with this agreement. After ratifying the contract, Linney filed a bill against Richardson, praying that the pretended ratification be set aside, on the ground that he, Linney, was not of age at the time of making it. This fact was disputed; but it appeared, at all events, that Richardson was ignorant of it, but thought that Linney became of age three days before the ratification. The bill was sustained; but the decree directed that a credit of two hundred dollars be allowed Richardson, for the sum he had actually advanced; the court saying, "He [Linney] comes into a court of equity for relief, and should be required to do equity."

Morrison v. Hershire, 32 Iowa, 271, was a case of a municipal assessment for improvement of streets. Certain property holders, claiming that the assessments were levied unequally, refused to pay their assessments, and filed a petition to restrain the sale of their lots for non-payment. It was held, that before the claimants could claim relief, "as to the sums which they claimed they were over-assessed upon their property, they must pay, or offer to pay, the sums lawfully and justly due according to their own theory of assessment; for he who seeks equity must do equity."

So it has been said that the grantee of a mortgagor of land cannot, because of fraud practised by the mortgagor in obtaining the mortgage, maintain a bill in equity against an assignee of the mortgagee to restrain a sale of the mortgaged premises under a power in the mortgage, without paying the entire debt secured by the mortgage, although the mortgage was assigned to the defendant as security for a less amount. *Foster v. Wightman*, 123 Mass. 100.

When a court of equity is called on to aid a party against the operation of the statute of frauds, and the acts of one who would take an unjust advantage of it, it scrutinizes the conduct and acts of the party invoking its aid, and demands of him the utmost good faith and fair dealing. *Evans v. Folsom*, 5 Minn. 342.

And a court of equity will not allow a

party to claim benefits under a contract, of which he repudiates the obligations. *N. Y., etc., R. Co. v. Mayor, etc.*, 1 *Hilton* (N. Y.), 562.

On this ground it has also been held that a party who receives securities issued by a foreign corporation, in violation of the laws of New York, and then sells them for money, cannot maintain a suit in equity to annul the securities given by him in exchange, without returning those received by him, or the money realized on the sale. *Mumford v. Amer. L. Ins. & Trust Co.*, 4 N. Y. 463. See also *Campbell v. Campbell*, 21 Mich. 438; *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190; *Secrest v. McKenna*, 1 Strobh. Eq. (S. Car.) 356.

1. Francis, *Maxims* (1st Am. ed.), 7.

2. *Scope*.—The maxim is more restrictive than the preceding. That does not assume that the party seeking relief has been guilty of wrong, nor does it refuse him relief, but makes his relief conditional upon his rendering to the defendant the latter's equitable rights. The present maxim does assume previous wrong-doing on the part of the suitor, and, on that account, refuses him any recognition. (1 *Pomeroy*, Eq. Jur. 433.) But the "iniquity" must have been done to the defendant himself, and not to a third party, and must have been in regard to the matter in litigation. *Francis, Maxims*, 1st Am. ed. p. 7, note a; 1 *Pomeroy*, Eq. Jur. 434.

In *Ansley v. Wilson*, 50 Ga. 418, it was said, "The rule that a complainant must come into equity with clean hands, does not go so far as to prohibit a court of equity from giving its aid to a bad or faithless man. The dirt upon his hands must be his bad conduct in the transaction complained of. . . . If the complainant does equity himself, or offers to do it (except in those cases where the rule *in pari delicto*, etc., comes in), his hands are as clean as the court can require. 'He who asks equity must do equity' is the maxim on which the expression as to clean hands is based."

Illustrations.—Many illustrations may be given. Thus, "When money has been loaned on usurious interest, and the lender comes into equity to enforce his claim under the instrument, the borrower may show the invalidity of the instrument, and have a decree in his favor, and a dismissal of the bill without paying the lender any thing, for the court will never assist a wrong-doer in effectuating his wrongful and.

7. *The Principle, "Between Equal Equities Time shall prevail,"* is the rule which is applied to determine the order between conflicting equities. It is perhaps best expressed as follows: "As between persons having only equitable interests, if their interests are in all other respects equal, priority in time gives the better equity."¹

illegal purpose." 1 Story, Eq. Jur. (13th ed.) 64; *Mason v. Gardiner*, 4 Bro. Ch. c. 435.

So, where for £90 loaned, the plaintiff got a bond of £800 from the defendant when he was drunk, and procured judgment thereon, the defendant was entitled to certain lands that were held by other persons in trust for his wife. The plaintiff brought his bill in equity to have these lands subjected to the satisfaction of his judgment, inasmuch as the defendant was entitled to the beneficial interest in the lands in the right of his wife. The court dismissed the bill, refusing to decree to the plaintiff even the amount actually loaned. 1 Ch. Ca. 202. But if in this case the borrower had come into equity to set aside the judgment for fraud, equity would have obliged him to pay to the lender the amount actually loaned. See Maxim 5.

Other illustrations are where, in enforcing the specific performance of a contract, the court will not decree such performance unless the party asking it has acted with perfect fairness in securing the contract. So equity will refuse relief in all cases where the plaintiff's claim is tainted with fraud, or where a contract is illegal. 1 Pomeroy, Eq. Jur. 435-443 and notes; *Bispham's Eq.* (4th ed.) 60-62 and notes.

In *Creath v. Sims*, 5 How. (U. S.) 192, *Daniel, J.*, said (p. 204), "The complainant alleges that the obligation to which he had voluntarily become a party, was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfilment. This prayer, too, is preferred to a court of conscience, to a court that touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this, that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, there we must leave you."

In *Palmer v. Harris*, 60 Pa. St. 156 (cited and approved by the court in *Parlett v. Guggenheimer* (Md.), 8 Cent. Rep. 796), the court refused to restrain the defendant from using, on a tobacco wrapper, certain words, admittedly part of the complainant's trademark, because the complainant marked on his cigar-boxes that the cigars were made in Havana, whereas they were made in New York.

In *Ludlum v. Buckingham*, 39 N. J. Eq. 563, A. and B. made a contract. A. failed to perform, and B. sought damages in equity. It appeared that B.'s conduct in the transaction was wanting in fairness and equity, and, moreover, that he could not perform his part of the contract: *held*, that B. was entitled to nothing. *Ludlum v. Buckingham*, 39 N. J. Eq. 563.

In *Cassady v. Cavenor*, 37 Iowa, 300, the complainant sought the removal of his neighbor's hog-pen as a nuisance. It was found that his own hog-pen was equally offensive. The court refused to interfere, saying, "If one coming into a court of equity for relief must do so with clean hands, it is not unreasonable that he should not be allowed to abate his neighbor's premises because of their uncleanness, when it appears that his own are equally filthy."

On this ground a court of equity will not entertain a bill to cancel an obligation the consideration of which is a violation of chastity, the compounding a felony, smuggling, gambling, false swearing, or the commission of any crime, or breach of good morals. *Weakly v. Watkins*, 7 Humph. (Tenn.) 356. See also *Harrington v. Bigelow*, 11 Paige (N. Y.), 349.

So, where the parties are *in pari delicto*, and where a complainant prays to be relieved from the fulfilment of a contract, which is intentionally made in fraud of law, the court will not interfere. *Carey v. Smith*, 11 Ga. 539; *White v. Crew*, 16 Ga. 416; *Freeman v. Sedgwick*, 6 Gill (Md.), 28; *Swartz v. Gillott*, 1 Chand. (Wis.) 207. And see *Farley v. St. Paul*, etc., R. Co., 14 Fed. Rep. 114. But compare *Bellamy v. Bellamy*, 6 Fla. 62, where it is said that there are circumstances which necessitate making exceptions to the rule. And it has been *held* that where parties are in fault, but are not in equal fault, that equity may act in favor of the one least in fault. *Harrington v. Grant*, 54 Vt. 236.

For other illustrations of the general principle, see *Goodman v. Jedidjah Lodge*, 67 Md. 117; *Kitchen v. Rayburn*, 19 Wall. (U. S.) 254; *Wilson v. Bird*, 28 N. J. Eq. 352.

1. Per *Kindersley, V. C.*, in *Rice v. Rice*, 2 Drew, 73.

Equities embraced in Maxim.—"The 'equities' spoken of in this maxim embrace both equitable estates, interests, and pri-

8. *Between Equal Equities the Law must prevail.* — The meaning of this maxim, which is to be taken in connection with the preceding one, is, that "where two persons have each an equally good equitable right, but one of them has the legal title to the subject in dispute, equity will not interfere, but will leave them to the courts of law, when, of course, the holder of the legal title will prevail." ¹

9. *The Maxim, "Equity aids the Vigilant, not those who sleep*

mary rights of property, such as the *cestui que trust's* estate in any species of trust, the mortgagee's equitable interest, equitable liens, the interest of the assignee under an equitable assignment, and the like, and also the purely remedial rights, or rights to some purely equitable remedy, to which the distinctive name 'equity' has been applied by modern judges and text-writers. . . . With respect to equities, considered in this comprehensive manner, and to many legal interests, the maxim, *Qui prior est tempore potior est jure*, is of wide and important application, both in equity and at law." . . .

"It follows, from this explanation, that when several successive claims upon, or interests in, the same subject-matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or incident which would, according to the settled doctrines of equity, give it precedence over the others, wholly irrespective of the order of time, — under these circumstances the principle applies, and priority of claim is determined by priority of time." ¹ Pomeroy, Eq. Jur. 454-456.

See also Lord Westbury's analysis, in Phillips v. Phillips, 10 Weekly Reporter (London), 236; s. c., 4 De G. F. & J. 208; Bispham's Eq. (4th ed.) 64; Snell's Eq. 25; 1 Story, Eq. Jur. (13th ed.) 65; Cave v. Cave, L. R. 15 Ch. D. 639; Fitzsimmons v. Ogden, 7 Cranch (U. S. C. C.), 2; Boone v. Chiles, 10 Pet. (U. S.) 177; Lucas v. Barrett, 1 G. Gr. (Iowa) 510; Van Meter v. McFaddin, 8 B. Mon. (Ky.) 435, 441; Russell v. Petrie, 10 B. Mon. (Ky.) 184; Jackson v. Holloway, 14 B. Mon. (Ky.) 108; Wailes v. Cooper, 24 Miss. 208; Ellis v. Durham, 2 Jones, Eq. (N. Car.) 465; Hume v. Dixon, 37 Ohio St. 66; Rooney v. Soule, 45 Vt. 303.

1. Bispham's Eq. (4th ed.) 59.

Reason. — Story says that in such a case "the defendant has an equal claim to the protection of a court of equity for his title, as the plaintiff has to the assistance of the court to assert his title; and the court will not interpose on either side; for the rule there is, *In aequali jure melior est conditio possidentis*. And the equity is equal be-

tween persons equally innocent and equally diligent." ¹ Eq. Jur. (13th ed.) 63.

Of the connection between this and the preceding maxim, Pomeroy says, "This maxim, and the one contained in the last preceding section, must be taken in connection, in order to constitute the enunciation of a complete principle. . . . The two are in fact counterparts of each other; and, taken together, they form the source of the doctrines, in their entire scope, concerning priorities, notice, and purchasers for a valuable consideration without notice." ¹ Eq. Jur. 457.

See also Francis' Maxims (1st Am. ed.), p. 72 *et seq.*, and cases there cited; Snell's Eq. 18 and 19; Bassett v. Nosworthy, 2 Lead. Cas. in Eq. (4th Am. ed.) 1; Thorndike v. Hunt, 3 De G. & J. 563; Newton v. McLean, 41 Barb. (N. Y.) 285.

Illustrations. — The most usual illustration is, "Where a purchaser for a valuable consideration, and without notice of a prior equitable right, obtains the legal estate at the time of his purchase, he becomes, in general, entitled to a priority, both in equity and at law." Bassett v. Nosworthy, Rep. temp. Finch, 102; s. c., 2 Leading Cas. in Eq. (4th Am. ed.) 1, and notes; Le Neve v. Le Neve, Ambe, 267; s. c., 2 Leading Cas. Eq. (4th Am. ed.) 109; Vattier v. Hinde, 7 Pet. (U. S.) 252; Rowan v. State Bank, 45 Vt. 160; Rexford v. Rexford, 7 Lans. (N. Y.) 6.

And it has even been held that a prior equity with a legal advantage will not be disturbed in favor of a junior equity, though the legal right was acquired in aid of the junior equity after a knowledge of the junior equity of the adverse party. Russell v. Petrie, 10 B. Mon. (Ky.) 184.

But although, where equities are equal the law prevails, if the party having the right at law acquires another interest inconsistent with his equity, so that he cannot honestly claim both, his equity is impaired, and the rule, *Qui prior est tempore, potior est jure*, prevails. Ellis v. Durham, 2 Jones, Eq. (N. Car.) 465.

See also, on the general principle, Carroll v. Johnston, 2 Jones, Eq. (N. Car.) 120; Boone v. Chiles, 10 Pet. (U. S.) 177; Van Meter v. McFaddin, 8 B. Mon. (Ky.) 435, 441.

on their Rights," or, "*Vigilantibus non dormientibus æquitas subvenit*," is designed to promote diligence, punish laches, and discourage the presentation of stale claims. Like the fourth maxim, it furnishes an important rule of guidance to the courts of equity, in their administration of equitable relief.¹

1. Application.—The application of the principle is twofold:—

(1) *Statute of Limitations.*—Where there is a statute of limitations.

(a) In some cases the courts of equity feel themselves bound by such statutes.

Equity follows Statute.—The statute of limitations in California applies to suits in equity as well as to actions at law. *Chemical Bank v. Kissane*, 32 Fed. Rep. 429.

So it was said, in *Fogg v. Price* (Mass.), 14 N. E. Rep. 741, that the statute of limitations can be taken advantage of by demurrer to a bill in equity.

Where the statute applies, it is binding on a court of equity; but where the statute does not apply, the court acts upon its own principles. *Lewis v. Baird*, 3 McLean (U. S.), 56, 83. See also *Fullwood v. Fullwood*, L. R. 9 Ch. D. 176; *Dickey v. Baltimore Permanent Land Co.*, 63 Md. 170; *Blanchard v. Williamson*, 70 Ill. 647; *Hutcheson v. Grubbs*, 80 Va. 251; *Hall v. Russell*, 3 Sawyer (U. S.), 506; *Binney's Appeal*, 116 Pa. St. 169.

(b) *Equity acts by Analogy to Statutes.*—In others they act merely by analogy to the statutes.

Ringo v. Woodruff, 43 Ark. 469, where it is said (p. 484), "So early were the statutes of limitation admitted to be the rule in equity as well as law, and though the courts of equity were not within the words of the statute, the time presented by them was adopted by analogy as a fit and just period for a bar in equity of analogous claims."

And in *Smith v. Wood*, 42 N. J. Eq. 563, it was held, that, where there is both a legal and equitable remedy for the same cause of action, if the legal remedy is barred by the lapse of time, the equitable remedy will be held to be also barred.

(c) *Courts refuse to follow Statutes.*—In other cases the courts have refused to follow the statutes.

A suit in equity may be maintained to enforce a security for a debt, although an action against the debtor directly upon the indebtedness is barred by lapse of time; and for such purpose the debt exists, notwithstanding the lapse of time. *Hickox v. Elliott*, 10 Sawyer (U. S.), 415; s. c., 22 Fed. Rep. 13.

In *Colwell v. Miles*, 2 Del. Ch. 110, it was held that lapse of time in collecting certain money was no bar. But in that case the trustees who were to pay, and the

executors who were to receive, were the same persons, and additional delay was caused by *lis pendens*.

So, in *Binney's Appeal*, 116 Pa. St. 169, it was said that equity interferes in many cases to prevent the bar of the statute of limitations where it would be inequitable.

(2) *Where there is no Statute.*—In other cases the administration of equitable relief is entirely within the discretion of the chancellor. In such cases, the party seeking relief must have used reasonable diligence; and the length of time necessary to constitute such laches as will prevent a court of equity from interfering, varies with the nature of the case. Thus, in applications to restrain by injunction acts authorized by statute, on the ground that they would constitute a nuisance, and in all other similar applications, the rule is well settled that a comparatively short delay in seeking his remedy, on the part of the plaintiff, may be sufficient to defeat his right thereto.

In *Great Western Ry. v. Oxford*, etc., Ry., 3 De G. M. & G. 341, a delay of nine months was held a bar in equity, but it was coupled with acquiescence during that time.

In *Tash v. Adams*, 10 Cush. (Mass.) 252, one month was held to be a sufficient delay, but there the delay had caused serious injury to third parties.

In *Canton v. McGraw* (Md.), 11 Atl. Rep. 287, a bill to set aside a deed for fraud was filed within three years from the date of the deed, and sixteen months from the death of the grantor. Held, that no laches could be imputed to the complainant.

A similar conclusion was reached in a similar case in Colorado where the delay was eighteen months. *Caldwell v. Davis* (Colo.), 15 Pac. Rep. 696; *Fellows v. Hyman*, 33 Fed. Rep. 313.

Otherwise, when the delay was for five years. *Gibbons v. Hoag*, 95 Ill. 45. So of ten years. *Hoffert v. Miller* (Ky.), 6 S. W. Rep. 447. So of fifteen years. *McCartin v. Traphagen* (N. J.), 11 Atl. Rep. 156, 165. See also *Harrison v. Gibson*, 23 Gratt. (Va.) 212; *Speidel v. Henrici*, 120 U. S. 377; *Grey v. Ohio*, etc., R. Co., 1 Grant's Cas. (Pa.) 412.

Equity will bar claims become stale from lapse of time, even though a trust be involved, if time and long acquiescence have obscured the acts of the parties, or other circumstances have given rise to presumptions unfavorable to its continuance. *Sanchez v. Dow* (Fla.), 2 So. Rep. 842.

10. *Equity imputes an Intention to fulfil an Obligation.*—The meaning of this maxim is, that, “when a person has expressly covenanted to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention.”¹

11. *Equity will not suffer a Right to be without a Remedy* is a principle which is at the foundation of equity jurisprudence, since the origin of the jurisdiction of the court of chancery was the failure of the courts of common law to meet the requirements of justice.²

12. *Equity acts in Personam, not in rem*, is a principle which sets forth one of the distinctions between the remedy in equity and that in common law. The meaning of the maxim simply is, “that a decree of a court of equity, while declaring the equitable estate, interest, or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest, or right to which he was pronounced entitled.”³

On the general principle, see *Brown v. McLean*, 5 Mackey (D. C.), 559; s. c., 8 Cent. Rep. 718; *Slemmer's Appeal*, 58 Pa. St. 168, 177; *Lewis v. Baird*, 3 McLean (U. S.), 56; *Creath v. Sims*, 5 How. (U. S.) 192, 204.

1. *Bispham's Eq.* (4th ed.).

Illustration.—The leading case is *Wilcocks v. Wilcocks*, 2 Vern. 558; s. c., 2 Lead. Cas. Eq. 4th Am. ed. 833. In that case a person, in marriage articles, covenanted to purchase and settle lands of a certain value, and afterwards did purchase lands of a greater value, but did not settle them. These lands descended upon the heir, who brought a bill in equity to compel other lands to be purchased out of the personal property, and settled upon him. It was held that the purchase of lands by the father, which descended upon the son, was a performance of the covenant. See also *Deacon v. Smith*, 3 Atk. 323; *Wellesley v. Wellesley*, 4 My. & Cr. 581. And where lands purchased under similar circumstances were less in value than those covenanted to be purchased, such purchase will be held a part performance of the covenant. *Snowden v. Snowden*, 1 Bro. Ch. 582; *Lechmere v. Lechmere*, Cas. Temp. Talb. 80.

To this head is to be referred the rule which makes a trustee who purchases land with the funds of his *cestui que trust*, a holder of the land for the benefit of the *cestui que trust*, although he takes the title in his own name, and with no declaration of such trust. See titles “Trust and Trustee.” 1 Pomeroy Eq. Jur. 462; *Ferris v. Van Vechten*, 73 N. Y. 113; *McLarren v. Brewer*, 51 Me. 402; *Hancock v. Titus*, 39 Miss. 224; *Stow v. Kimball*, 28 Ill. 93; *Homer v. Homer*, 107 Mass. 82.

2. There are certain restrictions upon the application of this maxim.

(2) *What Rights intended.*—The rights here intended are those which the law acknowledges to be such, and never gives judgment against them, although it cannot give a remedy for them, and those purely equitable rights, for which equity gives a remedy in the very creation of them. Francis, *Maxims* (1st Am. ed.), 29, note, and cases there cited. Equity does not attempt to deal with purely moral rights and obligations. *Bispham's Eq.* (4th ed.); 1 Pomeroy, Eq. Jur. 466; *Finnegan v. Ferdinandina*, 15 Fla. 379; *Rees v. City of Watertown*, 19 Wall. (U. S.) 107.

(2) *Remedy at Law.*—Where the remedy at law is adequate, equity will not interfere. “In order that the principle may apply, one of three facts must exist; viz., either (1) the right itself must be one not recognized as existing by the law, or (2) the right existing at the law, the remedy must be one which the law can not or does not administer at all, or (3) the right existing at the law, and the remedy being one which the law gives, the remedy as administered by the law must be inadequate, incomplete, or uncertain. Of these three alternatives, the first and second denote the exclusive jurisdiction of equity; the third, the concurrent jurisdiction.” 1 Pomeroy, Eq. Jur. 465; *Bispham's Eq.* (4th ed.).

Plaintiff must not have been guilty of Laches.—The third restriction upon the principle is found in the ninth maxim; i. e., when a case comes within one of the three cases mentioned above, equity will not interfere where the plaintiff has been guilty of laches. 1 Pomeroy, Eq. Jur. 465. See also Maxim 9.

3. 1 Pomeroy, Eq. Jur. 468.

13. *Equity acts specifically*, and not by way of compensation, means simply that equity endeavors to put the parties in the same position which they ought to occupy, not merely to compensate them for losses they have actually sustained.¹

The ordinary method of enforcing the decrees of a court of chancery was by an attachment against the person of the defendant.

Land outside the Jurisdiction of Court.—And the jurisdiction has been said to depend on the personal service of material defendants found in the county, the subject-matter in dispute lying in another county. *Roper v. Roper*, 3 Tenn. Ch. 53; *Parkes v. Parkes*, 3 Tenn. Ch. 647. Accordingly the parties being within the jurisdiction of the court, the court will, under ordinary circumstances, grant relief, even in reference to a subject-matter beyond the territorial cognizance of the court. *Penn v. Lord Baltimore*, 1 Ves. Sen. 444; s. c., 2 Lead. Cas. Eq. (4th Am. ed.) 1806.

So in *Vaughan v. Barclay*, 6 Whart. (Pa.) 392, the Supreme Court of Pennsylvania decreed the conveyance of lands situated in Virginia, Kentucky, North Carolina, South Carolina, and Georgia.

In *Wood v. Warner*, 15 N. J. Eq. 81, the court enforced contracts in regard to an island situated in the Caribbean Sea, and decreed an account in relation thereto, holding that "it is no objection to the court's taking an account, and making a decree in the cause, that the property is out of the jurisdiction of the court, so that the decree could not be enforced *in rem*, since the court could enforce its decree in relation to such contracts *in personam*."

So injury to a dam situated in Maine was restrained by injunction in a court of New Hampshire. *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462.

And the same conclusion was reached in *Topp v. White*, 12 Heisk. (Tenn.) 165, where the court of Tennessee took cognizance of a case affecting lands in Mississippi, and declared that it was not bound by the law of the latter State.

A bill was filed in the State of New York against several defendants, one of whom lived in New Jersey, but was served with process in New York. The principal subject of the suit was land in New Jersey owned by that party; but land in New York was also affected, and the ground of the suit was a fraudulent transfer of the whole, executed in New York.

It was held that the court had jurisdiction to set aside the conveyance, and make a decree against the New Jersey defendant and his lands. *DeKlyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185.

But compare *Glen v. Gibson*, 9 Barb.

(N. Y.) 634, in which it was held that a court of equity in a sister State has no power to make a decree directing trustees to complete contracts for the sale of lands in New York.

Courts cannot sustain jurisdiction of mere naked questions of title to lands beyond the limits of the State. But the jurisdiction of a court of equity is sustainable wherever the person of the defendant may be found in cases of trusts, of fraud, and of contract, even though lands not geographical may be affected by the decree. A decree cannot operate as a conveyance of land outside the jurisdiction; but when the court has jurisdiction of the parties, it may decree a conveyance of such lands, and carry such decree into effect in the manner in which other decrees are enforced. *MacGregor v. MacGregor*, 9 Iowa, 65. See also note to *Penn v. Lord Baltimore*, 2 Ldg. Cas. in Eq. (White & Tudor) (4th Am. ed.) 1823; *Bispham's Eq.* (4th ed.) 65; *Sed cf. Smith's Man. of Eq.* (13th ed.) 30.

Operation of Equity upon the Conscience.

—Under this head comes the operation of equity upon the conscience of a party. The best description of this operation is that of Pomeroy's, who says, "I mean the most important principle that equity acts upon the conscience of a party, by imposing upon him a personal obligation of treating his property in a manner very different from that which accompanies and is permitted by his mere legal title. . . . A testator has given certain lands to A. by a will properly executed; but A. procured the devise by wrongful representations made to the testator, and the lands should, by the doctrines of equity, belong to B. The statute of wills, however, is peremptory in its prescribed mode of executing a will; there can be no will without conforming to the statutory requirements. Equity . . . admits the validity of the will, and the legal title vested in A., but, on account of A.'s wrongful conduct in procuring the devise to himself, . . . it imposes upon him the obligation to hold the land for B.'s benefit as the equitable owner thereof; and then arises the further obligation upon his conscience to perfect and complete B.'s equitable ownership by a conveyance." 1 *Pomeroy, Eq. Jur.* 470-472; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Greaves v. Lo-field*, L. R. 14 Ch. D. 563.

1. Thus equity decrees the specific performance of a contract, and will sometimes restrain the commission of destructive

V. Divisions of Equity.—The subjects or heads of the jurisdiction of the courts of chancery may be divided into three classes. The first includes those cases in which the common law did not recognize a title; the second, those in which the common law did not recognize a right; and the third, those in which there was not a full and complete remedy at common law.¹

trespass. To this maxim are to be referred the doctrines of specific performance and injunction. Bispham, Eq. (4th ed.) 425-519. See titles "Contract" (specific performance) and "Injunction."

1. Bispham's Eq. (4th ed.) 29. This classification is similar to that of Spence, who says, "It will be found that the jurisdiction of the court [of chancery] as affecting legal rights and liabilities has been brought into action as regards three kinds of subjects:—

"1. Where some specific property, real or personal, has been the subject;

"2. Where no specific property has been the subject, but one or both of the parties has been under some liability, for which an action for damages might be sustained; or,

"3. Where there was no specific property in dispute, nor was there any right of action at law, but one of the parties has sought to establish against the other some claim in respect of which the law was silent, and to which, therefore, the negative state of the law would not have afforded an effectual defence at law." 1 Spence, Eq. 430.

Other writers divide the jurisdiction of the court of equity into the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction. 1 Story's Eq. Jur. (13th ed.) 82; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note f.; Jeremy on Eq. Jur. Introd. p. xxvii.; 1 Pomeroy's Eq. Jur. 119.

(1) *The Concurrent Jurisdiction.*—This has its origin in one of two sources: either the courts of law, although they have general jurisdiction in the matter, cannot give adequate, perfect, and specific relief; or, under the actual circumstances of the case, they cannot give any relief at all. The former occurs in all cases where a simple judgment for the plaintiff or defendant does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross-claims are to be introduced, and finally acted on; and a decree meeting all the circumstances of the particular case between the parties is indispensable to distributive justice. The latter occurs when the object sought is incapable of being accomplished by the courts of law; as, for instance, a perpetual injunction, or a preventive process to restrain nuisances or waste. 1 Story's Eq. Jur. (13th ed.) 82. And see 1 Pomeroy's Eq. Jur. 123.

Under the head of the concurrent jurisdiction may be placed two classes of cases: (1) those in which the subject-matter constitutes the principal ground of the jurisdiction; and (2) those in which the peculiar remedies afforded by courts of equity form the principal ground of the jurisdiction. 1 Story's Eq. Jur. (13th ed.) 83. To the first class may be referred the jurisdiction of equity in cases of Accident, Mistake, Fraud, Actual or Constructive; Matters of Account, and, as incident thereto, Matters of Apportionment, Contribution, and Average; Liens, Rents and Profits; Tithes, and Moduses, and Waste; Matters of Administration, Legacies, and Marshalling of Assets; Confusion of Boundaries; Matters of Dower; Marshalling of Securities; Matters of Partition; Matters of Partnership; Partition; and, lastly, Matters of Rent, so far as they are not embraced in the preceding head of account. 1 Story's Eq. Jur. (13th ed.) 84, 108, 194, 265, 443.

To the second class may be referred the equitable remedies of Specific Performance of Contracts, Re-execution, Reformation, Rescission, and Cancellation of Contracts, Interpleader, Bills Quia Timet; Bills of Peace and Injunctions. 2 Story Eq. Jur. (13th ed.) 1, 134, 156, 172, 178.

(2) *The Exclusive Jurisdiction.*—To this jurisdiction of equity are to be referred Express Trusts, including Marriage Settlements, Terms for Years, Mortgages, Assignments, Wills and Testaments, Election and Satisfaction, Application of Purchase-Money, and Charities; Implied Trusts; Penalties and Forfeitures; Infants, Idiots, and Lunatics; Married Women. 2 Story's Eq. Jur. (13th ed.) 226-764.

(3) *The Auxiliary Jurisdiction.*—This is merely a special case of the exclusive jurisdiction, since its methods and objects are confined to the equity procedure. No remedy is either asked or granted in suits which belong to this jurisdiction. Their sole object is the obtaining or preserving of evidence to be used upon the trial of some action at law. The cases embraced within this proper auxiliary jurisdiction are Bills of Discovery; Bills for the Perpetuation of Testimony; and Suits to take the Testimony of Witnesses *de bene esse*, and of Witnesses in a Foreign Country. 1 Pomeroy's Eq. Jur. 125-127; 179-215.

This classification gives rise to the three great divisions of equity jurisdiction; viz., (1) equitable titles, (2) equitable rights or equities, and (3) equitable remedies.¹

VI. Equitable Titles.—Under the first of these divisions may be classed trusts, mortgages, and assignments.²

1. *Trusts.*—A trust³ is the beneficial title or ownership of property of which the legal title is vested in another.⁴ The holder of the legal title is called the trustee, and the person for whose benefit it is held is called the *cestui que trust*. Trusts, if classified according to the duties of the trustee, are active or passive,—active when the trustee has some special and definite duties to perform; passive when there is a simple conveyance of property to one upon trust for another, without further specifications or directions.⁵ In the latter case the trustee, being merely the holder of the legal title, may be compelled to convey to the *cestui que trust* whenever called upon to do so. Another division of trusts is into executed and executory,—executed when the terms of the trust are fully defined in the instrument creating it; executory where the instrument creating the trust is provisional merely, and other conveyances are necessary to the effectual carrying out of the terms of the trust.⁶ Trusts are also private or public, lawful or unlawful, if classified according to the purposes for which they were created.⁷

a. *Express Trusts.*—In reference to their creation, trusts are express or implied. Express trusts are such as are created by the language of the parties.⁸

b. *Implied Trusts.*—Implied trusts are resulting trusts and constructive trusts.

(1) *Resulting Trusts* are trusts that the courts presume to arise out of the transactions of parties.⁹

(2) *Constructive Trusts* are trusts that arise when a person clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself.¹⁰

1. Bispham's Eq. (4th ed.) 31.

2. The arrangement and a large part of the substance of the remaining part of this title are taken by permission from Bispham's Principles of Equity, 4th edition.

3. See title "Trusts."

4. Bispham's Eq. (4th ed.) 31.

5. Perry calls these special and simple trusts. Perry on Trusts (2d ed.), 14.

6. Bispham's Eq. (4th ed.) 31. Perry mentions a further division into ministerial and discretionary trusts, and also a mixed trust and power. Law of Trusts (2d ed.), 14 & 15.

7. Bispham's Eq. (4th ed.) 31; Perry on Trusts (2d ed.), 15.

8. They are generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust; although except in the case of a trust

in lands, which is required by the statute of frauds in England, and similar statutes in most of the United States, to be in writing, they may be created by parol. No particular form of words is necessary to create these trusts, but they may be created by direct fiduciary expressions, by precatory words, or by words denoting that a power is to be used in trust. Bispham's Eq. (4th ed.) 32; Perry on Trusts (2d ed.), 16.

9. Perry on Trusts (2d ed.), 17. The most usual case is where the purchase-money for an estate is paid by one man, and a deed is taken in the name of another. Here the law implies a trust on the part of the latter to hold the legal title for the benefit of the actual purchaser. For other cases and a full description of resulting trusts, see Bispham's Eq. (4th ed.) 32, 119-132.

10. Perry on Trusts (2d ed.), 17. The

c. Trusts for Married Women. — Trusts for married women are created to secure to a married woman her estate free from the interference of her husband, and so that he had not his common-law rights therein. By conveying the estate to a trustee for the sole and separate use of a married woman, the *corpus* of her estate may be secured from any control of her husband, or from any liability to his debts, and the income paid directly to the wife.¹

d. Trusts for Charities. — Trusts for charities depend to a great extent, both in England and the United States, upon the statute of 43 Eliz. chap. 4.²

e. Powers and Duties of Trustees. — The duties of trustees are generally to protect and preserve the trust property, to see that it is employed solely for the benefit of the *cestui que trust*, and to abstain from making any use of the property for the trustees' own benefit.³

2. *Mortgages.* — An equitable mortgage is a lien upon real estate recognized in equity as a security for the payment of money, and treated as a mortgage, although arising without any deed or express contract for that distinct purpose.⁴

3. *Assignments.* — *Equitable Assignment.* — Equitable assignments are assignments of *choses in action*, things not *in esse*, as mortgages of personal property to be acquired in the future, and mere contingencies, which, though not good at law, equity will recognize.⁵

VII. Equitable Rights. — Equitable rights or equities are accident and mistake; fraud; notice; estoppel, election; conversion and reconversion; adjustment, including set-off, contribution, exoneration, subrogation and marshalling; and liens.⁶

most numerous cases arise out of real or presumptive fraud. "A case which arises from actual fraud is where (for example) a conveyance is obtained by direct deceit or misrepresentation. In such a case equity affords redress by treating the wrong-doer as a trustee of the legal title for the benefit of the injured party and directing a conveyance."

"Presumptive fraud is where the law supposes that a transaction is fraudulent from the mere circumstance of the relations of the parties, or the nature of the transaction, without any proof of actual deceit. Thus a bargain between a solicitor and his client, a guardian and ward, a parent and child, a trustee and his *cestui que trust*, or any other two persons standing in a confidential, or *quasi* confidential, relation, touching the subject-matter as to which the fiduciary relation exists, will be set aside at the option of the client, ward, child, or *cestui que trust*, as the case may be, unless the entire fairness of the transaction is abundantly proved. In this case, also, equity uses the theory of a trust for the

purpose of effecting relief in the same way as in the case of actual fraud." Bispham's Eq. (4th ed.) 33. See also title "Fraud."

"Constructive trusts in the absence of fraud may arise in several ways. Thus where a person acquires trust property without notice of the trust, but without having paid any value for it, he is not entitled to hold it discharged of the trust, but is looked upon in equity in the same light as a trustee." Bispham's Eq. (4th ed.) 33 for this and other instances.

1. Bispham's Eq. (4th ed.) 34, 138-163. See also titles "Married Women" and "Trusts."

2. Bispham's Eq. (4th ed.) 35, 164-180. See also titles "Charities" and "Trustees."

3. As to powers and duties of trustees, see Bispham's Eq. (4th ed.) 35, 180-191. See also title "Trustees."

4. Abbott's Law Dict. See title "Equitable Mortgage."

5. Bouvier's Law Dict. See title "Equitable Assignments."

6. Bispham's Prin. of Eq. (4th ed.) 228-244.

1. *Accident*. — By the term accident is meant not merely inevitable casualty or the act of Providence, or what is technically called *vis major* or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party.¹

2. *Mistake*. — A mistake as remediable in equity is an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition.²

3. *Fraud*. — Fraud, in the sense in which it is used in a court of equity, includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.³ It has been divided into (1) fraud arising from facts and circumstances of imposition; (2) fraud arising from the intrinsic matter of the bargain itself; (3) fraud presumed from the circumstances and condition of the parties; and (4) fraud affecting third parties.⁴ The first includes actual fraud, the second and third constructive fraud, and the last has relation to the parties whom the fraud may affect.

a. *Actual Fraud* is something said, done, or omitted by a person with the design of perpetrating what he must have known to be an actual fraud.⁵

b. *Constructive Frauds*. — Constructive frauds are such acts or contracts as, though not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency, to deceive or mislead other persons, or to violate public or private confidence, or to impair or injure the public interests deemed equally reprehensible with positive fraud, and therefore are prohibited by law.⁶ This includes (1) *Frauds arising from the Intrinsic Nature of the Transaction*; ⁷ and (2) *Frauds presumed from the Circumstances and Condition of the Parties*.⁸

1. Story's Eq. Jur. (13th ed.) 85, § 78. See title "Accident."

2. Smith's Manual of Eq. (13th ed.) 50, § 80. See also *Hurd v. Hall*, 12 Wis. 125. Mistake is some unintentional act, or omission, or error, arising from ignorance, omission, surprise, or misplaced confidence. 1 Story's Eq. Jur. (13th ed.) 108, § 110. See also *Bruse v. Nelson*, 35 Iowa, 157. See title "Mistake."

3. Story's Eq. Jur. (13th ed.) 201, § 187. But see title "Fraud."

4. *Per Lord Hardwicke*, in *Chesterfield v. Janssen*, 1 Atk. 301; s. c., 2 Ves. 125; s. c., 1 Lead. Cas. Eq. (4th Am. ed.) 773. *Lord Hardwicke* mentions a fifth class, but it is included in the others, and this classification has been generally followed.

5. Smith's Man. of Eq. (13th ed.) 63, § 104. See title "Fraud."

6. 1 Story's Eq. Jur. (13th ed.) 265, § 258.

7. Frauds from the intrinsic nature of the transaction arise in the case of contracts void by reason of their terms, bargains by reversioners and expectant heirs, usurious contracts, gambling contracts, contracts void by reason of their subject-matter, gifts and conditions in restraint of marriage, and sales of public offices. *Bispham's Eq.* (4th ed.) 276-290.

8. Fraud is presumed from the relations of the parties in two classes of cases: first, where one of the parties is laboring under some mental disability; and, second, where the transaction takes place under undue influence. To the first of these classes may be referred fraud presumed in the case of contracts where one of the contracting parties is a lunatic or idiot, in a condition of drunkenness, or acts under duress. To

(3) *Frauds affecting Third Parties* are, (a) frauds upon creditors; (b) frauds upon purchasers; (c) frauds upon marital rights; and (d) frauds upon powers.¹

4. *Notice*. — Notice is the information concerning a fact, actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent, in its legal effects, to full knowledge of the fact, and to which the law imputes the same consequences as would be imputed by knowledge.²

5. *Equitable Estoppel*. — Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both in law and in equity, from asserting rights which might perhaps otherwise have existed, either of property, of contract, or of remedy, as against another person who has, in good faith, relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy.³

6. *Election*. — An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument.⁴

7. *Conversion and Reconversion*. — Conversion in equity denotes the notional alteration of land into money, or of money into land, in accordance with a direction to that effect of a testator or settlor, and in pursuance of the equitable doctrine that what is agreed or imperatively directed to be done is already done, or as good as done.⁵

Reconversion is that imaginary process by which a prior constructive conversion is annulled, and the converted property restored in contemplation of law to its original state.⁶

the second class may be referred fraud presumed in all transactions in which "influence has been acquired and abused, in which confidence has been reposed and betrayed." *Per Lord Kingsdowne* in *Smith v. Kay*, 7 H. L. Cas. 750. These transactions may be either in the nature of a gift or contract; and, as a general rule, fraud will be presumed in all gifts or contracts in which the parties stand in a confidential relation, as guardian and ward, parent and child, solicitor and client, trustee and *cestui que trust*. Bispham's Eq. (4th ed.) 290-304. See title "Fraud."

1. Bispham's Eq. (4th ed.) 305-325. See title "Fraud."

2. 2 Pomeroy's Eq. Jur. 20, § 594. Notice is either (1) statutory, i.e., made so by legislative enactment; (2) actual, which brings the knowledge of a fact directly home to the party; or (3) constructive or

implied, which is no more than evidence of facts which raise such a strong presumption of notice that equity will not allow the presumption to be rebutted. Constructive notice may be subdivided into: (a) where there exists actual notice of matter, to which equity has added constructive notice of facts, which an inquiry after such matter would have elicited; and (b) where there has been a designed abstinence from inquiry for the very purpose of escaping notice. Wharton's Law Lex. See title "Notice."

3. 2 Pomeroy's Eq. Jur. 263, § 804. See title "Estoppel."

4. Bispham's Eq. (4th ed.) 361, § 295. See title "Election."

5. Brown's Law Dict. See title "Equitable Conversion and Reconversion."

6. Rap. & L. Law Dict. See title "Equitable Conversion and Reconversion."

8. *Set-off*. — A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim.¹

9. *Contribution*. — Contribution is the making up by several parties, jointly interested or indebted to one of their number, of a loss sustained or payment made by him for the benefit of them all.²

10. *Exoneration*. — Exoneration is a right which exists between those who are successively liable for the same debt, by which when the party who is secondarily liable has paid or satisfied the principal's obligation, or any part thereof, he is entitled to be reimbursed by the principal debtor, and can bring an equitable action for that purpose.³

11. *Subrogation*. — Subrogation is the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt.⁴

12. *Marshalling of Assets*. — The marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of those funds.⁵

13. *Equitable Liens*. — Equitable liens are such as exist in equity, and of which courts of equity alone take cognizance.⁶

VIII. Equitable Remedies. — Equitable remedies are specific performance; injunctions; re-execution, reformation, rescission, and cancellation of contracts; account; partition; dower; boundaries; rent; partnership bills; creditors' bills and administration suits; the protection of infants, idiots, and lunatics; discovery; *bills quia timet*; receivers; and writs of *ne exeat*.⁷

1. *Specific Performance*. — Equity, in obedience to the cardinal rule of natural justice, that a person should perform his agreement, enforces, pursuant to a regulated and judicial discretion, the actual accomplishment of a thing stipulated for, on the ground that what is lawfully agreed to be done, ought to be done, and indeed is, in its contemplation, considered as now done.⁸

2. *Injunction*. — An injunction is an order, judgment, or writ, by which a party to an action is required to do, or refrain from doing, a particular thing.⁹

1. Bouvier's Law Dict. See title "Set-off."

2. Burrill's Law Dict. See title "Contribution."

3. Bispham's Eq. (4th ed.) 392, § 331; 3 Pomeroy's Eq. Jur. p. 467, § 1416. See title "Exoneration."

4. Bouvier's Law Dict. See title "Subrogation."

5. 1 Story's Eq. Jur. (13th ed.) p. 570, § 558. See title "Marshalling of Assets."

6. Bouvier's Law Dict. They differ

from common-law liens, in that they are wholly independent of possession of the thing to which they are attached as an incumbrance. They operate after the possession has been changed, and are available by way of charge instead of detainer. Bouvier's Law Dict. See title "Liens."

7. Bispham's Eq. (4th ed.) 425-619, §§ 361-581.

8. Wharton's Law Lex. See title "Specific Performance."

9. Rap. & L. Law Dict. See title "Injunctions."

3. *Re-execution, Reformation, Rescission, and Cancellation of Contracts.* — These are the means by which courts of equity administer equitable relief in cases where equity requires that a lost instrument should be supplied, an instrument which has been erroneously framed corrected, and documents obtained by fraud or duress surrendered.¹

4. *Account.* — The equitable remedy of account is applied whenever it is required as a matter of course, in all cases in which equitable titles are to be protected, and equitable rights enforced; in many instances where jurisdiction has been assumed by virtue of equitable remedies;² and sometimes when the necessity for an account itself offers the only ground for the jurisdiction of a court of equity.³

1. Bispham's Eq. (4th ed.) 520, § 466. See title "Contracts," § 55 and § 100, and also titles "Accident, Mistake," and "Re-execution, Reformation, Rescission, and Cancellation of Contracts."

2. Thus, if a trustee violate his duty by making a profit at the expense of the trust estate, he will be compelled by a court of equity to account to the *cestui que trust* for the profits thus made. And if a conveyance tainted with fraud is sought to be set aside, it may be necessary for the complete vindication of the equitable right which the complainant seeks to enforce that the defendant should account for the rents and profits of the property which he has been fraudulently enjoying; and such an account will accordingly be ordered. In these instances the account is subordinate to the principal object of the bill. The jurisdiction already attached invokes or makes use of the remedy of account. Bispham's Eq. (4th ed.) 532, 533.

3. The peculiar equitable remedy of account lies where the jurisdiction of the court is based solely upon the necessity for an account. This had its rise from the inadequacy of legal remedies, of which the only ones applicable to such cases were *assumpsit*, which only lay when the balance was admitted, and did not admit of an investigation of the several items, and account render, which was very tedious and applicable only in certain cases. The jurisdiction of the court, therefore, in matters of account, comes under that class of cases in which the courts of common law could not give a complete remedy. In such bills a foundation is first laid for all necessary inquiries by the discovery elicited from the defendant's answer. The cause is then referred to a master before whom the account is taken who has the power to examine parties under oath, and who can compel the production of books and documents, and by whom all the items can be passed upon, subject to revision by the

court upon the coming in of his report. Bispham's Eq. (4th ed.) 533, 534; Adam's Eq. (7th Am. ed.) 225.

But a court of equity will not take cognizance of every transaction between individuals in which an adjustment of an account between parties is necessary. See *Jewett v. Bowman*, 29 N. J. Eq. 174.

Jurisdiction of courts of equity in matters of account is concurrent with that of the common-law courts, and is, therefore, discretionary, and will be exercised only where some special ground peculiar to equity exists; as where the accounts are intricate, or discovery is necessary. And where an accounting is asked incidentally, if the main ground for seeking relief is insufficient, the bill must be dismissed: it cannot be sustained as a bill for an accounting. *Jewett v. Bowman*, 29 N. J. Eq. 174.

Accordingly, where an account is so complicated that it cannot fairly be tried at law, equity will restrain the action at law, and assume jurisdiction; and nothing in New Jersey practice act affects such right. A clear case, however, must be made. *Crane v. Ely*, 37 N. J. Eq. 564; *Woolley v. Osborne*, 39 N. J. Eq. 54; *Crossley v. New Orleans*, 20 Fed. Rep. 352; *Kirby v. Lake Shore & Mich. So. Ry. Co.*, 120 U. S. 130; *Deck v. Gerke*, 12 Cal. 433; *White v. Hampton*, 10 Iowa, 238. Compare *Baker v. Biddle*, 1 Baldw. (U. S.) 394.

A court of equity has jurisdiction in cases in which the plaintiff asks for an accounting and discovery. *Gordon v. Clarke*, 10 Fla. 179.

In *Knotts v. Tarver*, 8 Ala. 743, it was said that it is not sufficient to give equity jurisdiction that an account exists between the parties, or that fraud has been practised. There must be a discovery wanted, or the accounts must be so complicated as to require the court to adjust them. But compare *Marvin v. Brooks*, 94 N. Y. 71, where it is held that the bill depends on the existence of a fiduciary relation rather than on

the need of discovery. See also *Ludlow v. Simond*, 3 Caines (N. Y.), 1; *Pearl v. Nashville*, 10 Yerg. (Tenn.) 179.

Where there is a fiduciary relation existing between the parties to an agency, a court of equity has jurisdiction to adjust the accounts between them. *Thornton v. Thornton*, 31 Gratt. (Va.) 212. And see *Clarke v. Pierce*, 52 Mich. 157. So persons associated together for the purchase and holding of property for their common benefit may compel an account from one of their number who has acted for them, and deceived them concerning the amount paid. *Dole v. Wooldredge*, 135 Mass. 140.

So an agent may often be compelled to account, especially when the accounts between himself and his principal are mutual and complicated, or where the nature of the employment is such that money is often paid in confidence without vouchers. *Bispham's Eq.* (4th ed.) 536.

A bill brought to compel an agent to account, and which joins those alleged to be his confederates in a scheme of fraud, claiming relief against them, and denying the agent's liability to respond in full, states a case for equitable relief. *Illges v. Dexter*, 73 Ga. 362.

Where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity; and, upon such an accounting, the burden is upon him of showing that his trust duties have been performed and the manner of their performance. *Marvin v. Brooks*, 94 N. Y. 71.

If A. intrusts money to B. to lend on good security, and B. invests numerous sums on inadequate security, forecloses, pays costs, etc., and refuses to render an account, equity will entertain a bill for accounting. *Rippe v. Stogdill*, 61 Wis. 38.

So in many cases growing out of assignments.

An action to compel the defendants to account as the general agents of the assignor of the plaintiff, and involving accounts as to the sale of a patent medicine, has been *held* to be maintainable on the equity side of the court. *Walker v. Spencer*, 45 N. Y. Super. Ct. Rep. 71.

Where an absolute assignment was fraudulently procured of certain judgment notes intended as collateral security, it was *held* that a bill in equity was maintainable for an account to compel repayment of the excess received from the notes above the debt intended to be secured, notwithstanding assumpsit might have been maintained for such excess. *Bierbower's Appeal*, 107 Pa. St. 14.

Equity has jurisdiction to compel an assignee in insolvency to execute his trust, and to account for the property assigned to him. *Sanderson v. McIntosh*, 65 Cal. 36.

Where the sons of the deceased intestate were intrusted for some years, during her lifetime, with a complete possession and control of her property, consisting of bonds, stocks, and money, and they changed its form from time to time, and refused to account with her administrator, *held*, that equity was the proper remedy. *Webb v. Fuller*, 77 Me. 568.

The administrator of a deceased wife may maintain a bill in equity to compel the husband to account as trustee of her separate equitable estate under an *ante nuptial* contract. *Donovan v. Haynie*, 67 Ala. 51.

The complaint of an administratrix for an accounting alleged that defendant, as agent for the plaintiff's intestate, received from the latter certain moneys to loan for him, and had not fully accounted therefor; and that plaintiff was not in possession of any books, papers, or memoranda, by which the amount of the investment thereof could be ascertained. *Held*, that (notwithstanding a statute, which superseded the proceeding by bill in equity for discovery in aid of another action) the complaint stated a good cause of action in equity. *Schwickerath v. Sohen*, 48 Wis. 599.

But a bill against an executor, for an account of the proceeds of real estate sold under a power in a will, cannot be maintained where it appears that no proceedings have been taken in a probate court to compel an account, and where it does not appear that the executor may not have given a special bond to the probate court, under the provisions of Gen. Stat. Mass. c. 102, § 6, to account for the proceeds of real estate to be sold. *Ammidown v. Kinsey*, 144 Mass. 587.

So an action by a stockholder of a bank, against its directors, to call them to account as trustees, is triable by a court of equity. *Brinkerhoff v. Bostwick*, 105 N. Y. 567.

Where matter of account against an insolvent co-tenant for past profits of the land is involved, and where partition of the premises cannot be made without a sale, equity has jurisdiction to decree partition and account. *Lowe v. Burke* (Ga.), 3 S. E. Rep. 449.

On the other hand, a bill for an account showing no confusion or complication in the accounts, and in fact only presenting the respective liabilities of two sets of sureties on an official bond, shows no ground for equity jurisdiction. *Grafton v. Reed*, 26 W. Va. 437; *Upton v. Paxton* (Iowa), 33 N. W. Rep. 773; *Bowen v. Johnson*, 12 Ga. 9; *Cummins v. White*, 4 Blackf. (Ind.) 356. *Compare Barnum v. Landon*, 25 Conn. 137.

Nor will equity take jurisdiction where the accounts are all on one side: the amount being ascertainable by simple calculation, the remedy at law is adequate.

5. *Partition*. — Partition is the dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty.¹

6. *Dower*. — Dower is the provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children.²

7. *Boundaries*. — The jurisdiction of the court of chancery in regard to disputed boundaries is of very ancient, but somewhat uncertain, origin. As a general rule, a court of equity has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, or unless some particular circumstance of fraud or collusion exists.³

Avery v. Ware, 58 Ala. 475; *Building Association's Appeal*, 83 Pa. St. 441; *Walker v. Cheever*, 35 N. H. 339.

And equity will not entertain a suit on a guardian's bond to compel an accounting, without a showing that the power of the probate court in the premises is insufficient. *Gorman v. Taylor*, 43 Ohio St. 86.

So a claim which in effect is merely for damages for breach of contract, cannot sustain a suit in equity for an accounting. *Linn v. Gunn*, 56 Mich. 447.

It is improper to order an account merely to establish by testimony the allegations of the bill. *Lively v. Winton* (W. Va.), 4 S. E. Rep. 451.

And where the complainant has been guilty of unreasonable delay in filing his bill, so that the transactions have become obscured by lapse of time, equity will not order an account, even though the lapse of time does not amount to a statutory bar. *Harrison v. Gibson*, 23 Gratt. (Va.) 212.

And as to what circumstances are sufficient to induce the court to re-open an account, see *Patton v. Cone*, 1 Lea (Tenn.), 14.

A court of equity has no jurisdiction of a bill for an account of profits brought by one, out of possession, who claims to be a joint owner of an oil-well, against his alleged co-tenants, until the question of title is first determined by a court of law. *Frisbee's Appeal*, 88 Pa. St. 144.

This jurisdiction is in most cases concurrent with that of courts of law. *Bruce v. Burdet*, 1 J. J. Marsh. (Ky.) 80; *Power v. Reeder*, 9 Dana (Ky.), 6; *McKim v. Odone*, 12 Me. 94; *Jewett v. Bowman*, 29 N. J. Eq. 174.

And it may be said in general, that in all cases where an action of account would be the proper remedy, and in all cases where a trustee is a party, the jurisdiction of equity is undoubted. *Baker v. Biddle*, *Baldw.* (U. S.) 394.

1. *Brown's Law Dict.* The jurisdiction of courts of equity in cases of partition

arises from the inadequacy of the common-law remedy. See title "Partition."

2. *Bouvier's Law Dict.* See title "Dower."

3. *Bispham's Eq.* (4th ed.) 552, § 503.

Where a settlement of the disputed boundaries cannot be had at law without multiplicity of suits, relief may be had at equity. *Bouverie v. Prentice*, 1 Bro. Ch. 200; *Commissioners v. Glasse*, 41 L. J. Ch. 409; *DeVeny v. Gallagher*, 20 N. J. Eq. 33.

Certain relations between the parties may give the court jurisdiction; e.g., where one of the parties was a tenant or copyholder. *Attorney-Genl. v. Stephens*, 6 De G. M. & G. 111, 133; *Clayton v. Cookes*, 2 Atk. 449; *Spike v. Harding*, L. R. 7 Ch. D. 871.

So where the party against whom the relief is sought has been guilty of fraud or neglect. *Wake v. Conyers*, 1 Eden, 331; *Pratt v. Bryant*, 20 Vt. 333; *Perry v. Pratt*, 31 Conn. 433; *Fraley v. Peters*, 12 Bush (Ky.), 469; *Wolfe v. Scarborough*, 2 Ohio St. 361.

Where the owner of land broke down the dam, and ploughed up the raceway which led from it so that it was difficult for the plaintiff, who had the right to use them, to ascertain and define their course. *Merriam v. Russell*, 2 Jo. Eq. (N. C.) 470.

When a question of boundary affects a large number of persons, and by proceeding in equity to determine the controversy a multiplicity of actions at law will be prevented, the additional circumstance that "the boundaries have become confused by lapse of time, accident, or mistake," is all that is required to give a court of equity jurisdiction of the case. *Beatty v. Dixon*, 56 Cal. 619.

But a mere confusion of boundaries will not be sufficient to sustain a bill. *Wolcott v. Robbins*, 26 Conn. 236; *Doggett v. Hart*, 5 Fla. 215; *Topp v. Williams*, 7 Humph. (Tenn.) 569; *Haskell v. Allen*, 23 Me. 448; *Tilmes v. Marsh*, 67 Pa. St. 507; *Wetherbee v. Dunn*, 36 Cal. 249; *Bresler v. Pitts*, 58 Mich. 347.

8. *Rent*. — The jurisdiction of courts of equity in regard to rent rests upon principles analogous to those which are applied in cases of confusion of boundaries.¹

9. *Partnership Bills*. — Partnership bills are generally designed to effect a dissolution of the partnership, the protection of its property, an account, and a distribution of its assets.²

10. *Creditors' Bills*. — These are bills in equity filed by one or more creditors, by and on behalf of himself or themselves, and all other creditors who shall come in under the decree for an account of the assets and a due administration of the estate.³

11. *Administration Suits*. — When bills for getting in and distributing the estate of a decedent are filed by legatees, they are generally termed administration suits.⁴

12. *Protection of Infants, Idiots, and Lunatics*. — The jurisdiction of the court of chancery in these cases in its inception belonged to the king, as part of his power as *parens patriæ* to protect his subjects, and was by him transferred to the court of chancery.⁵

13. *Discovery*. — Revealing or disclosing a matter. The courts of common law were originally unable to compel a litigant to disclose any fact resting merely within his knowledge, or discover any document in his power which would aid in the enforcement of a right, the repelling of an unjust demand, or the redress of a wrong, — an infirmity which the equity judges cured by compelling such a party to disclose the fact, or discover the document, upon his oath, in his answer to a bill of complaint, filed by the opposite party, called a bill of discovery which was an original bill.⁶

14. *Bills Quia Timet*. — Bills *quia timet* are bills in equity, entertained to guard against possible or prospective injuries, and to preserve the means by which existing rights may be protected from future or contingent violations; differing from injunctions in that the latter correct past and present, or imminent and certain,

And it is necessary for the complainant to show that some portion of the lands, the boundary of which is in dispute, are in the possession of the defendant. *Atty.-Genl. v. Stephens*, 6 De G. M. & G. 111.

And he must establish a clear title to some land in the possession of the defendant. *Godfrey v. Littell*, 1 Rus. & My. 59; 2 Rus. & My. 630.

All parties interested in the lands must be made parties, although they need not all be joined as plaintiffs. *Miller v. Warrington*, 1 J. & W. 484; *Pope v. Melone*, 2 A. K. Marsh. (Ky.) 239.

1. *Bispham's Eq.* (4th ed.) 554, § 504. *Dawson v. Williams*, 1 Freem. Ch. (Miss.) 99; *Lawrence v. Hammett*, 3 J. J. Marsh. (Ky.) 287; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 294; *Ryall v. Prince*, 71 Ala. 66. See also 1 *Story's Eq. Jur.* (13th ed.) 693, § 684 *et seq.* And see title "Rent."

2. *Bispham's Eq.* 556, § 505. See title "Partnership Bills."

3. In the United States the term is also used of a suit to enforce a judgment as a lien in equity against the property of the debtor: in the code States, proceedings supplementary to execution in the original action have, however, for the most part, superseded the creditors' bill in this sense of the term. *Rapalje & Lawrence's Law Dict.* See title "Creditors' Bills."

4. *Bispham's Eq.* (4th ed.) 576, § 528. See titles "Creditors' Bills" and "Executors and Administrators."

5. 2 *Story's Eq. Jur.* (13th ed.) 665, § 1333; 3 *Pomeroy's Eq. Jur.* 327, § 1304; *Bispham's Eq.* (4th ed.) 589, § 542. See titles "Infants, Idiots," and "Lunatics."

6. *Wharton's Law Lex.* See title "Discovery."

EQUITY OF REDEMPTION—EQUITY PLEADINGS.

injuries, while the former proceed to the extent of securing rights against an invasion which need not be imminent and certain, but which may be only future and contingent.¹

15. *Receivers*.—A receiver is a person appointed by a court possessing chancery jurisdiction to receive the rents and profits of land, or the profits or produce of other property in dispute.²

16. *Writs of Ne Exeat*.—These are writs which issue from a court of equity to restrain a person from going out of the country without the leave of the court.³

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1. Bispham's Eq. (4th ed.) 607, § 568. See title "Bills Quia Timet."

2. Bouvier's Law Dict. See title "Receivers."

3. Rap. & L. Law Dict. See title "Writ of Ne Exeat."

Authorities on Equity.—Bispham's Principles of Equity, 4th ed.; Pomeroy's Equity

Jurisprudence; Story's Equity Jurisprudence, 13th ed.; Adam's Doctrine of Equity, 7th Am. ed.; Smith's Manual of Equity, 13th ed.; Francis, Maxims of Equity, 1st Am. ed.; Bouvier's, Rapalje & Lawrence's, Burrill's and Brown's, Law Dictionaries; Wharton's Law Lexicon.

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I. Difference between Legal and Equitable Pleadings.—Under the form of procedure existing prior to the code system adopted at the present time in several of the States, the pleadings in an action or suit at law and at equity differed. In law there were certain prescribed forms to which the pleader, in setting out his case, must adhere with no material deviation, no matter what the actual facts might be in his case. There was also a class of cases for which the courts of law afforded no plain, adequate, or complete remedy, or which the courts of law under their strict rules of pleading could not reach at all. To obtain his remedy in such cases, the party might come into a court of equity, and present the facts on which he relied for relief according to certain rules of pleading and practice which prevailed in that court. The administration of equity rested exclusively in courts whose sole province was to administer equity, and which were separate and distinct from courts of law. Courts of equity did not, however, give any different construction to the law from that governing courts of law, and were equally bound by precedents, but they might enlarge or illustrate the principles governing decisions in prior cases: in fact, courts of equity have always endeavored, in cases properly before them, to control the remedy so as to give all parties their real and substantial rights when possible under the rules by which they are governed.¹

II. The Code System abolishes Former Distinctions.—In those States where the code system exists, all former rules of pleading and practice have become merged therein, and in some cases abolished: although “the former distinctions which existed between common law and equity pleadings no longer exist,” and “the code has reduced all to one common system,” yet “the old and well-established principles of pleading,” as determined by precedents, are resorted to in construing the code so far as is practicable.²

1. 1 Story's Eq. Jur. (11th ed.) § 33; Mitf. Plead. (2d ed.) 1, *et seq.*

“There is a strict analogy between the pleadings in equity and those at common law.” Lube's Eq. Plead. (Pract. Series) 155, § 203, *et seq.*; Lube's Eq. Plead. (Pract. Series) 19-23.

“Where the common-law forms are inadequate to do justice, the courts, as courts of equity, may, in order to reach the equity of the case, so mould and adapt their forms to the circumstances as to accomplish that purpose.” Mathews v. Stephenson, 6 Pa. St. 496, 498.

Equity will give parties their substantial rights, even though there be no exact precedent to the case. Thus, where a personal action was enjoined by bill filed by defendant, and soon after the defendant died, held that equity would give relief against the executor. Pulteney v. Warren, 6 Ves. 73, 83.

“Where, by interposition of court to prevent an act, the defendant has lost a remedy at law, the court of equity will give him a remedy equivalent to that from which the interposition of the court has barred him.” Brown v. Newall, 2 My. & Cr. 558, 572; Morgan v. Morgan, 2 Dick. 643.

2. Bowen v. Aubrey, 22 Cal 566, 570; White v. Lyons, 42 Cal. 279, 282; Wa Ching v. Constantine, 1 Idaho, N. S. 266; Harper v. Harper, 10 Bush (Ky.), 447, 457; Bank of Genesee v. Patchin Bank, 13 N. Y. 309, 313, somewhat qualifies this statement; Moore v. Edmiston, 70 N. Car. 510, 518; Pomeroy's Rem. & Remed. Rights (2d ed.), §§ 28, 35, 36, 44, 70-73; Stevens v. The Mayor of New York, 84 N. Y. 296; Millikin v. Cary, 5 How. Fr. (N. Y.) 272, 274; Kloune v. Bradstreet, 7 Ohio St. 322; Matlock v. Todd, 25 Ind. 128; Latin v. McCarty, 41 N. Y. 107, 110; Bonesteel v. Bonesteel, 28 Wis. 245.

III. Pleadings in Equity defined. — Pleadings in equity are the written statements of the parties, setting out, in conformity with certain established rules, the matters and facts relied upon by the respective parties to the suit, in order to maintain or to defeat it, or to obtain or prevent the equitable interposition of the court concerning the relief sought.¹

IV. Bill in Equity defined. — A bill in equity, or, as it is sometimes called, a petition in equity, is a statement in writing of the plaintiff's case, whereby he seeks equitable relief, and it answers

This last case decides that the writ of *ne exeat regno* cannot issue in an action at law, since the code abolishes distinctions only of form, and not of remedy. *Peck v. Newton*, 46 Barb. (N. Y.) 173; *Goulet v. Asselar*, 22 N. Y. 225, 228; *Troost v. Davis*, 31 Ind. 34, 39.

It is said by the court in *Myers v. Field*, 37 Mo. 434, 441, "that the distinction between law and equity has not been abolished by the new code of practice. Equitable rights are still to be determined according to the doctrines of equity jurisprudence, and in the peculiar modes of proceeding which are sometimes required in such cases, and legal rights are to be ascertained and adjudged upon principles of law; and the rules of proceeding at law are, in many respects, very different from those which are applied to equity cases. Pleadings should be drawn up with reference to these distinctions, though in the form prescribed by statute. Where the petition is framed for legal redress, the plaintiff cannot be allowed to prove his equitable rights, though the facts be stated to some extent in its petition. If he seeks equitable relief, the facts must be stated in such manner as to show that he is entitled to the relief prayed for as under the former practice; if he claims redress at law, the essential elements of his cause of action must be stated with reasonable clearness and certainty."

Codes, constitutions, and rules governing forms and methods of civil procedure:—

Alabama.—Constitution 1875 (in Code of 1876, art. 4, sec. 46); Keyes, Wood, & Requemore's Code 1876–1877.

Arkansas.—Code approved 1868; Gantt's Digest 1874; Mansfield's Digest 1884.

California.—Deering's Codes 1885; Huttell's Codes (3 vols.) 1876–1880.

Colorado.—Code of Civil Procedure 1877.

Connecticut.—Practice Act of 1879; Gen. Stat. (Rev. 1887) sec. 872, *et seq.*

Dakota Territory.—Revised Codes 1877; Levisse's Codes (2 vols.) 1883.

Delaware.—Revised Code of 1852, amended 1874.

Georgia.—Constitution 1877 (in Code

1882), art. 6, secs. 2, 4; Revised Code 1873, Supplement 1878, Revision 1882.

Idaho Territory.—Code of Civil Procedure 1881.

Illinois.—Chancery Act in Starr & Curtis's Annotated Statutes 1885, chap. 22.

Indiana.—Constitution 1851 (in Rev. Stat. 1881), art. 7, sec. 20; Revised Codes 1881.

Iowa.—Miller's Iowa Code (2 vols.) 1880, and McClain's Annotated Iowa Code (2 vols.) 1880.

Kentucky.—Constitution 1850 (in Gen. Stat. 1873), art. 8, sec. 22; Bullitt's Codes of 1876.

Louisiana.—Voorhies' Revised Civil Code 1875.

Maryland.—Code and Supplement (2 vols.) 1878–1880.

Michigan.—Constitution 1850 (in Howell's Stat. 1882), art. 6, sec. 5.

Mississippi.—Revised Code 1880.

Montana.—Code 1879.

Nevada.—Constitution 1864 (Compiled Laws 1873), art. 6, sec. 14.

New York.—Bliss's N. Y. Code Annotated, 2 vols. 1878, 1880; Code of Civil Procedure 1881, vol. 4; Banks & Bros'. Rev. Stat. 7th ed.

North Carolina.—Constitution 1868, amended 1876 (in Code 1883), art. 4, sec. 1; Code 1883.

Ohio.—Constitution 1851 (in Rev. Stat. 1880), art. 14, sec. 2; Rev. Stat. 1880.

Oregon.—Code Gen. Laws 1872.

South Carolina.—Constitution of 1868 (in Gen. Stat. 1882), art. 5, sec. 3; Code of Civil Proc. Gen. Stat. 1882.

Tennessee.—Milliken & Ventree's Code 1884.

Utah.—Code of Civ. Proc. chap. 55, Biennial laws 1884.

Virginia.—Code 1873.

Washington Territory.—Wash. Ter. Code 1881.

Wisconsin.—Constitution 1868 (Gen. Stat. 1882), art. 7, sec. 22.

Wyoming.—Civil Code, chap. 13, Compiled Laws 1876.

1. Story's Eq. Plead. (9th ed.) §§ 4 and 5 and note; Lube's Eq. Plead. (Pract. Series) 24, sec. 7.

to the declaration at law.¹ The bill, with few exceptions, has always been in the *English* language, and, when preferred to the king in his High Court of Chancery, was called an *English* bill, since proceedings in suits within the ordinary jurisdiction of the court were anciently entered and enrolled in the French or Norman tongue, and afterwards in Latin, the same as pleadings in other common-law courts.²

1. *Nature and Form of Bill. — Generally.* — Formerly bills in equity were of great simplicity: the facts were clearly and briefly set out. Sometimes, in the most early practice, neither relief was asked, nor process prayed for, the bill merely petitioning the court or chancellor to examine defendant; or, in those cases where relief was asked, the prayer for process followed no regular form.³

As the affairs of business grew more complex, and the rights of parties consequently more numerous, bills in equity necessarily began to assume a more regular form so far as pleading and practice were concerned: such later bills simply alleged the facts upon which the plaintiff based his claims for relief, and contained a prayer to the court for such relief in equity as the facts warranted, and that a *subpœna* or other suitable writ might issue against the defendant for that purpose.

By degrees, however, parts were added to the bill, until equity pleading has reached its present complex form, and has become a science requiring great learning and technical knowledge to master it in its various branches, as well as the exercise of sound legal discretion and judgment to properly plead and practise it. But, as is said by Justice Story, "The statement of the case, and prayer of the bill for relief or otherwise, always were, and continue to be to this day, the very substance and essence of the bill."⁴

The fact that the early chancellors were ecclesiastics who were learned only in the civil and canon law, accounts for the similarity existing between the pleadings and practice in the chancery courts and the pleadings and practice in the civil law, although the systems have now for a long time been entirely distinct and separate.⁵

1. Lube's Eq. Plead. (Pract. Series) 33, § 11, 165, § 216; Story's Eq. Plead. (9th ed.) § 7; Webster v. Harris, 16 Ohio, 490, 503; Bailey v. Ryder, 10 N. Y. 363, 369; Harding v. Handy, 11 Wheat. (U. S.) 103, 120.

2. Mitf. Plead. (2d ed.) 7 and 8; Story's Eq. Plead. (9th ed.) § 7.

3. Story's Eq. Plead. (9th ed.) §§ 11, 12. Formerly the prayer for general relief was sufficient. 2 Madd. Chan. 138.

Formerly very little more than the stating part and a simple prayer was contained in the bill. 2 Madd. Chan. 137.

4. Story's Eq. Plead. (9th ed.) §§ 12, 13, et seq.; Lube's Eq. Plead. (Pract. Series) 19-23.

5. Reeve's Hist. Eng. Law (Amer. ed. 1879), 553.

Rule 90, U. S. Eq. Rules, provides that "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." Desty's Fed. Proc. (Pract. Ser.) 730.

2. *General Division.* — Bills are divided into original and not original.¹

a. Original Bills are those which the same persons, having the same interests, have not before litigated in the court.²

b. Bills not Original are in addition to, or a continuance of, an original bill, or both, and relate, therefore, to some matter already in controversy between the same parties, or their privies, as in cases of Bills of Revivor.³

c. Other Bills. — To these bills were added, by the old pleadings in equity, a certain kind of bills, which are, for the most part, still in use, and were classed under bills in the nature of original bills. These were bills to review proceedings already had in the court, to suspend or impeach decrees, to carry the same into effect, or to set up by the defendant some affirmative matter connected, or not inconsistent, with the matter in controversy by the original bill.⁴

(1) *Original Bills.* — *Subdivisions.* — Original bills are divided into those praying relief, and not praying relief.⁵

(a) *Bills for Relief defined.* — Bills for relief are those that seek for an adjudication upon the merits of the very suit before the court to ascertain present existing rights, and remedy present wrongs. Only those original bills wherein a decree of the court is asked, are technically termed bills for relief.⁶

(b) *Bills not of Relief defined.* — All other bills, as those seeking relief from future apprehended injury, or seeking relief affecting suits in courts of ordinary jurisdiction, are technically *bills not of relief*. The distinction between these two kinds of original bills is not a matter of mere form, but goes to the life of the bill.⁷

(c) *Bills for Relief.* — *Subdivisions.* — Bills for relief are again divided into (1) a bill praying the decree of the court touching some right claimed by the plaintiff in opposition to the defendant, (2) a bill of interpleader, (3) a *certiorari* bill.⁸

1. Hinde's Chan. 19; Mitf. Plead. (2d ed.) 31.

2. Mitf. Plead. (2d ed.) 31, 36; Robinson's Elementary Law (ed. 1882), 208, § 334; Hinde's Chan. 19; 1 Daniell's Chan. Plead. and Pract. (3d Amer. ed.) 307; Adams' Eq. (3d Amer. ed.) 671, side page 301.

3. 1 Dan. Chan. Plead. and Pract. (3d Amer. ed.) 307; Mitf. Plead. (2d ed.) 31, 53; Lube's Eq. Plead. (Pract. Series) 188; Robinson's Elementary Law (ed. 1882), 208, § 334; 2 Madd. Chan. 135, side page 136; Hinde's Chan. 19; Adams' Eq. (3d Amer. ed.) 671, side page 301.

4. In Mitford's Plead. (2d ed.) 31-34, 43, 66, 67, 74-89, these bills are classed as bills in the nature of original bills, and are divided into (1) cross-bills; (2) bill of review; (3) bill in nature of bill of review; (4) bill to impeach a decree on the ground of fraud;

(5) bill to suspend or avoid the execution of a decree; (6) bill to carry a decree into execution; (7) bill in the nature of a bill of revivor; (8) bill in the nature of a supplemental bill. Hinde's Chan. 20, 21. A similar division is made in Equity Draughtsman by Hughes, 444, 445.

5. Mitf. Plead. (2d ed.) 32, 36; Hinde's Chan. 19.

6. Lube's Eq. Plead. (Pract. Series) 186; Story's Eq. Plead. (9th ed.) § 17.

7. Story's Eq. Plead. (9th ed.) § 17; Lube's Eq. Plead. (Pract. Series) 186, § 247.

8. Mitf. Plead. (2d ed.) 36, 37, 47, 49; Hinde's Chan. 19, 20.

Original bills praying for relief are divided as follows in the Equity Draughtsman by Hughes, 8-350: (1) Bills for specific performance of agreements; (2) bills to cancel agreements, bills of exchange,

(d) *Bills not of Relief. — Subdivisions.* — Bills not praying for relief are divided into (1) a bill to perpetuate testimony, (2) a bill for discovery.¹

(2) *Bills not Original. — Subdivisions.* — Bills not original are divided into (1) a supplemental bill, (2) a bill of revivor, (3) a bill of revivor and supplement.²

3. *Informations* are generally brought in the name of the attorney-general, or other public officer, in behalf of the crown or government itself, or of those under its peculiar protection. In the latter case a relator is named, and sometimes so in the former. An information differs from an ordinary bill in no respect except its form.³

(A) ORIGINAL BILLS. — *Their Several Parts, their Form.* We have seen that original bills are divided into two principal parts, viz., those praying relief, and those not praying relief; although in a certain sense all bills pray relief,⁴ and of bills praying relief those most frequently brought are the first class, which pray the decree of the court touching some right claimed by the plaintiff in opposition to the defendant. These will therefore be first treated of as to their *form*, and then as to their *substance*. It is equally necessary that a bill should be convenient in form as well as sufficient in substance.⁵

The form of an original bill consists of nine parts; viz., (1) the address; (2) the introductory part, which contains the names and description or abode of the parties; (3) the stating part, or that which contains a statement of the plaintiff's case; (4) the general charge of confederacy against the persons complained of; (5) the charging part of the bill, which is in anticipation of the defence, wherein the plaintiff alleges that the defendant pretends to set up certain matters in defence, and so avoid such matter by charging it. This part is used also to put in issue a matter which plaintiff does not believe it for his interest to admit, or to obtain a discovery of the defence; (6) the jurisdiction clause, so called because it is here averred that the acts complained of are contrary to equity, and that he is compelled to come into a court of equity for

bonds, and other instruments; (3) bills relating to annuities; (4) bills by assignees on behalf of bankrupt estates; (5) a *certiorari* bill; (6) bill to compel the acceptance of a composition; (7) bill to restrain the infringement of a copyright; (8) bills by creditors for payment of debts; (9) bill to compel the delivery of title-deeds; (10) bill for dower; (11) bills of foreclosure; (12) bills of interpleader; (13) bill for the payment of legacies, and also to carry the trusts of wills into execution; (14) bills by and against lords of manors; (16) bills by next of kin for account; (17) bills for partition; (18) bills relating to partnership matters; (20) bills for redemption; (22) bills for appointment of new trustees; (23) bills by

underwriters in respect to frauds practised upon them in the insurance of ships; (24) bills to restrain waste.

1. Equity Draughtsman (by Hughes), 359-373; Mitf. Plead. (2d ed.) 50, 52.

2. Mitf. Plead. (2d ed.) 33, 53, *et seq.*; Hinde's Chan. 20.

3. Lube's Eq. Plead. (Pract. Series) 173, 204, 134 f, 172; Mitf. Plead. (2d ed.) 90, *et seq.*; Story's Eq. Plead. (9th ed.) §§ 7, 8, 49; Hinde's Chan. 73; 2 Bouv. Law Dict. 339, title "Pleadings in Chancery," Ld. Redes. Treat. Pl. (4th ed.) 22, 99, and notes; 2 Madd. Chan. 133, side page 135.

4. Story's Eq. Plead. (9th ed.) § 17.

5. Mitf. Plead. (2d ed.) 41.

a remedy; (7) the interrogating part; (8) the special prayer for relief, also a general prayer for relief; (9) the prayer for process.¹

1. *The Address* or direction of the bill contains the title and style of the court to which the bill is brought.²

2. *The Introductory Part* contains the names and residences of the parties, and such further necessary description as to show them to be within the jurisdiction of the court, and also that the court may know of whom to compel performance of any decree or order made in the premises, and to whom to look for payment of costs.³

But it has been held that if matter, which is properly of introduction, is stated elsewhere in the pleadings, as in case of citizenship of a corporation, it is sufficient.⁴

a. *Parties in General.*—See sub-title "Multifariousness," *post*. As a general rule, all persons who have a legal or beneficial interest in the subject-matter of the suit should be made parties, either plaintiffs or defendants, no matter how numerous they may be, to prevent multiplicity of suits, and to enable the court to determine, and finally settle, the rights of all.⁵

1. 2 Madd. Chan. 135, 136; Equity Draughtsman (by Hughes), 1; Mitf. Plead. (2d ed.) 41-46; Story's Eq. Plead. (9th ed.) §§ 26-47; Hinde's Chan. 15-18; Lube's Eq. Plead. (Pract. Series) 182 *et seq.*

There are four parts given in Lube's Eq. Plead. (Pract. Series) 166, which are as follows: "(1) The circumstantial statement of the relation, including the inducement or introductory part; (2) the incidents which produce the grievance complained of, including the requests made to the defendant, and his refusal; (3) the statement of such collateral circumstances, if necessary, by way of charge, as may compel the defendant to acknowledge the grievance, or which may anticipate and controvert his defence; (4) and lastly, by reason of the foregoing complaint, and for want of adequate remedy at common law, it concludes with a petition for the *subpœna*, to the end that the defendant may answer the premises, and the court decree relief." 3 Amer. & Eng. Ency. of Law, 199 *et seq.* title "Bill of Discovery."

2. Hinde's Chan. 15; 2 Madd. Chan. 133, side page 135; Cooper's Eq. Pl. 9; Van Heyth's Eq. Drafts, 2; Sterrick v. Pugsley, 1 Flip. (U. S.) 350. This case decides that a bill addressed to the circuit court in equity as the "Circuit Court in Chancery sitting" is sufficient.

3. 1 Harr. Pract. in Chan. 86, 87; Mitf. Plead. (2d ed.) 41.

4. Muller v. Dows, 94 U. S. 444; Bingham v. Cabot, 3 Dall. (U. S.) 382; Jackson v. Ashton, 8 Pet. (U. S.) 148.

In describing a corporation defendant, it is not sufficient to say the L. Co. a citizen

of the State of Indiana, but it must be clearly stated to be a corporation. This may, however, be stated in pleadings subsequent to the complaint. Lafayette Ins. Co. v. French, 18 How. (U. S.) 404.

The Rules of Pleading in Equity in the United States courts provide, in regard to the *Introductory Part*, that "Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought." Rule 20, U. S. Eq. Rules; Desty's Fed. Proced. (Pract. Ser.) 688, and cases cited.

5. 2 Madd. Chan. 143; Hinde's Chan. 2; Chicago, etc., Land Co. v. Peck, 112 Ill. 408; Gaston v. Plum, 14 Conn. 344, 1 Harr. Pract. in Chan. 76; Crocker v. Higgins, 7 Conn. 342; McGraw v. Bayard, 96 Ill. 146, 153; Vanhorn v. Duckworth, 7 Ired. Eq. (N. Car.) 261; Hilton v. Lothrop, 46 Me. 297; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344, 349; Calvert on Parties, 1-11; Lyman v. Bonney, 101 Mass. 563; Miller v. Whittier, 32 Me. 203, 210; Trades Savings Bank v. Freeze, 26 N. J. Eq. 453; Busby v. Littlefield, 31 N. H. 193, 198; Caldwell v. Taggart, 4 Pet. (U. S.) 190, 203; McConnell v. McConnell, 11 Vt. 290; Ladd v. Harvey, 27 N. H. 372; Zelle v. W. B. Co., 10 Bradw. (Ill.) 335; Moore v. Hood, 9 Rich. Eq. (S. Car.) 311; Willis v. Henderson, 4 Scam. (Ill.) 13; Howell v. Harvey, 5 Ark. 270; Whelan v. Whelan, 3 Cow. (N. Y.) 537; McArthur v. Scott, 113 U. S. 340; Boughton v. Allen, 11 Paige (N. Y.), 321; La Grange v. Merrill, 3 Barb. Ch. (N. Y.) 625; Farmers and

So, generally, all persons should be made parties whose interests would necessarily be affected by the decree;¹ and the court may refuse to grant a decree until all are made parties who are entitled to be.²

It is no ground for dismissal of a suit, when all the parties are before the court, and there is a proper case for equitable interposition, that the parties are wrongly placed as plaintiff or defendant.³

Mechanics' Bank v. Polk, 1 Del. Chan. 167; *Cornwall v. Lee*, 14 Conn. 524.

"The codes . . . have taken the most general doctrines of equity in relation to parties, have put them into a statutory form, and have made them applicable without exception to all actions. Whether these doctrines have been entirely incorporated into the legal actions under the codes, has sometimes been doubted. It is universally admitted, however, that they are operative with their full force and effect in all equitable actions which may be brought in accordance with the new procedure." Pom. Rem. & Remed. Rights (2d ed.), § 247, pp. 297, 298.

There is a distinction made between the *subject-matter* and the *object* of the suit in connection with parties. Barb. on Parties (ed. 1864), 237.

"The interest need not be personal and beneficial. It includes any estate or right in the subject-matter, legal or equitable, whether beneficial to the holder thereof or not." Pom. Rem. & Remed. Rights (2d ed.), sec. 331.

By *interest* is meant something more than wishes or ardent feeling. "It implies a *right* in the subject of controversy which a decree more nearly or remotely may affect." Crocker v. Higgins, 7 Conn. 342; *Story v. Livingston*, 13 Pet. (U. S.) 359, 375.

Those whose interests are in issue are meant. *Story v. Livingston*, 13 Pet. (U. S.) 359, 375; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299, 306.

"The grand principle which underlies the doctrine of equity, in relation to parties, is, that every judicial controversy should, if possible, be ended in one litigation; that the decree pronounced in the single suit should determine all rights, interests, and claims; should ascertain and define all conflicting relations, and should forever settle all questions pertaining to the subject-matter." Pom. Rem. & Remed. Rights (2d ed.), § 247.

"The rule is almost inflexible; certainly so, where it can be done without extraordinary difficulty, or where the defendants are not very numerous, and do not reside in remote and distant countries, that all parties in interest shall be made defendants so that no decree shall be made which can affect their interest without their being

heard." The court in *Herrington v. Hubbard*, 1 Scam. (Ill.) 569, 573; *Smith v. Rotan*, 44 Ill. 506.

1. "All persons whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties." *Trades Savings Bank v. Freeze*, 26 N. J. Eq. 453.

It is not necessary to make one a party who would not be affected by the decree. *Allen v. Woodruff*, 96 Ill. 11.

"Where a decree in the relation to the subject-matter of litigation can be made without a person who has an interest having that interest in any way concluded by the decree," that person need not be a party to the suit. *Story v. Livingstone*, 13 Pet. (U. S.) 359, 375.

2. *Townsend v. Anger*, 3 Conn. 354, 357; *Story's Eq. Plead.* (9th ed.) § 137.

"In cases where several individuals and interests are concerned, a court of equity will in general require all parties interested to be made parties in a proceeding affecting such interests, either as plaintiffs or defendants, for the purpose of preventing further and unnecessary litigation, as well, also, that a decree may be formed which shall be safe for all who are bound to perform it." *New London Bank v. Lee*, 11 Conn. 112.

Generally, there can be no final decree until all parties are brought in whose interests are affected by it. *Smith v. Rogers*, 1 Stew. & P. (Ala.) 317.

3. *West v. Bank of Rutland*, 19 Vt. 403.

So it has been *held* that where one who was a necessary party to the bill was made complainant instead of being properly made a defendant, the court would not consider this an obstacle to the proper determination of the rights of the parties. *Sapp v. Phelps*, 92 Ill. 588, 595.

"Equity does not particularly concern itself with determining that such a person shall be a plaintiff, and such another a defendant, but rather requires in a more general form that the persons shall be parties so as to be bound by the decree, and is in general satisfied if they are thus brought before the court, either as plaintiffs or defendants." *Pomeroy's Rem. & Remed. Rights* (2d ed.), § 248.

The court will refuse to dismiss a bill merely for the want of necessary parties.

(1) *Is a Rule of Convenience.* — The rule that all persons materially interested in the suit, or likely to be affected in their rights by the decree, is a rule of convenience merely, and may be dispensed with when impracticable, extremely difficult, or very inconvenient, and is largely within the discretion of the court.¹

(2) *Exceptions to the Rule.* — There are certain admitted exceptions to the rule, requiring all persons materially interested to be made parties, as where, 1st, a party is without the jurisdiction of the court; 2d, or where the fact that one is a personal representative is contested; 3d, or the parties are unknown; or, 4th, are very numerous, and also in other cases.²

Potter v. Holden, 31 Conn. 385; Nash v. Smith, 6 Conn. 421.

A mere agent is not properly a party. Case of allegation of fraud connecting agent with same held properly a party. Gartland v. Nunn, 11 Ark. 721.

"The privity necessary to exist between parties to proceedings in equity is not necessarily a privity of contract, but such as gives the complainant a title to sue the defendant." Busby v. Littlefield, 31 N. H. 193.

1. Wiser v. Blackly, 1 John. Ch. (N. Y.) 437; Wendell v. Van Rensselaer, 1 John. Ch. (N. Y.) 344; Vann v. Hargett, 2 Dev. & B. Eq. (N. Car.) 31; Townsend v. Anger, 3 Conn. 354, 357; Scofield v. Lansing, 17 Mich. 437; New London Bank v. Lee, 11 Conn. 112; 2 Madd. Chan. 143; Murray v. Hay, 1 Barb. Ch. (N. Y.) 59; Harvey v. Harvey, 4 Beav. 215; Hallett v. Hallett, 2 Paige (N. Y.), 15, 18; Carey v. Hoxey, 11 Ga. 645, 648; Birdsong v. Birdsong, 2 Head (Tenn.), 289, 302; Donalds v. Plum, 8 Conn. 447.

It is declared by Chief Justice Marshall in Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 166, that "this equitable rule (requiring all parties to be named) is framed by the court itself, and is subject to its discretion. It is not an inflexible rule, a failure to observe which turns the party out of court, but being introduced by the court itself, for the purpose of justice, is susceptible of modification for the promotion of these purposes."

As to nominal parties, Rule 54, U. S. Eq. Rules, provides that "Where no account, payment, conveyance, or other direct relief, is sought against a party to a suit, not being an infant, the party, upon service of the *subpoena* upon him, need not appear and answer the bill unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the

proceedings against him, unless the court shall otherwise direct." Desty's Fed. Proced. (Pract. Ser.) 707.

2. Lucas v. Bank of Darien, 2 Stew. (Ala.) 280.

The rule as to privity between parties, complainants or defendants, where there is a community of interests, will not always be enforced when the court can do justice, and avoid multiplicity of suits. Kennedy v. Kennedy, 2 Ala. 571.

What is said in Willis v. Henderson, 4 Scam. (Ill.) 13, 19, is directly in point. The court, in that case, declares that "there are necessarily many exceptions, and we find the rule modified in a great many instances. One general rule, however, governs all of these exceptions; and that is, 'that as the object of the rule is to accomplish the purposes of justice between all of the parties, and as it is a rule founded in some sort upon public convenience and policy, rather than upon positive rules of municipal or general jurisprudence, courts of equity will not suffer it to be applied so as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable, and if the persons thus interested are unknown to the complainant, he need not make them parties. And another exception is where the persons collaterally interested are exceedingly numerous, and it would be impracticable to join them without great delays and other inconveniences.'"

Rule 22, U. S. Eq. Rules, provides that, "If any person, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction, and may properly be made parties, the bill may pray that pro-

(a) *1st, Where the Party is not within the Jurisdiction of the Court.* — Such parties will be dispensed with when the decree will not prejudice their interests, or when they are not necessary to a proper and equitable adjustment of the case upon the bill.¹

(b) *2d, Where a Personal Representative is a Necessary Party,* and it is alleged in the bill that the representation is contested in the proper tribunal, such representative will be dispensed with as a party.²

(c) *3d, Where the Persons interested are Unknown to the Plaintiff.* — In this case he may set forth the fact in his bill, and ask discovery of such parties, in order that they may be brought into court.³

(d) *4th, Where the Parties are very Numerous,* and it would be impracticable, or lead to great expense or inconvenience, to bring them all into court, in such case the court may proceed to decree without them.⁴

cess may issue to make them parties to the bill if they should come within the jurisdiction." *Desty's Fed. Proced. (Pract. Ser.)* 690.

1. 2 Madd. Chan. 143, *et seq.*; *Story's Eq. Plead.* §§ 78-90; 1 *Harr. Pract. in Chan.* 77; *Mittf. Plead.* (2d ed.) 30, 146, 221; *West v. Randall*, 2 *Mason* (U. S.), 181, 192, 196; *Vattier v. Hinde*, 7 *Pet.* (U. S.) 252, 263; *Traders' Bank v. Campbell*, 14 *Wall.* (U. S.) 87, 94; *Carey v. Hoxey*, 11 *Ga.* 645, 648.

One outside of the jurisdiction need not be made a party if a decree can be made without manifest injustice to him. *Towle v. Pierce*, 12 *Met. (Mass.)* 329.

Where persons reside out of the jurisdiction of the court, or for any other reason cannot be brought in, it is not necessary to make them parties. *Farmers & Mechanics' Bank v. Polk*, 1 *Del. Chan.* 167.

Rule 47, U. S. Eq. Rules, provides that, "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder will oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties." *Desty's Fed. Proced. (Pract. Series)* 703.

As to citizenship of parties in different States, when jurisdiction is dependent thereon, it must be averred. *Wood v. Mann*, 1 *Sumn.* (U. S.) 578; *Speigle v. Meredith*, 4 *Biss.* (U. S.) 120; *Jackson v. Ashton*, 8 *Pet.* (U. S.) 148.

That one properly a party, is out of the jurisdiction, should be alleged; and the bill

should ask that he be made a party, in case he comes within the court's jurisdiction. *Tobin v. Walkinshaw*, *McAll* (U. S.), 26, 31.

2. *Vann v. Hargett*, 2 *Dev. & B. Eq.* (N. Car.) 31; *Story's Eq. Plead.* (9th ed.) § 91; 1 *Harr. Pract. in Chan.* 77; *Plunkett v. Penson*, 2 *Atk.* 51.

3. *Story's Eq. Plead.* (9th ed.) § 92; *Mandeville v. Riggs*, 2 *Pet.* (U. S.) 482; *Willis v. Henderson*, 4 *Scam.* (Ill.) 13, 20.

4. See sub-title "Multifariousness," *post*; *Story's Eq. Plead.* § 94; 2 *Madd. Chan.* 144; *Mandeville v. Riggs*, 2 *Pet.* (U. S.) 482; *Smith v. Swormstedt*, 16 *How.* (U. S.) 288; *West v. Randall*, 2 *Mason* (U. S.), 191, 192, 196; *Cockburn v. Thompson*, 16 *Ves.* 321; *Wilson v. Stanhope*, 2 *Coll.* 629; *Stimson v. Lewis*, 36 *Vt.* 91.

This rule ordinarily prevails where the court can, without injuring the rights or interests of absent parties, proceed to a decree in order to do justice to those actually before the court. If this were not so, the plaintiff might, in many cases, be unable to obtain the equitable relief to which he is entitled. *Cockburn v. Thompson*, 16 *Ves.* 326; *Wood v. Dummer*, 3 *Mason* (U. S.), 308, 318; *Menx v. Maltby*, 2 *Swan* st. 291.

It ought to appear on the face of the bill, or be alleged, that the parties are too numerous. *Good v. Blewitt*, 13 *Ves.* 397; *Weld v. Bonham*, 2 *Sim. & Stu.* 91; *Whitney v. Mayo*, 15 *Ill.* 251, 255; *Hitchens v. Congreve*, 4 *Russ.* 562, 575; *Walworth v. Holt*, 4 *Myline & Craig.* 619, 635.

Rule 48, U. S. Eq. Rules, provides that, "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it

(e) *One in Behalf of All.* — Under the last exception are cases where one or more may bring suit, or defend, in behalf of the others, where they have some common interest,¹ as in the case of the *People v. Sturtevant*, 9 N. Y. 263, where certain parties had been committed for contempt in disobeying an injunction restraining persons named therein from authorizing in any manner the laying, by an individual corporation within the city of New York, a certain railroad. The restraining words of the injunction as addressed were, "To the mayor, aldermen, and commonalty of the city of New York, their counsellors, attorneys, and agents, and all others acting in aid or assistance of them, and each and every of them." Upon the question as to who was bound by such decree, and who were *proper* parties to an injunction, it was held that the practice had never prevailed in bills for injunctions against corporations "to make every person a party to the suit who could by any possibility be its agent in doing the prohibited act," and that the decree as framed would bind not only the intangible, artificial being, but also all the individuals who act for the corporation in the transaction of the business to whose knowledge the injunction or decree comes. But in a case where a statute founded on this rule in equity provided that one or more might maintain or defend a suit in behalf of all, when it would, by reason of the parties being very numerous, be impracticable to bring them all before the court, or when the question was one of common or general interest to many persons, it was held that a tax-payer could not sue in behalf of himself and other tax-payers of a certain school-district to restrain the county treasurer from selling real estate in said district belonging to the complainants, for the purpose of collecting taxes based upon certain judgments, and further asking that the judgments be declared void; that, inasmuch as the rights and interests of the several tax-payers were separate and distinct, one tax-payer could "obtain complete relief without making another a party;" that the statute was in recognition of the rule which governed in chancery pleadings in analogous cases.²

to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties." *Desty's Fed. Proced. (Pract. Series)* 705.

1. *Strong v. Waterman*, 11 Paige (N. Y.), 607; *Bouton v. The City of Brooklyn*, 15 Barb. (N. Y.) 375, 391; *Bromley v. Smith*, 1 Simon, 8; *Smith v. Swormstedt*, 16 How. (U. S.) 288, 302.

2. *Newcomb v. Horton County Treasurer*, 18 Wis. 566.

The court declared in this case that "It is an elementary rule in chancery pleading that every person who is at all interested in the event of a suit, or necessary to the

relief, must be made a party in order to enable the court to settle the rights of all, and make a complete and final decree upon the merits. This rule was dispensed with where it was inconvenient, difficult, or impracticable on account of the number or situation of the parties, to unite them in one suit. In that case the court went as far as it could in doing justice to the parties before it, rather than deny it altogether. Sometimes, where the question was one of a common or general interest, in order to prevent a multiplicity of suits, one or more was permitted to sue or defend for the benefit of the whole." Citing *Story's Eq. Plead.* ch. 4, §§ 97, 98, 107, 124, 168, 285; *Lube's Eq. Plead.* ch. 3; *Mitt. Plead.* 164.

(f) *Creditors and Legatees*.—Another class of cases under this fourth exception are those where suits are permitted to be brought by creditors and legatees as well in behalf of themselves as others.¹

But it must appear by the bill that the suit is in behalf of all, and that they have a common interest.²

It is decided, however, that, if a legacy be given jointly to several persons, all must join, and one cannot sue for his share.³

Where a legatee or creditor files a bill to establish a claim against the estate of a testator, the *residuary legatee* is not a necessary party. The executor should be made the defendant.⁴

The rule is laid down in Delaware, that residuary legatees under a will should be joined as parties to a bill for the recovery of the residuary legacy.⁵

1. *Brown v. Ricketts*, 3 John. Chan. (N. Y.) 553; Mitf. Plead. (2d ed.) 145; Pom. Rem. & Remed. Rights (2d ed.), 319, § 267; *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466; *Danbridge v. Washington's Exors.*, 2 Pet. (U. S.) 370, 377; *Hendricks v. Robinson*, 2 John. Chan. (N. Y.) 484; *Davone v. Fanning*, 4 John. Chan. (N. Y.) 199; *Hallett v. Hallett*, 2 Paige (N. Y.), 15, 20; *Egberts v. Wood*, 3 Paige (N. Y.), 516; *New London Bank v. Lee*, 11 Conn. 112; *Leigh v. Thomas*, 2 Ves. 312; *Cockburn v. Thompson*, 16 Ves. 321, 327; *Hubbell v. Warren*, 8 Allen (Mass.), 173, 177.

This is the rule also in case of judgment creditors. *Wakeman v. Grover et al.*, 4 Paige (N. Y.), 23.

Legatee may bring a suit in behalf of himself and other legatees against the testator's personal representative for a settlement of accounts and payment of the legatees. *Ross v. Crary*, 1 Paige (N. Y.), 416, note; *Montagu v. Nucella*, 1 Russ. 165, 173.

So it is decided in *Catlin v. Wheeler*, 49 Wis. 507, 519, that "a suit is properly brought jointly by the legatees whose legacies depend upon the same right, and would be affected by the judgment. All of the legatees and the executors are necessary parties to such a suit, either as plaintiffs or defendants; and those who seek the same relief are properly made plaintiffs, and those who controvert their right to the relief demanded are properly made defendants."

"A legatee may sue the executor for his own particular legacy without making the residuary legatees, or any other legatees, parties."

Not so residuary legatees. They must all join. *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466, 474.

Several legatees may join in a bill to recover legacies charged upon land of the testator, the bill being in this case exhib-

ited against the devisee in trust and parties holding under him as purchasers, with notice. *Judd v. Bushnell*, 7 Conn. 204.

2. See cases cited in the notes under this head *ante*, also *Haughton v. Davies*, 23 Maine, 28, 34; *Joy v. Wirtz*, 1 Wash. (U. S. C. C.) 417; *Leigh v. Thomas*, 2 Ves. 312.

But in case of debts or legacies which are charged upon the real estate under a will, all the creditors or legatees must be made parties, or, if these cannot be known, then this fact must be averred. *Hallett v. Hallett*, 2 Paige (N. Y.), 15.

3. *Pray v. Belt*, 1 Pet. (U. S.) 670, 681.

4. *Melick v. Melick*, 17 N. J. Eq. (2 C. E. Green) 156.

5. *West et al. v. Evans*, Adm'x, 1 Del. Ch. 122; *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466, 474.

There is a great diversity of opinion on this point, and the law does not seem to be fully settled. See *Hallett v. Hallett*, 2 Paige, Ch. (N. Y.) 15 *et seq.* an exhaustive opinion; also discussion on same point in *Pray v. Belt*, 1 Pet. (U. S.) 670, 681; *Cockburn v. Thompson*, 16 Ves. 321, 328; *Story's Eq. Plead.* (9th ed.) §§ 89, 104.

Where a *residuary legatee* files a bill, ordinarily he should make all persons parties who are interested in the residue, although such rule will be dispensed with when not necessary or convenient that they should all be before the court. *Bradwin v. Harper*, Amb. 375; *Pomeroy's Rem. & Remed. Rights* (2d ed.), 314, § 261.

And it has been held that in a bill by creditors or legatees, it is not necessary to make *residuary legatees* parties. *Lawson v. Barker*, 1 Bro. C. C. 303; *Anon.* 1 Vern. 261.

It is said in a Georgia case, that the residuary legatees need not be made parties where the legal construction of the bill shows that they have no interest in

So a trustee may be brought in where the beneficiaries are numerous.¹

(g) *Voluntary Associations*. — Another instance under these exceptions is where a bill is exhibited by or against a voluntary association. In such case it is not necessary to make all the stockholders parties before any decree can be made, since to require this to be done might in many cases tend to impede or defeat justice.²

(h) *One Stockholder in Behalf of Others*. — A stockholder in a corporation may bring a suit in behalf of himself and the other stockholders against an officer of the corporation for a fraudulent conversion of the funds of the corporation, where the corporation itself upon request neglects or refuses to institute a suit; and in such case the corporation may be made a party defendant.³

(i) *Prize-money*. — And this exception holds in cases of suits by members of a crew in behalf of themselves and the rest for prize-money.⁴

(j) *Other Exceptions*. — There is still another class of cases which perhaps is not strictly within the exceptions to the general rule as to who should be parties; and this class comprehends those causes wherein the nature of the relief prayed or sought, or to which the plaintiff is entitled by the bill, does away with the necessity of making parties of all those who have an interest. This is well illustrated by the case of *Howes v. Wadham*,⁵ where the defendant contracted for the purchase of the interest of the plain-

the question as to lapse. *Silcox v. Nelson*, 24 Ga. 84.

1. *Chicago, etc., Land Co. v. Peck*, 112 Ill. 408.

2. *Mandeville v. Riggs*, 2 Pet. (U. S.) 484, 488; *Barker v. Walters*, 8 Beav. 92; *Lloyd v. Loring*, 6 Ves. 773, 777; *Hickens v. Congreve*, 4 Russ. 562, 575; *Birmingham v. Gallagher*, 112 Mass. 190.

In a suit brought against a voluntary banking association to obtain payment out of the separate estate of the stockholders of notes issued by the bank and held by the plaintiff, it was held that, although all the members of the company need not be made parties defendants, yet, as to those who were actually made parties, the *proceedings* as to them *must be regular*, and in case of death the bill ought to have been revived against their personal representatives unless some good reason could be assigned to the contrary. *Mandeville v. Riggs*, 2 Pet. (U. S.) 484, 488; *Martin v. Dryden*, 1 Gilm. (Ill.) 187, 209.

3. *Hazard v. Durant*, 11 R. I. 195; *Davenport v. Dows*, 18 Wall. (U. S.) 626, citing *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Robinson v. Smith*, 3 Paige (N. Y.), 222, 223; *Cunningham v. Pell*, 5 Paige (N. Y.), 607; *Hersey v. Veazie*, 24 Me. 1;

Charleston Ins., etc., Co. v. Sebring, 5 Rich. Eq. (S. Car.) 342; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Bagshaw v. Eastern Union R. Co.*, 7 Hare (Chan.), 114-131.

In a suit against the directors of a corporation for a fraudulent breach of trust, all the directors need not be made parties. *Cunningham v. Pell*, 5 Paige (N. Y.), 607; *Wilkinson v. Parry*, 4 Russ. 272, 274, and note.

4. *Good v. Blewett*, 13 Ves. 397; *Lloyd v. Loring*, 6 Ves. 773, 777; *Pierson v. Belchier*, 4 Ves. 627.

Rule 48, U. S. Equity Rules (Desty's Fed. Procd. Pract. Series, 705), provides that "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."

5. *Ridg. & Hard*. 199, 201.

tiff as mortgagee of a certain estate. Finding that the mortgagee had only an equitable interest of the mortgage term, as claiming under a party who should have taken out letters of administration, but had not done so, he prevailed upon the said party to take out letters of administration to assign an interest to him, and then set the mortgagee at defiance. A bill was brought, praying that the defendant be compelled to complete the purchase, or else that the estate be sold, and also praying general relief. The court held, that, to be entitled to the special relief, the mortgagor or his heir should have been made a party; but under the general prayer it might be decreed that the defendant be considered a trustee for the benefit of the plaintiff without the necessity of joining the mortgagor, whose interest would not be affected thereby.¹

b. Who are Necessary Parties. — And herein arises the question as to who are necessary parties, since parties may have an interest, and yet not have such an interest, legal or beneficial, but that a decree may, upon the bill, be granted without affecting their rights; and we have already seen² that there are others whose interests are material, and whose rights are affected by the decree, who are not necessary in the sense that they must be brought into court before a decree can be had. Necessary parties have been defined by Justice Story as those concerning whom "no decree can be made respecting the subject-matter of litigation until they are before the court, either as plaintiffs or as defendants, or where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties."³

Under this last division it would seem proper to place those cases where the plaintiff may, by the allegations of his bill, set up certain matter whereby it will appear that those who would otherwise be entitled are not of necessity parties, as that no claim is made to any interest;⁴ or that the interest has been parted

1. See also *Deeks v. Stanhope*, 14 Sim. 57, 73; *Walworth v. Holt*, 4 My. & Cr. 619, 634; *Williams v. Williams*, 9 Mod. 299; *Story's Eq. Plead.* (9th ed.) § 127.

2. *Story's Eq. Plead.* (9th ed. by Gould) sec 226. See the several exceptions to the general rule herein enumerated *ante*, "Numerous Parties."

3. *Story's Eq. Plead.* (9th ed.) § 136. See also *Whelan v. Whelan*, 3 Cow. (N. Y.) 537. The words cited are taken from the opinion of the court in *Bailey v. Inglee*, 2 Paige (N. Y.), 278. The definition is there commented on at length by *Justice Story*, who says, "These propositions are true, but they furnish no sufficient test as to the question; for the inquiry is still open when will a court of equity proceed to a decree without them, and what is the interest which entitles the defend-

ants before the court to insist upon the presence of other persons as defendants, before a decree is made which shall bind themselves." §§ 136 *et seq.*, and exceptions there noted.

Upon a bill for an account and distribution of a fund, all are necessary parties who are entitled to any share in the same. *Mitchell v. Lenox*, 2 Paige (N. Y.), 280.

4. *Story's Eq. Plead.* (9th ed.) §§ 139, 213, 214, 221, 228; *Williams v. Williams*, 9 Mod. 299; *May v. Selby*, 1 Y. & Col. Chan. 235; *Smith v. Brooksbank*, 7 Sim. 18; *West v. Randall*, 2 Mason (U. S.), 181, 197; *Dart v. Palmer*, 1 Barb. Ch. (N. Y.) 92.

In a bill brought by a partner against some of the other partners, praying for his share of profits, and alleging that the remaining partners other than the plaintiff

with; or, in case of an executor, that he has accounted.¹ This manner of framing a bill, however, will not be permitted where others' rights may be prejudiced thereby.²

Having considered the general rule as to parties and the exceptions thereto, the next inquiry is as to who may sue, and who defend, and first as to who may sue in equity.³

(1) *Parties Plaintiff*.—All bodies politic and corporate, and all persons of full age, except *femes covert*, idiots, lunatics, and some otherwise disabled, as those reduced by old age and infirmity to second childhood, may bring a bill in chancery by themselves.⁴

(a) *Lunatics* may not sue alone, but must bring suit by their committees, guardians, or other legal custodian, in whose charge they are.⁵

Upon a bill exhibited to set aside certain acts done by a lunatic while under mental imbecility, it was held that it was not necessary that the lunatic be made a party with his committee, but that he may be joined as a matter of form.⁶

(b) *Infants* may not sue by themselves,⁷ nor by attorney,⁸ but must sue by their next friend. A relative or a stranger may act as *prochain ami*;⁹ and any person may institute a suit in their behalf, with or without their consent, if they see their rights liable

and defendants had received their share of the profits, it was held that the said remaining partners need not be parties. *Mare v. Malachy*, 1 Myl. & Cr. 559, 577.

So the plaintiff, may, on hearing, waive the relief he claims against a person, and thus do away with the objection for want of such party. *Pawlett v. The Bishop of Lincoln*, 2 Atk. 295; *Wicks v. Marshall*, 3 Atk. 400.

1. Story's Eq. Plead. (9th ed.) §§ 214 a, 221.

2. Story's Eq. Plead. (9th ed.) § 139; *Dart v. Palmer*, 1 Barb. Ch. (N. Y.) 92.

3. *Incapacity to Sue*.—Incapacities to sue are absolute and partial. "Absolute are such as, while they continue, wholly disable the party to sue; the partial are such as disable the party to sue by himself alone without the aid of another. The absolute incapacities in England are outlawry, excommunication, and alienage; in America the two former are either wholly unknown, or, if known at all, are of very limited local existence." Story's Eq. Pl. § 51. See sub-title "Aliens," *post*.

4. Lube's Eq. Plead. (Pract. Series) 34, § 13; *Hinde's Chan.* 2; 1 Harr. Pract. in Chan. 74; Mitf. Plead. (2d ed.) 24; Story's Eq. Plead. (9th ed.) §§ 50, 56, 66.

"In chancery it is necessary that the plaintiffs, in order to sustain a suit, should have an interest in the subject of the suit, or a right to the thing demanded." *Gaston v. Plum*, 14 Conn. 344; *Lester v. Kinne*, 37 Conn. 9.

Where one has assigned all his interest in the subject-matter set up in the bill, he is not a proper party thereto, and the court will dismiss the bill where party bringing it has assigned all his interest in the matter in controversy. *Gaston v. Plum et al.*, 14 Conn. 343.

5. *Dorsheimer v. Rohrbach*, 18 N. J. Eq. (3 C. E. Green) 439, citing *Shelford on Lunatics*, 415; Story's Eq. Pl. § 64; 1 Danls. Chan. Pr. (3d ed.) 79; *Stock on Non Composites Mentis*, 33; Mitf. Plead. 29; 2 Barb. Chan. Pr. 224; *Cooper's Eq. Plead.* 32; Mitf. Plead. (2d ed.) 28; 1 Harr. Pract. in Chan. 79; Lube's Eq. Plead. (Pract. Series) 35, § 13; *Modawell v. Holmes*, 40 Ala. 391; *Narcom v. Rogers*, 16 N. J. Eq. 484; *Bird v. Bird*, 21 Gratt. (Va.) 712; *Dorsheimer v. Rohrbach*, 18 N. J. Eq. 438.

A suit by a lunatic is by his committee or guardian; and when the interests of the guardian clash with the lunatic's interest, then he sues by the attorney-general or *prochain ami*. *Narcom v. Rogers*, 16 N. J. Eq. 484.

6. *Ortley v. Messere*, 7 John. Ch. (N. Y.) 139.

7. Mitf. Plead. (2d ed.) 25; Story's Eq. Plead. (9th ed. by Gould) §§ 57, 58, 59; *Bowie v. Minter*, 2 Ala. 406, 410.

8. Anon. 1 Vent. 54.

9. 1 Harr. Pract. in Chan. 78; *Hinde's Chan.* 3, 4; Mitf. Plead. (2d ed.) 25; Lube's Eq. Plead. (Pract. Series) 35, § 13; Story's Eq. Plead. (9th ed.) §§ 57, 58, 59; Anon. 1 Atk. 570; *Klaus v. The State*, 54 Miss. 644.

to be endangered.¹ But if the next friend has an interest adverse to that of the infant, he may not sue in the infant's behalf.²

(c) *Those reduced by Age or Infirmary.* — Those reduced by old age or infirmity to second childhood, or laboring under other legal disability, must, on analogous principles with those governing suits by others who are incapacitated, sue by the person in whose legal custody they are, or by their next friend.³

(d) *A Married Woman* must join with her husband in a suit in equity respecting her rights, except she claims some right in opposition to those claimed by her husband. In such cases she sues by her next friend.⁴

In cases of married women, the next friend may not sue without her consent: in this the rule differs from that in regard to infants.⁵ And where the husband has abjured the realm, is an exile, or an alien enemy, she may sue in her own name as a *feme sole*.⁶

1. 1 Harr. Pract. in Chan. 74. But see Lube's Eq. Plead. (Pract. Series) 34, § 13; Andrews v. Craddock, Prec. in Chan. 376; Pennington v. Alven, 3 P. Wms. 264; Baltimore, etc., R. Co. v. Fitzpatrick, 32 Md. 619, 624.

2. Story's Eq. Plead. (9th ed.) §§ 58, 59, 60; Peyton v. Bond, 1 Sim. 390; Walker v. Crowder, 2 Ired. Eq. (N. Car.) 478, 488.

Upon death of next friend a new one will be appointed upon proper application to the court. Bracy et al. v. Sandiford et al., 3 Madd. 468; Lancaster v. Thornton, 1 Amb. 398.

There is said to be on record a case of a suit by next friend in behalf of an infant *in ventre sa mère* for an injunction to stay waste, which case is cited by most of the older text-writers. The syllabus seems to bear out this proposition, and is strictly in accordance with the argument of counsel. But there is nothing in the case, either upon the facts or in the opinion of the judge, which has any reference to this point, except, perhaps, by inference or logical deduction. Musgrave et al. v. Parry et al., 2 Ver. 711, case 632.

As to the right of a testamentary guardian, or one appointed by the court, to infants, and *de* the legal custodians of lunatics, and their right to maintain actions in their own names, this is declared to rest upon the *statutes* in the several States defining their powers and duties. Pom. Rem. & Remed. Rights (2d ed.), 223, § 182.

An infant may bring suit by next friend for guardian to account. Johnson v. Jones, 41 Ga. 596; Heilman v. Martin, 2 Ark. 158, 167; Linton v. Walker, 8 Fla. 144, 153.

3. Story's Eq. Plead. (9th ed.) §§ 56-66.

4. Mitf. Plead. (2d ed.) 27; Story's Eq. Plead. (9th ed.) § 61; 1 Harr. Pract. in Chan. 78; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196, 210; Spring v. Sandford, 7

Paige (N. Y.), 551; Griffith v. Hood, 2 Ves. 452; Bridges v. Phillips, 25 Ala. 136; Cherry v. Belcher, 5 Stew. & P. (Ala.) 133, 139; Bradley v. Emerson, 7 Vt. 369; Wilson v. Wilson, 6 Ired. Eq. (N. Car.) 236; Ringo v. Warder, 6 B. Mon. (Ky.) 514, 516. (New Procedure.) See Pom. Rem. & Remed. Rights (2d ed.), §§ 234-246, 336 note, 342-345, 376, 377.

A *feme covert* suing to recover separate estate, should bring suit by her next friend. Roberts v. Evans, 7 L. R. Ch. D. 830.

A husband may not bring a bill in chancery to recover the separate estate of the wife: the next friend is the proper party. Bowers v. Smith, 10 Paige (N. Y.), 193, 201. Cases relied on are, 2 Sim. & Stu. 464; 2 Keen, 73; 11 Beav. 96; 8 Sim. 551. See Grant v. Van Schonhoven, 9 Paige (N. Y.), 255, 257.

Under the statute (Gen. Stat. ch. 108, sec. 3) in Massachusetts, wife may sue alone in regard to her separate property without joining her husband. Forbes v. Tuckerman, 115 Mass. 115.

5. Mitf. Plead. (2d ed.) 26; Lube's Eq. Plead. (Pract. Series) 35, § 13; Fulton v. Rosevelt, 1 Paige (N. Y.), 178; Gambia v. Atlee, 2 DeG. & Sm. 745.

6. Countess of Portland v. Prodgors, 2 Vern. 104; Coke on Littleton, 1 Inst. 132 b, 133 a (19th ed. Butler & Hargrave's notes); Lube's Eq. Plead. (Pract. Series) 35, § 13; 1 Harr. Pract. in Chan. 74; Newsome v. Boyer, 3 P. Wms. 37; Troughton v. Hill, 2 Hay. (N. Car.) 406; Robinson v. Reynolds, 1 Atk. (Vt.) 174.

The exception has been extended to cases where the husband has deserted the wife. So decided indirectly in Rhea v. Rhenner, 1 Pet. (U. S.) 108. See discussion of this point in Story's Eq. Plead. (9th ed.) § 61, note 2, citing among others the cases of Gregory v. Paul, 15 Mass. 31;

It is a rule in equity, that the wife or husband may sue each other.¹

(e) *Corporations, Plaintiff*.—Bodies politic and corporate may sue in their own name.²

A town may maintain a suit in chancery as party plaintiff, upon a bond given by its selectmen by a collector of taxes, to secure it from loss on account of a breach of official duty by the obligor.³

(f) *Foreign Corporations* are entitled to sue in equity.⁴

Abbott v. Bayley, 6 Pick. (Mass.) 89; Gregory v. Pierce, 4 Metc. (Mass.) 478.

Where a *feme covert* filed a bill in her own name against the former committee of her husband for an accounting, *held* that the bill could not be sustained, although he had abandoned her, and gone out of the State. Hay v. Warren, 8 Paige (N. Y.), 609, 612.

The codes of several States make provision, that, in case of desertion by the husband, the wife may prosecute and defend all actions for the preservation of her rights and property the same as if a *feme sole*. Pom. Rem. & Remed. Rights (2d ed.), §§ 236, 246.

1. Dewall v. Covenhoven, 5 Paige (N. Y.), 581; Wolf v. Banning, 3 Minn. 202; Porter v. Bank of Rutland, 19 Vt. 410, 417; Hunt v. Booth, Freem. Ch. (Miss.) 215; Cannell v. Buckell, 2 P. Wms. 243.

A wife may sue her husband in equity where adverse interests exist in regard to property. Elibank v. Montobin, 5 Ves. 737; Wood v. Wood, 2 Paige (N. Y.), 454.

2. Story's Eq. Plead. (9th ed.) §§ 50, 55; Robinson v. Smith, 3 Paige (N. Y.), 222, 232; Hinde's Chan. 2; 1 Harr. Pract. in Chan. 74, 78; German Reformed Church v. Von Puechelstein, 27 N. J. Eq. (12 C. E. Green) 30. See title "One Stockholder in Behalf of All," *ante*, and note.

By the constitutions of several States, it is provided generally that corporations may sue and be sued in the courts. Ala. Const. 1875 (Code 1876), art. 14, sec. 12; Cal. Const. 1873 (Hittell's Codes), art. 12, sec. 4; Kas. Const. 1859 (Laws 1879), art. 12, sec. 6; Mich. Const. 1850 (How. Stat. 1882), art. 15, sec. 11; Minn. Const. 1857 (Gen. Stat. 1878), art. 10, sec. 1; Neb. Const. 1875 (Ann. Laws 1883), art. 13, sec. 3; Nev. Const. 1864 (Comp. Laws, 1873), art. 8, sec. 5; New York Const. 1846 (1 Banks & Bros.' Rev. Stat.), art. 8, sec. 3; North Car. Const. 1868, Am'd 1876 (Code 1883), art. 8, sec. 3.

The suit must be brought in the corporate name, unless permitted by incorporating act to defend by the name of another as their president, etc. Mauney v. Motz, 4 Ired. Eq. (N. Car.) 195.

3. Montville v. Haughton, 7 Conn. 543.

"Where the cause of action affects the

entire interests of the corporation as such, the corporation is the proper party to sue: where it affects specially a stockholder, he has the same right to sue *pro interesse suo* as any one else. In the latter case it may, or may not, be necessary to make the corporation a party." The court in Dewing v. Perdicaries, 96 U. S. 196.

It is said that voluntary associations cannot sue by a corporate name, since it is the exclusive prerogative of government to create corporations. Story's Eq. Plead. (9th ed.) § 497; Barb. on Part. (ed. 1864) 381. See sub-titles "Voluntary Associations," "Suits by One on Behalf of Others," *ante*.

In suits in the United States courts, where citizenship is a matter pertaining to jurisdiction of the court, it must appear by the bill that the corporation was created by a State other than that of which the adverse party is a citizen. Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Mullen v. Dows, 94 U. S. 444.

Rule 94, U. S. Eq. Rules, provides that "Every bill brought by one or more stockholders in a corporation against the corporation and other parties founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action." Desty's Fed. Proced. (Pract. Ser.) 731.

4. "In respect to foreign corporations, either private or municipal, there seems to be no just ground to deny their competency to sue in courts of equity; and it has accordingly been the general practice to maintain suits by them as founded in the principles of international justice and amity." Story's Eq. Plead. (9th ed.) sec. 55; Barb. on Parties (ed. 1864), 375.

(g) *Attorney-General, Plaintiff*. — The government, in behalf of those to whom protection is owed, may sue in equity by the proper public officer, who brings suit in his official name, where the rights of government itself, and not those to whom it owes protection, are involved, or where it is a public matter purely. In the latter case some party is made the relator, and is named in the bill.¹

(h) *Alien Sovereign, Plaintiff*. — That a foreign sovereign may sue in this country, is a well-settled doctrine, based on principles of natural justice. It is also a constitutional provision of the United States.²

(i) *Aliens, Plaintiffs*. — As has already been noted,³ there exist both absolute and partial incapacities to sue. Alien enemies labor under a disability which is absolute so long as it continues, and may not, except in special cases,⁴ bring a suit in equity.⁵ An alien friend is under no disability of suing any personal demand, but otherwise where the demand is of a mixed nature real and personal, or where it respects land.⁶

(j) *Joinder of Plaintiffs*.⁷ — It is difficult to lay down any rule other than a most general one, as to who should be joined as plaintiffs in an action in equity, since, as has been shown,⁸ equity only requires generally that all should be made parties, either plaintiff or defendant, and that, where one has mistakenly been made a party plaintiff instead of defendant, the court would not consider this an obstacle to granting relief.⁹ But there are cases where persons have a common interest arising out of the same transactions, or

"It is well settled that foreign corporations may sue here in their corporate name, and may prove as a matter of fact, if the same were denied, that they were lawfully incorporated." The court in *Silver Lake Bank v. North*, 4 John. Ch. (N. Y.) 371.

1. Story's Eq. Plead. (9th ed.) §§ 8, 49, 50, 69; Mitf. Plead. (2d ed.) 20; Hinde's Chan. 73; Barb. on Parties (ed. 1864), 367-370. See *Craft v. Jackson Co.*, 5 Kan. 518; *Garr v. Bright*, 1 Barb. Ch. (N. Y.) 157, 164.

2. "A foreign sovereign may bring a civil suit, in the courts of the United States, for injury to the public property of his nation; and such suit is not defeated or abated by a change in the person of the sovereign, arising from his death or deposition. The *Sapphire*, 11 Wall. (U. S.) 165. While a foreign sovereign cannot maintain a bill in equity to restrain acts which only violate his political privileges, he may bring a bill to restrain a threatened and unauthorized wrong to his property, or that of his subjects, including the circulation of spurious notes purporting to be guaranteed by his nation. *Emperor of Austria v. Day*, 3 De G., F. & J. 217. But a foreign sovereign, when plaintiff in a suit in respect of commercial transactions, may be required to give security for costs, like any non-resi-

dent plaintiff. *Emperor of Brazil v. Robinson*, 5 Dowl. 522; *King of Greece v. Wright*, 6 Dowl. 12; *The Beatrice*, 36 L. J. Adm. 10; *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62." Story's Eq. Plead. (9th ed.) §§ 55, note *u*, 69 a; Barb. on Parties (ed. 1864), 360.

3 See sub-title "Incapacities" to sue, *ante*.

4. "As where he is here under the license, protection, and safe conduct of the government." Story's Eq. Plead. (9th ed.) sec. 724.

5. Mitf. Plead. (2d ed.) 188; Story's Eq. Plead. (9th ed.) §§ 51-54, 724; Barb. on Part. (ed. 1864) 338, 358-360; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 465 (decided so indirectly in this case); *Seymour v. Bailey*, 66 Ill. 288. But see *Masterson v. Howard*, 18 Wall. (U. S.) 99; *Levine v. Taylor*, 12 Mass. 8.

6. Barb. on Part. (ed. 1864) 338, 358-360; Mitf. Plead. (2d ed.) 188; Story's Eq. Plead. (9th ed.) §§ 51-54, 724.

7. See title "Parties in General," *ante*; also title "Multifariousness," *post*.

8. See notes under title "Parties in General," *ante*.

9. *Sapp v. Phelps*, 92 Ill. 588, 595, and cases cited *supra* on this point, title "Parties in General."

where their interests, claims, duties, liabilities, obligations, and contracts are joint, both technically so in point of law, and also joint in the sense of growing out of the same matters, related to each other in such manner as to entitle the parties to the same general relief.¹

So where fifty-nine persons, who were separate owners of certain real estate along a street which the city had graded, filed a bill against the city and its treasurer and collector to restrain the defendant corporation from collecting an assessment or tax therefor, upon demurrer it was held that inasmuch as the question in controversy was the illegality of the tax, which was the same as to all, and which, if illegal at all, would be equally illegal to every one of the plaintiffs, or, if valid to one of them, then it would be valid to all, there was not any objection to the joinder, unless the trial of the case should develop complications or multiplicity of issues which would overbalance the advantages to be derived from adjudicating the whole matter by one suit instead of by separate suits, in which case the court would of its own motion dismiss the bill.²

So, again, it has been decided that where there are several parties, as in case of legatees, creditors, etc., whose rights and interests the decree of the court may affect, here, in order to avoid multiplicity of suits, such parties are frequently joined.³ And

1. Story's Eq. Plead. (9th ed.) § 159; Pom. Rem. & Remed. Rights (2d ed.), 298, 299, sec. 248 *et seq.*; Barb. on Part. (ed. 1864) 348; Trades Savings Bank v. Freese, 26 N. J. Eq. 453.

2. Scofield v. Lansing, 17 Mich. 437.

The court cited Story's Eq. Pl. § 530; Adams' Eq. 309, 310, 313; Campbell v. Mackay, 1 Myl. & Craig, 603; Kensington v. White, 3 Price, 164. (Bill by seventy-two different underwriters on different insurance policies.) Murray v. Hay, 1 Barb. Ch. (N. Y.) 59. (Bill by two persons owning two houses in severalty to restrain a nuisance.) Reid v. Gifford, 1 Hopkins' Ch. (N. Y.) 416. (Bill by several proprietors of several lands and mills to restrain a nuisance.)

It was said, however, that "there is a great conflict in the authorities upon this question, and a review of them would require a treatise," and that the rule as to joinder, etc., was one merely of convenience, and "must depend for its application upon the circumstances of each particular case." See also Middleton v. Flat River, etc., Co., 27 Mich. 533.

It is held in Connecticut that "the mere saving of the expense of separate suits is no ground for their uniting in a bill in chancery to obtain an injunction against the doing of an act which would give each of them a right of action at law." Sheldon

v. Centre School District, 25 Conn. 224, 228.

The court will not permit a consolidation of actions so as to avoid a multiplicity of suits by several, each of whom has a separate action at law, and so bring all the several actions into one suit into a court of equity, where the law affords adequate relief to each party. Dodd v. Hartford, 25 Conn. 232, 238.

As a rule, all persons who are interested in obtaining a decree should be joined as complainants. If, however, any refuse to be joined, or have adverse interests, they should be made defendants, and their refusal or adverse interest stated in the bill. "The object of the rule is to have all the parties in interest before the court, that the decree may be final and conclusive upon them, and afford adequate protection to the party required to perform the decree." Freeman v. Scofield, 16 N. J. Eq. 28.

A party cannot be both plaintiff and defendant to a bill in equity, "although he appears on one side in his personal, and on the other in his official, character." McElhanon v. McElhanon, 63 Ill. 457.

3. 1 Harr. Pract. in Chan. 75; Robinson v. Smith, 3 Paige (N. Y.), 222, 230; Fellows v. Fellows, 4 Cow. (N. Y.) 682, 697.

So is the rule in case of those affected by a common charge or burden. Story's

upon a bill in equity for an injunction and account alleging an infringement of a patent, the owner of the legal title, as well as he who has the equitable right, should be joined as plaintiffs.¹

If, however, persons are joined as plaintiffs, whose interests will probably come into conflict in the future stages of the case, the bill will be dismissed.²

Nor can parties be joined as plaintiffs whose interests are adverse or conflicting, or who claim by distinct and separate interests.³

(k) *Government. — Joinder.* — The proper public officer should be made a party, either as plaintiff or defendant, in all suits in equity in which the government has an interest, in order to protect that interest.⁴

(2) *Parties Defendant.* — As a rule, all persons capable by themselves of instituting a suit, are likewise capable by themselves of defending one.⁵ But a suit will not lie against the government in its own courts, or against a foreign sovereign; although, in case of the government, the attorney-general is a necessary party to defend its interests when involved.⁶

Generally, no one ought to be made a party against whom the plaintiff can have no decree.⁷

Eq. Plead. (9th ed.) § 162; Barb. on Parties (ed. 1864), 353.

1. *Stimpson v. Rogers*, 4 Blatchf. (U. S.)

333.

2. *Jacobs v. Lucas*, 1 Beav. 434, 443; *Hendrickson v. Wallace*, 31 N. J. Eq. 604.

3. *Reybold v. Herdman*, 2 Del. Chan. 34; *Jones v. Quinnipiac Bank*, 29 Conn. 25.

"It is believed to be a well-settled rule of proceeding in equity, that the interests of plaintiffs should be consistent, although it is immaterial whether the interests of defendants are, or not, in conflict with each other;" and a motion in the case to amend the bill by joining plaintiffs who had adverse interests was denied. *Parsons v. Lyman*, 4 Blatchf. (U. S.) 432.

"Persons having adverse or conflicting interests in reference to the subject-matter of the litigation ought not to join as complainants." *Grant v. Schoonhoven*, 9 Paige (N. Y.), 255; *Saumerez v. Saumerez*, 4 My. & Cr. 331, 336.

"Two complainants, with distinct causes of action alleging distinct injuries," cannot unite in the same bill. "To authorize them to join as complainant, their cause of action must be the same, the injury the same, and they must be entitled to the same remedy;" although in this case, in view that the plaintiffs claimed the right to amend, and thus obviate the objection, the court, in order to save expense, examined the case upon its merits, and decreed ac-

cordingly. *Plum v. Morris Canal, etc., Co.*, 10 N. J. Eq. (2 Stock.) 256, 259; *Reybold v. Herdman*, 2 Del. Chan. 34.

4. *Story's Eq. Plead.* (9th ed.) § 222. See title "Corporation Defendant," *post* (as to municipal corporations defendant).

"The joinder of improper parties as citizens of the same State will not affect the jurisdiction of the circuit courts in equity as between the parties who are properly before the court, if a decree may be pronounced as between the parties who are citizens of the same State." *Banks v. Carmeal*, 10 Wheat. (U. S.) 181, 189.

It is held in *Beardsley v. Knight*, 10 Vt. 185, that all parties nominally or really interested might be joined.

5. *Story's Eq. Plead.* (9th ed.) § 70; *Hinde's Chan.* 146; Barb. on Part. (ed. 1864) 449-458; 1 Harr. Pract. in Chan. 75.

The rule requiring all parties materially interested to be made parties, does not hold in its full force as to bills of discovery, but only as to bills of relief. *Trescott v. Smyth*, 1 McCord, Ch. (S. C.) 301, 303.

6. *Hinde's Chan.* 146; *Story's Eq. Plead.* (9th ed.) §§ 69, 222; Barb. on Part. (ed. 1864) 449, 469; *President, etc., of the Mich. Bank v. Hastings*, 1 Doug. (Mich.) 225.

7. 1 Harr. Pract. in Chan. 76; *Mayor of London v. Levy*, 8 Ves. 398; *Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 371, 383; *Pom. Rem. & Remed. Rights* (2d ed.), 381, § 329, *et seq.*

(a) *Married Woman*. — Although a *married woman* may not sue alone, she may defend by herself by permission of court.¹

(b) *Infants, and those reduced by Old Age or Infirmity* to second childhood, defend by guardian.²

(c) *Idiots and Lunatics* defend by their committees or other legal custodian.³

The defendant must have some interest in the subject-matter of the controversy, or he is improperly a party thereto.⁴ Ordinarily, a decree does not bind those not made parties.⁵ But the court is not bound to make one a party who has a possible interest merely, and whom the decree does not necessarily affect.⁶

Where it is disclosed by the answer that some third person has an interest in the matter which is in suit, he should be made a party to enable him to defend his interests.⁷

1. Hinde's Chan. 146.

As where she claims in opposition to her husband, or does not approve of his defence, or lives separately from him. Hinde's Chan. 146.

Ordinarily, however, the husband must be joined as co-defendant. Story's Eq. Plead. (9th ed.) § 71.

2. Hinde's Chan. 146; 1 Harr. Pract. in Chan. 78; Parker v. Lincoln, 12 Mass. 16; Bank of U. S. v. Ritchie, 8 Pet. (U. S.) 128, 144.

Rule 87, U. S. Eq. Rules, provides that "Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable, may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants or other persons." Desty's Fed. Proced. (Pract. Ser.) 728.

3. Hinde's Chan. 146; 1 Harr. Pract. in Chan. 75; Westcomb v. Westcomb, 1 Dick. 233; Young v. Turnpauigh, 33 Ind. 49.

A lunatic defendant must be sued in the name of his guardian. It is the duty of the court to see that he is properly represented, and, if he has no guardian, to appoint one *ad litem*. Sturges v. Longworth, 1 Ohio St. 544, 551; Search v. Search, 26 N. J. Eq. 110.

And if a *new* committee be appointed after a decree against a lunatic, he must be joined. Lyon v. Mercer, 1 Sim. & Stu. 356.

Lunatics "are to defend suits in equity by their committees; and upon a joint bill filed against the lunatic and the committee of his estate, the latter, if he has no interest adverse to that of the lunatic, is, as a matter of course, appointed guardian to appear and answer for him." New v. New, 6 Paige (N. Y.), 237.

4. Wych v. Meal, 3 P. Wms. 311; How v. Best, 5 Madd. 19; Eq. Draughtsman, by Hughes, 373; Story's Eq. Plead. (9th ed.) § 231, *et seq.*

It is impossible to file a bill against one who is a mere witness, if relief is sought by the bill. Fenton v. Hughes, 7 Ves. 287.

The stewards and receivers, or agents, of a vendor may not be parties to a bill compelling specific performance of a contract. McNamara v. Williams, 6 Ves. 143.

But a person may be made a party, although not actually necessary to the life of the suit, or where he may have no actual interest. Story's Eq. Plead. (9th ed.) §§ 142, 144, 146, 153, 156, 167, 169, 186, 193, 211, 221, 229, 231.

One who is only an agent of an interested party should not be made defendant. Garr v. Bright, 1 Barb. Ch. (N. Y.) 157.

5. Bishop of Winchester v. Payne, 11 Ves. 194, 197; Finley v. Bank of the U. S., 11 Wheat. (U. S.) 304.

But a decree may be binding on those interested, although not parties to the bill. Van v. Hargett, 2 Dev. & B. Eq. (N. Car.) 31. See cases, *ante*, of suit by one in behalf of all.

There can be no decree against a defendant, unless the bill shows some interest in him. Jerome v. Jerome, 5 Conn. 352, 356.

6. Townsend v. Augur, 3 Conn. 354, 357.

7. As in a case where a bill was brought for the specific performance of a contract for the sale of land, and it appeared, that, before the exhibiting of such bill by the plaintiff, a contract had been made between the respondent and one W. for a sale and conveyance of the same land to him, and in pursuance thereof the defendant had executed and delivered, for a valuable consideration, a deed of said land to W., held that W. should be made a party. Herrington v. Hubbard, 1 Scam. (Ill.) 569; Lietze v. Clabaugh, 59 Ill. 136.

A suit in equity was brought by A. against the heirs of B., alleging an agreement whereby certain money belonging to A., B., and C. was invested for their own use, benefit, and advantage in making a purchase of certain land, and that a division was made by which the fee should vest, and be in A. and B., but that C. should have wood from the land during her life. It was decided that C. was properly a party to the bill, and that she was entitled to allege and show whether her interest was limited to the use of the wood alone, or that the actual agreement was that she should have an equal interest in the fee with A. and B.¹

Equity does not require that the interests of the defendants should be consistent, as in case of plaintiffs. Their claims may not only conflict with each other, but they may some of them have like claims, in part the same as the plaintiffs.²

(d) *Corporations Defendant.* — Generally, in all suits affecting the corporate rights and liabilities, the corporation is a proper party defendant.³

Upon a petition for an injunction to restrain a municipal corporation from paying the salaries of certain policemen not legally appointed, it was held that it was not enough to make the clerk, auditor, and treasurer of the corporation defendants, but that the city should be made a party.⁴ So where it appeared upon a bill in equity brought against the defendants as president and directors of a certain insurance company, that they retained in their hands certain moneys due the plaintiff, by virtue of a judgment obtained against the company on a policy of fire insurance, and that the defendants had made fraudulent use of such funds, and had refused to pay the same to the plaintiff, it was held upon demurrer that the company itself was a necessary party.⁵

1. *Dow v. Jewell*, 18 N. H. 340, 350.

2. *Barb. on Parties* (ed. 1864), 452; *Mayor of York v. Pilkington*, 1 Atk. 282.

A bill may also be brought against several holding by the same general right. *Brinckerhoff v. Brown*, 6 John. Ch. (N. Y.) 139, 153, 156; *Mix v. Hotchkiss*, 14 Conn. 32, 44; *Dimmock v. Bixby*, 20 Pick. (Mass.) 368, 377; *Mayor of York v. Pilkington*, 1 Atk. 282.

One may be made a party defendant for purposes of discovery; as where a third party has books, deeds, etc., in his possession here, he is properly made a defendant. *Cato v. Easley*, 2 Stew. (Ala.) 214; *Morely v. Green*, 11 Paige (N. Y.), 240.

But such bill of discovery will not lie against counsel, as to deeds and other documents in his possession. *Wakeman v. Bailey*, 3 Barb. Ch. (N. Y.) 482.

Ordinarily the names of parties outside the jurisdiction of the court should be stated in the bill, in order that they may be subjected to process, if the court should

obtain jurisdiction of them. *Brooks v. Burt*, 1 Beav. 109, note h, referring to *Munoz v. De Testet*. But see *Haddick v. Tomlinson*, 2 Sim. & Stu. 219.

3. See, generally, "Corporations Plaintiff" suits, by one in behalf of others, *ante*, and statutes and constitutions of the different States. *Lyman v. Bonney*, 101 Mass. 562; *Barb. on Parties* (ed. 1864), 471-477.

Where a stockholder of such voluntary association brings a bill to have all the affairs of the company settled, the members should all be made parties. *Evans v. Stokes*, 1 Keene, Ch. 24, 32; *Richardson v. Hastings*, 11 Beav. 17, 24.

Where the property is in the hands of trustees, such trustees must all be parties to a bill, to have the affairs of the company settled. *McKinley v. Irvine*, 13 Ala. 681, 706.

4. *Samis v. King*, 40 Conn. 298, 312, citing *Allen v. Turner*, 11 Gray (Mass.), 436.

5. *Lyman v. Bonney*, 101 Mass. 562; *Inhabitants of Deerfield v. Nims*, 110 Mass. 115.

Although the general rule prevails, that no one should be made a party who has no interest in the cause, yet an exception obtains in cases where a bill of discovery is brought against a corporation: the book-keeper, or some officer of the corporation, may be made a party.¹

(e) *Joinder Defendants*.—The same general rule obtains in relation to joinder of defendants as to joinder of plaintiffs; that is, that all persons interested in the subject-matter of the suit, either legally or beneficially, should be made parties.²

In suits concerning joint bonds, or obligations, all the parties thereto should be joined.³

If one assigns his interest in the subject of a contract, he should not be joined with the assignee in a bill for specific performance.⁴

c. *Other Parties*.—(1) *Partners*.—As a general rule, all the partners should join as plaintiffs, or be joined as defendants, in suits in equity, by or against them.⁵

A bank president or corporation officer may be made a party. *Walker v. Hallett*, 1 Ala. 379.

Where a mortgaged railroad was foreclosed at request of a majority of stockholders, the minority filed a bill against the purchaser, asking that the sale be set aside on the ground of fraud and collusion. It was held that the mortgagees and majority stockholders should also be made parties defendants. *Ribon v. R. R. Co.*, 16 Wall. (U. S.) 446, 450.

1. *Wych v. Meal*, 3 P. Wms. 310; *Many v. Beekman Iron Co.*, 9 Paige (N. Y.), 188.

Foreign Corporations are under the statutory provisions of nearly, if not all, the States, enabled to be made amenable to process; but where this is not so, process compulsory in its nature will not lie against them; and this is so where their residence in a State, other than that of their incorporation, is not for the purpose of transacting business. *Florence Co. v. Grover & Baker Co.*, 110 Mass. 1, 9.

An alien enemy may be a defendant. *University v. Finch*, 18 Wall. (U. S.) 106, 111; *Lee v. Rogers*, 2 Sawyer (U. S.), 549, 569.

2. See titles "Parties Generally," and sub-titles thereto, "Corporations Plaintiff," "Joinder of Plaintiffs," "Parties Defendant," and sub-titles thereto, "Corporations Defendant," *ante*, and title "Multifariousness," *post*. *Barb. on Part.* (ed. 1864) 449; *Story's Eq. Plead.* (9th ed.) § 225, *et seq.*

Discovery.—"The practice of joining, as defendants, other persons than the real parties in interest, for the purposes of discovery and costs, seems to be now limited both to cases of fraud and to persons who are strictly agents, including in that term solicitors and attorneys, or who are arbi-

trators." *Story's Eq. Plead.* (9th ed.) § 233, citing *Clark v. Girdwood*, 7 Ch. D. 9; *Barnes v. Addy*, L. R. 9 Ch. 244; *Baker v. Loadar*, L. R. 16 Eq. 49; *In Weisse v. Wardle*, L. R. 19 Eq. 171.

Where an allegation of the bill was that application had been made to the administrator to sue, and he had refused, he is properly a co-defendant. *Worthy v. Johnson*, 8 Ga. 236.

In equity, "Where an attempt is made to enforce an obligation which is joint and several, all the debtors who are liable as principals, and not sureties, should, unless there are satisfactory reasons to the contrary, be brought in as defendants." The case here was a joint and several note secured by a mortgage, and the action was a bill to foreclose the same; rule in equity said to differ from that in law. *Dederich v. Barber*, 44 Mich. 19, 21.

Plaintiff or Defendant.—"In case of joint claims, all persons having a community of interest in the claims or liabilities, and who may be affected by the decree, are to be made parties." *Trades Savings Bank v. Freese*, 26 N. J. Eq. 453.

3. *Story's Eq. Plead.* (9th ed.) § 169.

4. *Miller v. Whittier*, 32 Me. 203, 210.

5. *Barb. on Part.* (ed. 1864) 426-432, 523-525; *Story's Eq. Plead.* (9th ed.) §§ 78, 167, 178; *Fuller v. Benjamin*, 23 Me. 255; *Bank v. Carrolton R. R.*, 11 Wall. (U. S.) 624, 630.

In case of a deceased partner, and the insolvency of the survivors, here the personal representatives of the deceased may be joined in a suit with the survivors as parties. *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508.

Where a member of the copartnership is out of the jurisdiction, the rule is not enforced. *Darwent v. Walton*, 2 Atk. 510;

(2) *Bill to foreclose. — Parties.* — The proper parties to a bill to foreclose a mortgage are principally the mortgagor and mortgagee, and all persons whose interests the decree might affect; and this includes all persons having an interest in the equity of redemption.¹

The party having the beneficial interest in the mortgage should be made complainant. A bill should not be in the name of one for the use of another.²

An assignee of a mortgagee is not a necessary party to a bill to foreclose unless the assignment is not an absolute one.³

Nor should the mortgagor be made a party where he has assigned his interest.⁴

It is decided in Alabama that all incumbrancers, prior or subsequent, may, but need not necessarily, be made parties to a bill to foreclose a mortgage.⁵

Milligan v. Milledge, 3 Cranch (U. S.), 220.

Where one of the partners is an infant, he should be joined. *Ex parte Henderson*, 4 Ves. Jr. 164.

Upon a bill for accounting between partners, held that one who has sold out all his interest in the partnership need not be made a party to such suit. *Howell v. Harvey*, 5 Ark. 270.

A person who is to receive a portion of the profits of a business for his services, is a proper party complainant to a bill in equity for account of the same. *Bentley v. Harris*, 10 R. I. 435.

1. Story's Eq. Plead. (9th ed.) §§ 193-203; Barb. on Parties (ed. 1864), 420-426, 490-503; Pom. Rem. & Remed. Rights (2d ed.), §§ 333-346; 2 Madd. Chan. 149 *et seq.*

It is said that the general principles underlying the question of who are proper and necessary parties to a bill for foreclosure of a mortgage, are that the court can only take cognizance of the rights of such parties as are properly before it, and that it is necessary that all persons having an interest in the subject-matter of the suit should have their rights adjusted and determined, and further to enable the court to pass such a decree as that it may be safely carried out between all parties, and end litigation. This rule, however, is subject to certain limitations and exceptions. *Jones on Mortg.* § 1367.

"The rule is, that there can be no foreclosure unless all the parties entitled to the mortgage money are before the court." So where a bill to foreclose a mortgage to two persons was brought by the executor of one without joining the survivor, a demurrer was sustained. *Trades Savings Bank v. Freese*, 26 N. J. Eq. 453, 456.

2. *Winkelman v. Kiser, etc.*, 27 Ill. 21; *Elder v. Jones*, 85 Ill. 384, 387.

3. *Miller v. Henderson*, 10 N. J. Eq. (2 Stock.) 320.

In case of an absolute assignment by the mortgagee of all his interest in the mortgage, he need not be made a party. *Whitney v. McKinney*, 7 Johns. Ch. (N. Y.) 144.

4. *Swift v. Edson*, 5 Conn. 531.

5. *Walker v. Bank of Mobile*, 6 Ala. 452; *Cullum v. Batre*, 2 Ala. 415.

But it is said by *Justice Story*, — Eq. Plead. 9th ed. (by Gould), sec. 193, — that it is "the general, although not the universal, rule that all encumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least as proper parties, to such a bill, whether they are prior or subsequent encumbrancers. There are certainly some acknowledged exceptions, such, for example, as where a second mortgagee brings a bill to foreclose against the mortgagor, and a third mortgagee, for in such a case the first mortgagee need not be made a party. . . . If, indeed, any encumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as, also, a decree of a sale would not. The prior encumbrancers are not bound, because their rights are paramount to those of the foreclosing party. The subsequent encumbrancers are not bound, because their interests would otherwise be concluded without any opportunity to assert or protect them." Citing *Finlay v. Bank of U. S.*, 11 Wheat. (U. S.) 304; *Haines v. Beach*, 3 Johns. Chan. (N. Y.) 459; *Delabere v. Norwood*, 3 Swanst. 114; *Rose v. Page*, 2 Sim. 471; *Weed v. Beebe*, 21 Vt. 495; *Cockes v. Sherman*, 2 Freem. 14; *Draper v. Clarendon*, 2 Vern. 518; *Richards v. Cooper*, 5 Beav. 304; *Jerome v. McCarter*, 94 U. S. 734; *Broward v. Hoeg*, 15 Fla. 370; *Walter v. Riehl*, 38 Md. 211.

An incumbrancer who has been fore-

But a decree of foreclosure will not be held void because a subsequent purchaser from the mortgagor is not made a party.¹

In a bill to foreclose, the owner of the equity of redemption is properly a party.² And upon the death of the mortgagee, his personal representative should be made a party to a foreclosure suit.³ So the heirs of a deceased mortgagor are held to be necessary parties to such action.⁴

In *Oregon* it is held that in a foreclosure suit, the wife, having the legal ownership of the property, must be made a party to the bill before her interests, nominal or real, can be affected by any proceeding relating to such estate.⁵

One of two mortgagees cannot maintain an action to foreclose without joining the other.⁶

(3) *Bill to redeem*. — The mortgagee, in the absence of any other interest held under him, is the proper party in a bill to redeem. In case of his death, and the mortgage is in fee, then the heir or other person holding the legal estate as the devisee is a necessary party, so also is the personal representative.⁷

closed is not a necessary party. *Broome v. Beers*, 6 Conn. 198.

"All persons having an interest in the equity of redemption should be made parties to a bill for a foreclosure, and *a fortiori* to a bill to sell the mortgaged property; and hence the general, though not universal, rule is, that all encumbrancers (as well as the mortgagor) should be made parties, if not as indispensable, at least as proper parties, to such a bill, whether they are prior or subsequent encumbrancers. If, indeed, such encumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them, as, also, a decree of sale would not." The court in *Hall v. Hall*, 11 Tex. 526.

All subsequent mortgagees are proper but not necessary parties. *Smith v. Chapman*, 4 Conn. 344.

1. *Kelgour v. Wood*, 64 Ill. 345.

A decree of foreclosure will not be opened because a prior mortgagee, not shown by any proceedings in the case to be interested, was not made a party, unless it be to prevent irremediable mischief. *Finley v. Bank of U. S.*, 11 Wheat. (U. S.) 304, 307.

Where a mortgagee brings a bill to foreclose, and neglects to make a subsequent incumbrancer a party, the latter's right to redeem is not affected by the decree. *Valentine v. Havener*, 20 Mo. 133.

2. *Hodson v. Treat*, 7 Wis. 263.

The equitable owner of the notes is a proper party to foreclose. *Hahn v. Huber*, 83 Ill. 243; *Ord v. McKee*, 5 Cal. 515.

3. *Vanhorn v. Duckworth*, 7 Ired. Eq. (N. Car.) 261.

An executor of a mortgagee is a necessary

party to a bill of foreclosure by the heir of the mortgagee. *Freake v. Horseley*, *Freem. Ch. (Miss.)* 180.

4. *Duval v. McLoskey*, 1 Ala. 708; *Erwin v. Ferguson*, 5 Ala. 158.

The executor need not be made a party to a bill to foreclose brought against the mortgagor's heir. *Duncombe v. Hansley*, 3 P. Wms. 333, note a.

5. *Fahie v. Pressey*, 2 Oreg. 23.

Where a wife should have been properly a party to a bill to foreclose, but was not mentioned as such in the bill, nor any process served on her, but subsequently, and without notice to her, a guardian *ad litem* was appointed to defend her, and an answer was filed by him, *held* that she was not properly before the court, and a decree against her was irregular and void. *Eslava v. Lepretre*, 21 Ala. 504.

In *Alabama* it is *held*, that, where a husband and wife join in a mortgage as mortgagors, she must be made a party to a bill of foreclosure, her dower interest in the lands being sought to be made subject to the payment of the mortgage debt. *Eslava v. Lepretre*, 21 Ala. 504.

6. *Mutual Life Ins. Co. v. Sturges*, 32 N. J. Eq. 678, 683.

7. *Hilton v. Lothrop*, 46 Me. 297, citing *Story's Eq. Plead.* § 188.

Bill in equity to redeem mortgaged premises is not technically one for discovery, and its verification is not required. *Hilton v. Lothrop*, 46 Me. 297, citing *Rules of Chancery Practice*, 18 Me. 444, Rule 2; 37 Me. 581, Rule 1; *Story's Eq. Pl.* § 188.

Where a mortgagor conveys all his interest in the mortgaged premises, he is not a

(4) *Creditors and Debtors, Parties.*—The principal instances where creditors are proper and necessary parties, are those where a suit is brought by a few, in behalf of all, for an account and application of the assets, real and personal, of a deceased debtor in payment of the demands, and the satisfaction of the debts of all.¹

A debtor to an estate is not a proper party to a bill brought by a creditor against the legal representative to obtain payment out of the assets, the reason being that the debtor is only liable to the legal representative, otherwise he might be burdened with the expense of numberless suits. But there is an exception to this rule, as in case of insolvency of the legal representative, or collusion between them and the debtor.²

(5) *Trustees and Cestuis Que Trustent, Parties.*—It is a general rule that the *cestui que trust* should be made a party with the trustee in all suits brought by or against him. So also both should be parties in suits by or against the *cestui que trust*.³

proper party to a bill in equity to redeem. *Hilton v. Lothrop*, 46 Me. 297.

In a bill to redeem a mortgage, a person who, "apparently, has an equitable interest in the premises, liable to be affected by the decree for redemption, ought to be made a party to the proceeding for that reason." *Rowell v. Jewett*, 69 Me. 293, 304.

"All the parties legally interested in the right to redeem a mortgage must be made parties to a bill to redeem. If any of them refuse to become parties complainant, they must be made respondents." Case of a bill to redeem dismissed for want of proper parties, the bill being brought by only one of several having the equity of redemption. *Welch v. Stearnes*, 69 Me. 192.

Under the statute in Maine it is proper in a bill to redeem that the husband of a married woman, who is the owner of the equity of redemption, should be joined with her. *Hilton v. Lothrop*, 46 Me. 297.

1. See title, Story's Eq. Plead. (9th ed.) §§ 99-102, 213-218; Barb. on Parties (ed. 1864), 381-392, 477-482, 507, 370-374, 469-471, 525.

In these cases the assets are marshalled, and all may come into the benefits of the decree; and whether they come in or not, they will be bound by the decree. *Neve v. Weston et ux.*, 3 Atk. 557; *Brown v. Rickets*, 3 John. Ch. (N. Y.) 553.

Although they have been permitted to come in afterwards upon proper showing and order of the court, before the funds are actually distributed. *Wilder v. Keeler*, 3 Paige (N. Y.), 164.

A single creditor may sue by himself for his own debt, out of the personal assets. *Bedford v. Leigh*, 2 Dick. 707; Atty.-Gen. v. *Cornewaite*, 2 Cox, C. C. 43; *Anon.* 3 Atk. 572.

In a bill in equity against one of several debtors, it is necessary to make all parties. *Trescott v. Smyth*, 1 McCord, Ch. (S. Car.) 301.

A bill lies in behalf of a creditor against his deceased debtors' representatives, after acceptance by them of the trust. *Butts v. Genung et al.*, 5 Paige (N. Y.), 254.

2. *Long v. Majestre*, 1 John. Chan. (N. Y.) 202.

In case of an assignment by a debtor to a trustee of all his estate in trust for the settlement of outstanding debts, the trustee, and not the debtor, should sue and defend, except in cases where the trustee should collude with the other party. This, however, is a matter largely regulated by statute in the several States. *Bailey et als. v. Smith*, 10 R. I. 29; *Benfield v. Solomons*, 9 Ves. 77, 82, 86.

Rule 51, U. S. Eq. Rules, provides that "In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable." *Desty's Fed. Proced. (Pract. Ser.)* 706.

3. Story's Eq. Plead. (9th ed.) §§ 207, 85-89, 143, 148-152, 155, 171, 180, 181, 192-194, 203-213, 207-214, 766-768; Barb. on Part. (ed. 1864) 439-444, 529-535; Pom. Rem. & Remed. Rights (2d ed.), §§ 250, 259, 260, 336 n. 355, 356 n. 357 n. 358, 387; *Bromley v. Holland*, 7 Ves. 3, 10.

Where property was conveyed to trustees for the use and benefit of a church corporation, subject to its use and control, held that the trustees were necessary parties to a bill in equity affecting the title. *East*

(a) *Exceptions to Rule.* — There are certain exceptions to this rule, which are well stated by the court in *Moore v. Hood*.¹

Haddam Baptist Church v. East Haddam Baptist Society, 44 Conn. 260.

Rule 49, U. S. Eq. Rules, provides that "In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell, and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, for the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties." *Desty's Fed. Proced. (Pract. Ser.)* 705.

1. 9 Rich. Eq. (S. Car.) 311. "Between trustees and beneficiaries, all of both classes are necessary parties generally, although an exception is tolerated in suits by beneficiaries where one of several trustees is pursued for his particular breach of trust, and exceptions are allowed in suits by trustees, 1. Where the object of the suit is merely to obtain from some third person possession of the trust property, and it is indifferent to the equitable claimants whether the trustees succeed or fail; and, 2. Where the trustee fully represents the beneficiaries. . . . The most familiar instance of this exception is in suits by or against executors and administrators concerning the personalty, as to which they are by law the owners and the representatives of the legatees and distributees; and usually in such suits the rights of the beneficiaries are held to be sufficiently represented and their interests protected in the names and persons of their said trustees."

The rule holds, even in the case of a void grant of trust, as where a suit was brought against the beneficial holder of a void annuity to compel the surrender of the securities of the annuity. The court said that the trustee should have been joined as defendant, or else, in case of a further suit against the trustee himself, the defendant might be joined, and hence be vexed twice for the same cause of action. *Bromley v. Holland*, 7 Ves. 3, 12.

Generally the *cestui que trust* should be made a party with the trustee; although, in a case where the *cestuis que trusts* were numerous, it was held that a demurrer to the bill, for want of proper parties, would not

be sustained, the exception being grounded on the fact that it would be intolerably oppressive and burdensome to enforce the rule, that it would be an unnecessary expense and delay, and a reflection on justice, to compel them all to be brought in. In this case they were an association. *Van Vechten et al. v. Terry et al.*, 2 John. Chan. (N. Y.) 197.

In a case where the trustee covenants with another for the *cestui que trust's* benefit, it is held, that, in a bill for specific performance, both must unite. *Cope v. Parry*, 2 Jac. & Walk. 538. See *Gordon v. Gordon*, 3 Swanst. 417, note, citing *Hook v. Kinnear et al.*; *Cooke v. Cooke*, 2 Ver. 36.

"Trustees and *cestuis que trusts* are necessary parties." But if the *cestui que trust* refuses to join, or has adverse interests, he may be made a defendant. Case of a bill filed by a trustee to foreclose a mortgage, without joining the *cestui que trust*. *Freeman v. Scofield*, 16 N. J. Eq. 28.

"The general rule is, that in suits respecting trust property, brought either by or against the trustees, the *cestuis que trusts*, as well as the trustees, are necessary parties. To this rule there are several exceptions. One of them is, that, where the suit is brought by the trustee to recover the trust property, or to reduce it to possession, and in no wise affects his relation with his *cestui que trust*, it is unnecessary to make the latter parties. . . . Such is now the well-settled rule of equity pleading and practice." *Mr. Justice Swayne* in *Carey v. Brown*, 92 U. S. 172, citing *Adams v. Bradley*, 12 Mich. 346; *Ashton v. Atlantic Bank*, 3 Allen (Mass.), 217; *Boyd v. Partridge*, 2 Gray (Mass.), 191; *Swift v. Stebbins*, 4 Stew. & P. (Ala.) 447; *The Assoc., etc., v. Beekman*, 21 Barb. (N. Y.) 565; *Alexander v. Cana*, 1 De G. & Sm. Ch. 415; *Potts v. The Thames, etc., Co.*, 7 Eng. L. & Eq. 262; *Story v. Livingstone's Excr.*, 13 Pet. (U. S.) 359.

Upon a bill to establish a trust under a deed, which, though absolute on its face, was, in fact, executed as a trust, the *cestui que trust* is a necessary party. *Pence v. Pence*, 13 N. J. Eq. 257.

An exception to the rule requiring both the trustee and *cestui que trust* to be made parties in litigation respecting trust property, exists "where the trust is an active one imposing on the trustee the duty of receiving, controlling, and managing the trust fund for the benefit of the *cestui que trust*." *McGraw v. Bayard*, 96 Ill. 146, 153.

In a bill to foreclose a mortgage of an estate voluntarily conveyed to a trustee for the benefit of creditors, it is sufficient if

(6) *Heirs, Devisees, and Distributees. — Parties.* — The cases where the questions arise, as to whether heirs, devisees, etc., should be parties, are principally, (1) In cases of suits to enforce or set aside the trusts of a will.¹ (2) In suits to enforce the specific performance of agreements. Here, where the original party dies, all others coming into the rights of such party, as heirs, devisees, etc., should be joined.² (3) In bills to foreclose, where the mortgagor dies, not having assigned his rights, or where the assignee of the mortgagor dies, here the heirs should be joined.³ (4) In suits to enforce claims against lands of decedents, the heirs-at-law need not be parties.⁴

A bill in equity for an accounting against the surviving partners of a firm, and the administratrix of the deceased partner, will not ordinarily lie in behalf of an heir-at-law or distributee.⁵

(7) *Assignor and Assignee, Parties.* — In case of an absolute unconditional assignment, with no equitable interest remaining in the assignor, and the assignment is not doubted or denied, it is not necessary to make the assignor a party.⁶

the trustee be made a defendant without joining the creditors. In this case, while the estate was conveyed to the trustee without notice of the mortgage, the creditors had acquired no interest which affected the rights of the complainant. *Willis v. Henderson*, 4 Scam. (Ill.) 13, 19, 20.

1. Story's Eq. Plead. (9th ed. by Gould) secs. 172, 176, 180.

It is said that cases to enforce the trusts of a will are infrequent in the United States. Pom. Rem. & Remed. Rights (2d ed.), §§ 264, 355, citing 1 Daniells, 231, 232; Story's Eq. Plead. § 163; Chipman v. Montgomery, 63 N. Y. 221; 1 Pom. Eq. § 352, n; Eddie v. Parke, 31 Mo. 513; Morse v. Morse, 42 Ind. 365.

It is provided by Rule 50, U. S. Equity Rules (Dest. Fed. Proced. Pract. Series), 706, that "In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him."

Where it is sought to set aside a will, the devisees, legatees, and executor should be made parties, unless the executor has not accepted the trust. Pom. Rem. & Remed. Rights (2d ed.), § 264. But see statutes of the several States.

Rule 50, U. S. Eq. Rules, provides that "In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him." Desty's Fed. Proced. (Pract. Series) 706.

2. Pom. Rem. & Remed. Rights (2d ed.), §§ 263, 366, 367; Story's Eq. Plead. (9th ed.) § 177.

3. Story's Eq. Plead. (9th ed.) §§ 183-202; Pom. Rem. & Remed. Rights (2d ed.), § 336, note 337.

The mode of procedure in actions to foreclose is, however, a matter of statute in nearly, if not all, the States.

4. Story's Eq. Plead. (9th ed.) §§ 163, 176, 180; Pom. Rem. & Remed. Rights (2d ed.), §§ 355, 357; Smith v. Wyckoff et als., 4 Edwards (N. Y.), 543. See, generally, Barb. on Part. (ed. 1864) 397-399, 503-511.

5. *Rosenzweig v. Tompson* (Md. 1887), 23 Reporter, 779. In arriving at this conclusion, the court discusses the following cases: *Bowsher v. Watkins*, 1 Russ. & Myl. 277; *Holland v. Pryor*, 1 Mylne & Keen, 244; *Davies v. Davies*, 2 Kean, 539; *Wright v. Hamilton*, 3 Jones & Latouche, 481; *Yeatman v. Yeatman*, L. R. 7 Ch. Div. 214; 23 Eng. Rep. 525; *Travis v. Milne*, 9 Hare, 150; *Staniton v. The Carron Co.*, 18 Beav. 157.

6. Story's Eq. Plead. (9th ed.) § 153.

Where assignor of a contract does not assign his whole interest, he is properly a party to bill to enforce it. *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430.

Where, after an assignment, any interest remains in the assignor, he must of necessity be made a party. *Montague v. Lobdell*, 11 Cush. 111.

One who has assigned all his interest in a contract may be a proper, though not a necessary, party to a bill in equity affecting that contract. *Day v. Cummings*, 19 Vt. 496.

An assignee *pendente lite* may bring his interest before the court by a supplemental bill.¹

Where the assignee of a strictly legal right brought a bill in equity, it was held that it would not be sustained, upon the ground that he could only sue at law in the name of the assignor, unless it appears that the assignor prevents the action being brought in his name, or unless the bill shows that the assignee could not by such action obtain an adequate remedy.²

(8) *Vendor, Parties.*—Where the personal representative of a vendor upon his decease brings a bill for specific performance, here the heir or devisee of the vendor is a necessary party.³

(9) *Account, Parties.*—All persons interested in the account on each side are necessary parties.⁴

3. *The Stating Part of the Bill.*—This part of the bill contains the plaintiff's case. The facts upon which a party relies in equity must be set out briefly, positively, and with certainty, so as clearly to inform the opposite party of the matters of which proof

1. *Wilder et als. v. Keeler et als.*, 3 Paige, Ch. (N. Y.) 164.

An assignee *pendente lite* is bound by the decree against his assignor. *Pond v. Clark*, 24 Conn. 370, 384; *Eyster v. Gaff et al.*, 91 U. S. 521.

An assignee of a lessor may bring a suit for the rents against the lessee. *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52.

2. *Walker v. Brooks*, 125 Mass. 241, citing *Hammond v. Messenger*, 9 Sim. 327, 332; *Story's Eq. Jur.* § 1057 a; *Story's Eq. Plead.* § 153; *Dhegetoff v. London Assurance Co.*, *Moreley*, 83; 4 Bro. P. C. (2d ed.) 436; *Fall v. Chambers*, *Mosely*, 193; *Motteux v. London Assur. Co.*, 1 Atk. 545, 547; *Cator v. Burke*, 1 Bro. Ch. 434; *Rose v. Clarke*, 1 Yo. & Col. Ch. 534, 548; *Riddle v. Mandeville*, 5 Cranch (U. S.), 322; *Mandeville v. Riddle*, 1 Cranch (U. S.), 322; *Harris v. Johnston*, 3 Cranch (U. S.), 311; *Carter v. United States Ins. Co.*, 1 John. Ch. (N. Y.) 463; *Adair v. Winchester*, 7 Gill & J. (Md.) 114; *Moseley v. Boush*, 4 Rand. (Va.) 392; *Smiley v. Bell*, *Mart. & Y. (Tenn.)* 378.

"The opposing decision in *Townsend v. Carpenter*, 11 Ohio, 21, is unsupported by any reference to authorities." *Field v. Maghee*, 5 Paige (N. Y.), 539; *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.), 583.

The last two cases said to contain no decision on this point. *Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596, 615; *Story's Eq. Jur.* § 1436 a, commented on.

The following cases are also commented on: *Williams v. Davies*, 2 Sim. 461; *Clark v. Cort*, Cr. & Phil. 154, 159; *Rawson v. Samuel*, Cr. & Phil. 161, 178; and, citing further, *Watson v. Mid. Wales Railway L. R.* 2 C. P. 593; *Spaulding v. Backus*, 122

Mass. 553. This case is an exhaustive review of the law on this point, both in England and this country. See, generally, on the subject of assignor and assignee, *Barb. on Part.* (ed. 1864) 360-366, 463-467; *Story's Eq. Plead.* (9th ed.) §§ 118, 134, 153-158, 183-186, 188-202; *Pom. Rem. & Remed. Rights* (2d ed.), § 251, chose in action, assignee may sue alone. §§ 261, 356, note, suits by assignees of creditors, etc. §§ 268, 357, 358, suits against assignees of creditors. §§ 251, 339, 364, joinder of assignor required in certain States. §§ 348, 349, where the debtor has assigned his property, the assignee is a necessary party in a suit intended to reach such property. § 364, who are proper parties in a suit against a corporation by an assignee of stock. § 383, who are defendants in suits by assignees to foreclose securities. § 387, assignee of partial or entire interest in a mortgage as defendant.

3. *Roberts v. Marchant*, 1 Hare, 547.

Although one may not be an actual party to an agreement, yet, if it be made for his benefit, he may maintain a bill in equity for its specific performance. *Crocker v. Higgins*, 7 Conn. 342; *Cooke v. Cooke*, 2 Vern. 36.

4. *Story's Eq. Plead.* (9th ed.) §§ 218, 219; *Barb. on Part.* (ed. 1864) 354-357, 461-463.

And this is so, no matter how small the interest. *Smith v. Farr*, 3 Y. & Coll. 328, 339.

Nor is it necessary that all should hold in the same right, or that their interests should be in common; but if they hold by different interests and separate rights, they should all join. *Park v. Clinton*, 12 Ves. 48.

will be offered, to the end that he may, within the rules of equity pleading, answer the same, and an issue be had also to enable the court to determine the law applicable to the cause.¹

Every material fact relied on should also be stated to enable the plaintiff to properly offer his evidence.²

While the same strictness in pleading is not required in equity as at law,³ yet certainty to a common intent is necessary as well as at law, for the purpose of enabling the adverse party to determine the precise charge against him, and that the court, if the matters pleaded be proven, may be enabled to pass a proper decree.⁴

1. *Strange v. Watson*, 11 Ala. 324, 335; Rule 21 of the U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series, p. 689) provides that "The plaintiff may, in the narrative or stating part of his bill, state and avoid by counter-averments any matter or thing which he supposes will be insisted on by the defendant by way of defence or excuse, to the case made out by the plaintiff for relief."

"The plaintiff must show by his bill some claim of interest in the defendant in the subject of the suit which can make him liable to the plaintiff's demands, or show that he is for some reason a necessary party to the suit." 1 Harr. Pract. in Chan. 288.

As to the law in England, it is said in *Evans v. Buck*, Law Rep. 4 Chan. Div. 432, 434, that "The same rules of pleading which prevailed under the old law prevail now, unless there is any thing in the Judicature Act, or in the new orders or rules, which prevents it."

Special relief cannot be granted unless the case set up by the *stating part* of the bill warrants it. *Thomas v. Warner*, 15 Vt. 110.

2. All material facts must be averred. *White v. Morrison*, 11 Ill. 361; *Russ v. Hawes*, 5 Ired. Eq. (N. Car.) 18; 1 Harr. Pract. in Chan. 85.

A different case cannot be made by the evidence than that shown by the bill. *Barrett v. Sargeant*, 18 Vt. 365; *Thomas v. Warner*, 15 Vt. 110.

Allegation and proof must agree. *Russ v. Hawes*, 5 Ired. Eq. (N. Car.) 18; *White v. Morrison*, 11 Ill. 361.

"Care must be taken to put in issue in the bill whatever is intended to be proved by the plaintiff, otherwise he will not be permitted to give it in evidence." *Russ v. Hawes*, 5 Ired. Eq. (N. Car.) 18.

3. *Hatcher v. Hatcher*, McMull. Eq. (S. Car.) 311.

The plaintiff's right to the relief sought, as well as the injury complained of, must be stated, not in the technical formality required in common-law pleadings, but

still the facts necessary to sustain the bill must be set out with sufficient certainty and particularity to enable the court to clearly determine what relief the plaintiff claims. *Townshend v. Duncan*, 2 Bland (Md.), 45, 48; *Banks v. Carneal*, 10 Wheat. U. S.) 181, 189.

"The plaintiff's title to the assistance of the court must always be exposed by the pleadings, but the style and character of pleading in equity has always been of a more liberal cast than that of other courts; as mispleading in matters of *form* has never been held to prejudice a party, provided the case made is right in matters of *substance*, and supported by proper evidence." *Tierman v. Poor*, 1 Gil. & J. (Md.) 216, 230.

"The rule as to form in pleading is not so stringent in equity as at law, but the substance of the rules is the same in each court; and it is a principle of universal application in pleading, founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case he is called upon to defend." *Cockrell v. Gurley*, 26 Ala. 405, 408.

4. *Farr v. Farr*, 34 Miss. 597.

"The rule requiring certainty in pleadings applies as well to proceedings in chancery as at law. The reason in both instances being the same, to enable the court to pronounce the proper judgment if the pleadings shall be adjudged true." *Prestidge v. Pendleton*, 24 Miss. 80.

"The bill must be true in substance, the matter plainly yet succinctly alleged with all necessary circumstances, as time, place, manner, and other incidents. It must be of a matter cognizable in this court: and as it must be sufficient in substance; so it must have convenient form; but this in equity is not strict or difficult." *Hinde's* Chan. 14; 1 Harr. Pract. in Chan. 287.

The substance of the rules as to form

There cannot be a demand in one bill by several plaintiffs of several matters against one defendant which are entirely distinct and unconnected.¹ Great minuteness and particularity of detail should be avoided.² And where matters are set up in the alternative, each alternative should make a sufficient case in itself.³ Especial care should be taken not to split up the causes of action.⁴ A bill, however, may be framed with a double aspect by the plaintiff where he is in doubt as to the relief to which he is entitled.⁵

Plaintiff need not allege what is implied of necessity, as where in a bill for an annuity, payable out of the rents of lands devised to an infant, it need not be alleged that the devisee or his guardian has received the rents.⁶

So, in case of a bill to enjoin the defendant from infringing the name of the plaintiff's newspaper, it need not be averred that the plaintiff has placed his name upon the plates so as to obtain the exclusive right to print the same in accordance with act of Parliament.⁷ Nor should matter of argument be set forth in either the bill or answer.⁸ And in certain cases in the United States courts, where the jurisdiction is dependent on citizenship, this must be specifically alleged.⁹

is same in equity as at law; and the case is required to be stated clearly and with such certainty as that the court may see that the case is cognizable in equity, and the defendant be apprised of the nature of the case presented. *Cockrell v. Gurley*, 26 Ala. 405.

The matter should be so alleged as that the court may base a just and effectual decree thereon, and one which shall be of avail, and binding upon the parties upon the issues raised. *Bradley v. Converse*, 4 Cliff. (U. S.) 366, 373.

The plaintiff should set forth definitely and precisely in his bill the whole case upon which he seeks relief. *Motley v. Rogers*, 22 Ark. 227.

There must be sufficient allegations to form the basis of a decree if the case be admitted by answer. *Perry v. Carr*, 41 N. H. 371.

"Whatever is necessarily within complainant's own knowledge should be alleged positively. On the other hand, if the facts essential to the determination of the plaintiff's case are charged in the bill, to rest on the knowledge of the defendant only, or must of necessity be within his knowledge only, a precise allegation is not required." *Aiken v. Ballard*, *Rice's Eq.* (S. Car.) 13.

It is only necessary to sufficiently set out plaintiff's title so that it may fairly be inferred from the bill. *Webber v. Gage*, 39 N. H. 182.

Allegations have been declared to be sufficient where enough is set out to enable the plaintiff to prove his claim for relief. *Hazard v. Durant*, 11 R. I. 195.

Every material fact on which the plain-

tiff relies for relief must be distinctly and clearly averred, and that, too, with reasonable fullness and certainty. *Smith v. Wood*, 42 N. J. Eq. (15 Stew.) 563.

Reasonable certainty and precision seem only to be required in stating plaintiff's case. *Spence v. Duren*, 3 Ala. 251.

So it has been held that an averment that plaintiff is "advised and believes," is not sufficiently within the rule requiring that facts should be set out with certainty and clearness. *Jones v. Cowles*, 26 Ala. 612; *Nix v. Winter*, 35 Ala. 309; *Cameron v. Abbott*, 30 Ala. 416; *Read v. Walker*, 18 Ala. 323. See distinction, however, on this point in *Lucas v. Oliver*, 34 Ala. 626; *Nix v. Winter*, 35 Ala. 309.

1. *Murray v. Stevens*, Rich. Eq. (S. Car.) 205. See title "Multifariousness," *supra*.

2. Plaintiff need not relate all the minute circumstances. *St. Louis v. Knapp Co.*, 104 U. S. 658.

3. *David v. Shepard*, 40 Ala. 587; *Rives v. Walthall's Exors.*, 38 Ala. 329.

4. *Starr v. Stark*, 1 Sawy. (U. S.) 270.

5. *Strange v. Watson*, 11 Ala. 324; *McConnell v. McConnell*, 11 Vt. 290; *Lloyd v. Brewster*, 4 Paige (N. Y.), 537; *Stein v. Robertson*, 30 Ala. 286.

6. *Townshend v. Duncan*, 2 Bland (Md.), 45, 51.

7. *Harrison v. Hogg*, 2 Ves. Jr. 323, 327.

8. *Weisman v. Heron Mining Co.*, 4 Jones, Eq. (N. Car.) 112, 117.

9. Rule 20 U. S. Eq. Rules cited (*Desty's Fed. Proced. Pract. Series*, 688, and cases cited); *Muller v. Dows*, 94 U. S. 444; *Jackson v. Ashton*, 8 Pet. (U. S.) 148.

The complaint should also set up facts, and not matters of evidence.¹

Instead of setting out in full a deed or other instrument in writing in the bill (which may not be done), it should be referred to in some such terms as this, "as in and by said indenture, reference being thereunto had, when produced will fully appear."²

Where a bill claims relief on the ground of fraud, accident, or mistake, such matter must be specifically, distinctly, and accurately alleged, both in respect to the facts constituting it, and the time when it was discovered; the object being to apprise the parties against whom the bill is exhibited, of the exact nature of the claim in this respect.³

Where it becomes necessary to resort to a court of equity to make an equitable estoppel available, it is necessary that the party seeking relief should allege or show some ground, other than that of the estoppel itself, sufficient to warrant the interposition of the court on equitable grounds. "Whereby the party entitled to

1. Bishop v. Bishop, 13 Ala. 475; Bowen v. Aubrey, 22 Cal. 566, 569; Milliken v. Cary, 5 How. Pr. (N. Y.) 272, 275.

A bill need not "allege or specifically describe" all the evidence to be offered, but "there must be allegations broad enough to cover any evidence offered before it becomes admissible; after that confessions or declarations or documents or cumulative facts are admissible to support any general allegations to which they apply, and such general allegations are alone often sufficient to render the introduction of such evidence proper." Nesmith v. Calvert, 1 Woodb. & M. (U. S.) 34, 44; Kennedy v. Kennedy, 2 Ala. 571, 604. But "a bill in chancery is not only a pleading, . . . but, also, in most cases an examination of the defendant upon oath for the purpose of obtaining evidence to establish complainant's case, or to counterprove or destroy the defence which may be set up by such defendant in his answer. The complainant may, therefore, state any matter of evidence in the bill or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill, as a pleading, or in ascertaining or determining the nature and extent or the kind of relief to which the complainant may be entitled consistently with the case made by the bill." Hawley v. Wolverton, 5 Paige (N. Y.), 522.

2. 1 Dan'l Chan. Plead. & Pract. 420, cited in Swetland v. Swetland, 3 Mich. 482.

3. U. S. v. Atherton, 102 U. S. 372; Fitzpatrick v. Beatty, 1 Gilm. (Ill.) 454, 469; Hynson v. Dunn, 5 Pike (Ark.), 395; Moon v. Green, 19 How. (U. S.) 69, 72; Beaubien v. Beaubien, 23 How. (U. S.) 190, 208.

"In a suit in equity, for relief, on the ground of fraud, it is enough if the facts found are not materially and substantially different from those alleged in the bill." Tufts v. Tufts, 123 U. S. 77. Opinion by Chief Justice Waite.

There can be no proof of fraud as the ground of a decree, unless it be set out substantially in the bill, so held in the case of a petition for the specific performance of an agreement. Crocker v. Higgins, 7 Conn. 342.

The facts constituting the fraud claimed must be distinctly set out in the bill. Smith v. Wood, 42 N. J. Eq. (15 Stew.) 563.

Fraud need not be charged by name. Skrine v. Simmons, 11 Ga. 401, 410; Kennedy v. Kennedy, 2 Ala. 571, 604.

It is said to be a "well-settled rule of pleading that every question of surprise, mistake, or fraud, must rest, not upon the mere statement of the pleader, *eo nomine*, but upon such a showing of facts and circumstances, if taken as true, as must lead to that legal conclusion." The court in Fahie v. Pressey, 2 Oreg. 23.

In a bill to set aside a conveyance on the ground of fraud, the complainant must allege that there was no consideration, or that there was a consideration, which he has offered to return, or that he has no knowledge whether or not there was a consideration, and that the facts are peculiarly within the knowledge of the respondent. Clark v. Chicago, etc., R. Co., 3 McCrary (U. S.), 589.

Thus, a bill seeking to have a contract for the sale of land set aside on the ground of fraud, must allege that the complainant is ready to reconvey the land. Murphy v. McVicker, 4 McLean (U. S.), 252.

the benefit of it, is prevented from making it available in a court of law. In other words, the case shown must be one where the forms of law are used to defeat that which in equity constitutes the right."¹

a. Scandal and Impertinence. — If the bill or answer allege any matter criminal, or of scandal or impertinence, it will be expunged.² But it must clearly appear to the court that the matter claimed to be impertinent is so before it will be ordered expunged.³

(1) *Scandal defined.* — Scandal is any matter which it is not becoming the dignity of the court to hear, or which reflects upon a party.⁴

(2) *Impertinence defined.* — Impertinence consists of needless prolixity, even where the matter is relevant, of alleging any matters in the case not properly before the court for decision, as where

1. *Drexel v. Birney*, 122 U. S. 241, 253.

That a bill in chancery cannot be admitted in another suit as evidence of the admissions of complainant made therein, see note to *Vanneman v. Swedesboro Loan and Bldg. Assoc'n*, 42 N. J. Eq. (15 Stew.) 264, *et seq.* See *Cooper v. Day*, 1 Rich. Eq. (S. Car.) 26.

It is provided by rule 21, U. S. Eq. Rules (Dest. Fed. Proced. Pract. Series, p. 691), that the "Plaintiff may in the narrative or stating part of his bill, state and avoid, by counter-averments at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief."

2. Mitf. Plead. (2d ed.) 47, 253; 1 Harr. Pract. in Chan. 89; Lube's Eq. Plead. (Pract. Series) p. 76, sec. 73-75; Story's Eq. Plead. (9th ed.) §§ 48, 266-270; 2 Madd. Chan. 175, 221, 277, 278; Hinde's Chan. 14, 15, 197; *Burr v. Burton, Admr.*, 18 Ark. 214.

Rule 26, U. S. Eq. Rules, provides that "Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments *in hac verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court for impertinence or scandal, and, if so found by him, the matter shall be expunged," etc. *Desty's Fed. Proced. (Pract. Series)* 691.

And Rule 27, U. S. Eq. Rules, provides that "No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent." *Desty's Fed. Proced. (Pract. Ser.)* 692.

3. *Dodd v. Wilkinson*, 42 N. J. Eq. (15 Stew.) 647; *Tucker v. Cheshire R. R. Co.*, 21 N. H. 29.

It is provided by Rule 26, U. S. Eq. Rules (*Desty's Fed. Proced. (Pract. Series)* 691), that "Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments *in hac verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court for impertinence or scandal, and, if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court, or a judge thereof, shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference."

4. Not all matter scandalous in terms is irrelevant or impertinent, as in cases where gross fraud is alleged to set aside deeds or other instruments; here the matter may be necessary to sustain the bill, and to enable plaintiff to obtain the relief to which he may be entitled. Such matter would not be considered scandalous. *Story's Eq. Plead. (9th ed. by Gould)* § 269.

Matter in an answer is never scandalous if material and relevant to the justice of the case. *Equity Draughtsman by Hughes*, § 5, p. 571; *Coffin v. Cooper*, 6 Ves. 514.

Relevant and material matter tending to the discovery of the very point in question is not scandalous, however much it reflect upon or discredit a party. 1 Harr. Pract. in Chan. 89, 90.

Scandal includes impertinence, but impertinence does not necessarily include scandal. 1 Harr. Pract. in Chan. 90.

records are filled with long statements or recitals of immaterial matters of fact, or where long deeds are set forth *in hæc verba*.¹

b. Multifariousness.—It is impossible to give any rule which shall govern absolutely in determining what constitutes multifariousness. An examination of the cases discovers the fact that this is a matter largely within the discretion of the court; and this will account in a measure, therefore, for the great diversity of opinion that exists, since the circumstances and equities in each case would generally be peculiar to that particular case as distinguished from every other, and the court, by virtue of its equitable powers, might, in the absence of some precedent directly in point or analogous thereto, extend and enlarge the principles of equity to meet the case under consideration. The general rule, which is taken as a starting-point, is, that a bill is multifarious which alleges matters entirely distinct and unconnected, or which introduces parties who have no interest in the subject-matter or decree sought, and only an interest which is incidental to some question raised by the averments of the bill.²

1. 1 Harr. Pract. in Chan. 89; Story's Eq. Plead. (9th ed.) §§ 266, 268.

"As to impertinent matter, the answer must not go out of the bill to state that which is not material or relevant to the case made out by the bill. Long recitals, digressions, stories, conversations, and insinuations tending to scandal, are of this nature. Facts not material to the decision are impertinent, and, if reproachful, they are scandalous; and the—perhaps the best—test by which to ascertain whether the matter be impertinent, is to try whether the subject of the allegation could be put in issue, and would be a matter proper to be given in evidence between the parties." The court in *Woods v. Morrell*, 1 Johns. Ch. (N. Y.) 104, 107.

A charge in a bill against the managers of a certain savings institution that they had made illegal loans, and that they were guilty of negligence in making them, and that a loan specially named had been made by them resulting in loss, and asking that the managers be made liable for the loss, and also showing in the bill the condition of the institution financially, and stating the unlawful management of it, is not impertinent or scandalous. *Wilkinson v. Dodd*, 42 N. J. Eq. (15 Stew.) 235.

2. *Warren v. Warren*, 56 Me. 360, 368; Story's Eq. Plead. (9th ed.) §§ 271-287, 530-549, 610, 747, 820; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Gartland v. Dunn*, 11 Ark. 720, 721; *Kennedy v. Kennedy*, 2 Ala. 573, defined in *Howell v. Howell*, 20 Ark. 25, 32. Defined as the alleging several distinct matters totally unconnected. *Chapman v. Chunn*, 5 Ala. 397; *Colburn v. Broughton*, 9 Ala. 351.

In determining whether or not a bill is multifarious, reference must be as well to the prayer as to the bill, but not to the answers or proof. *Carpenter et ux. v. Hall*, 18 Ala. 439; *Halstead v. Shepard*, 23 Ala. 558.

Decisions under the new procedure are substantially in accordance with those prior thereto. *Pom. Rem. & Remed. Rights* (2d ed.), § 486, *et seq.*

It is impossible to deduce any governing principle from the cases which is safe to adhere to as a general rule upon the subject of multifariousness. "While multiplicity of actions on the one hand ought to be avoided, we should be careful on the other to guard against that complication and confusion in the investigation of rights and the application of remedies arising from the attempt to blend in one suit distinct and incongruous claims and liabilities. The interests and liabilities of defendants may be separate, and yet they can be joined in the same suit" where their liability and interests arise from the same source. *Johnson v. Brown*, 2 Humph. (Tenn.) 327.

In a case in the Supreme Court of the United States, the complainant exhibited his bill to recover certain lands against several defendants, each holding distinctly from every other, and each claiming as a *bona fide* purchaser without notice, under a will sought to be impeached in the bill. Upon a question as to multifariousness which was raised by demurrer, the bill was held not multifarious; and the court, *McLean, J.*, declared "That a bill which is multifarious may be demurred to for that cause, is a general principle; but what shall constitute multifariousness, is a mat-

Where a bill alleged two distinct and separate causes for relief, and defendant by his answer set out that one of the causes had been removed subsequent to filing the bill, held that such answer obviated an objection that the bill was multifarious, and the allegation should be then deemed as stricken from the bill.¹

Upon an objection to a bill for multifariousness as embracing two separate contracts, it appeared that A., acting as the agent of B. and C., under a contract between all three, was to bid off a certain tract of land in his own name, and said land was to be divided between them. A bill was brought, wherein the complainants D. and E. averred ownership of the land, and a sale thereof to A.; it also set up the contract between A., B., and C., and prayed that specific performance of the agreement for the sale of the land be decreed, and that the contract between A., B., and C. be re-formed on the ground of mistake between them in draughting the same. The entire relief prayed was granted, and this decree was affirmed, on appeal.²

Where a demurrer was interposed, for multifariousness, to a bill against several defendants for rent, some of whom had no interest therein at the time the suit was brought, it was sustained.³

ter about which there is a great diversity of opinion. In general terms, a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. . . . It is well remarked by Lord Cottenham in *Campbell v. Mackay*, 7 Simon, 564, and in *Mylne & Craig*, 603, "to lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is upon the authorities utterly impossible." Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. . . . Multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, although the interests may have arisen under distinct contracts." *Gaines v. Chew*, 2 How. (U. S.) 619, citing *Story's Eq. Plead.* § 534; *Att'y-Gen. v. Cradock*, 3 Mylne & Craig, 85; 7 Sim. 241, 254.

"A bill is not multifarious where it sets up one sufficient ground for equitable relief, and sets up another claim which upon its face contains no equity which can entitle the complainant to the interposition of the court, either for discovery or relief. The proper course for the defendants in such a case, is to answer as to the first, and demur to the last, for want of equity, or he may answer as to both, and make the objection as to the want of equity in the last claim at the hearing." *Varick v. Smith, etc.*, 5 Paige, Ch. (N. Y.) 137.

1. *Whitney v. Union Railway Co.*, 11 Gray (Mass.), 359, 368.

A bill is not multifarious "because two good causes of complaint arising out of the same transaction are joined in one suit in which all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character." *Varick v. Smith, etc.*, 5 Paige (N. Y.), 137, cited in *Warren v. Warren*, 56 Me. 360, 368, citing *Foss v. Haynes*, 31 Me. 81; *Bugbee v. Sargent*, 23 Me. 269; *Newland v. Rogers*, 3 Barb. Ch. (N. Y.) 432; *Oliver v. Piatt*, 3 How. (U. S.) 333.

If "a bill attempts to bring into question and have adjudicated distinct and discordant interests," it is demurrable for multifariousness. *Taylor v. King*, 32 Mich. 42.

If distinct and independent claims are united against several defendants, the bill is bad for multifariousness. *Stuart's Heirs v. Coalter*, 4 Rand. (Va.) 74.

A bill is not obnoxious for multifariousness simply because it seeks relief as against different defendants who have distinct and separate interests, especially when contention as to some of the matters have ceased between the parties; since equity, having obtained jurisdiction, will proceed with the case in all matters germane to the case made upon the original bill. *Hurd v. Ascherman*, 117 Ill. 501, 509; *Mix v. Hotchkiss*, 14 Conn. 32.

2. *Sapp v. Phelps*, 92 Ill. 588, 595.

3. *Childs v. Clark*, 3 Barb. Ch. (N. Y.)

52.

In case of a bill brought against a partnership itself, and also against one of its members; the trustee under a deed of trust from said partner; the creditors secured by said deed; and certain purchasers of the property at a sale made by the trustee, — it was held bad for multifariousness on demurrer, although it was said that, upon motion, the court would dismiss the bill as to those parties against whom the bill was bad, and retain the suit as to the others.¹

A bill is not bad for multifariousness where the plaintiffs all hold or claim by virtue of one general right, although separate and distinct interests are held by the defendants.²

Where all the parties have a common interest in the matters in controversy, the bill is not objectionable for multifariousness. Nor is it necessary that all the parties are interested in all the subject-matters of the suit: if each party has an interest in some matters in controversy, these are connected so as to be outside of the objection to multifariousness.³

"Where a joint claim against several defendants is united in the same bill with a separate claim against one defendant alone with which the other defendants have no connection, the bill is multifarious." *McIntosh v. Alexander*, 16 Ala. 89.

1. *Johnson v. Brown*, 2 Humph. (Tenn.) 327.

2. *Mix v. Hotchkiss*, 14 Conn. 32.

Where different creditors brought a bill to set aside several deeds made at various times, and alleged to be voluntary gifts to the debtor's children, who were in possession of the property, and to subject the same to the payment of the debts of the grantor, upon demurrer by the defendants for multifariousness, it was held, citing *Story's Eq. Plead.* sec. 534, 537 a, that "Where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain a bill against all of them." Upon this principle it has been held that 'distinct and several judgment creditors may join in a bill for discovery and relief to set aside conveyances which have been made by their debtor in fraud of his creditors, — for they all have a common interest in the suit, — and if they succeed, the decree will be beneficial to all in proportion to their respective interests.' In addition to these general reasons, it may be added, that it is a favorite object of equity jurisdiction to do complete justice, and prevent a variety of litigation. If the allegations of the plaintiff should be successfully maintained in administering the proper relief, the court may deem it necessary to have the several donees before them, in order to adjust the

equities which may arise among themselves." *Williams v. Neel*, 10 Rich. Eq. (S. Car.) 338.

3. *Worthy v. Johnson*, 8 Ga. 236, citing *Addison v. Walker*, 4 You. & Coll. 444; *Parr v. Att'y-Gen.*, 8 Cl. & Fin. 435. See also *Booth v. Stamper*, 10 Ga. 109.

Generally, on multifariousness, see the case of *Fellows v. Fellows*, 4 Cow. (N. Y.) 682; s. c., 15 Amer. Dec. 412, and note, p. 427, wherein the question is considered under the following heads: —

(1) Joinder of defendants in equity.

(2) The general rule.

(3) Joinder of different assignees of fraudulent debtor.

(4) Other applications of the rule.

The editor, referring to the case of *Fellows v. Fellows*, and Mr. Justice Story's Commentary thereon, — *Story's Eq. Plead.* sec. 286, — also on the case of *Brinkerhoff v. Brown*, 6 John. Ch. (N. Y.) 139, viz., that no English authorities fully bear out the propositions contained in those cases, or are reconcilable with them, says, "Notwithstanding this seeming doubt, the conclusion arrived at in the principal case (*Fellows v. Fellows*), that where a judgment creditor fraudulently transfers his property in distinct parcels and by separate conveyances at different times to different persons who have no communication with each other, the judgment creditor seeking to set aside such transfers may join the debtor and his several assignees in one bill, is well settled in New York and other States." And cites *Hammond v. Hudson River, etc., Co.*, 20 Barb. (N. Y.) 378; *Boyd v. Hoyt*, 5 Paige (N. Y.), 65; *Reed v. Stryker*, 12 Abb. Pr. (N. Y.) 47; *Morton v. Weil*, 11 Abb. Pr. (N. Y.) 421; *Lawrence v. Bank of Republic*, 35 N. Y. 320; s. c., 31 How. Pr. (N. Y.) 502; *Williams v. Neel*, 10 Rich. Eq.

4. *The Confederacy Clause.*—The fourth part of the bill contains the general charge of confederacy against the persons complained of. This is a part of the bill originally inserted upon the theory that not otherwise could new parties be added by amendment, or perhaps with some view of giving jurisdiction. This clause contained a charge in general terms, that the parties named therein, combine together, and with others to the plaintiff unknown, and asking that liberty be given plaintiff to inscribe their names in the bill upon discovering the same. This clause is not necessary, however, as it is generally treated as impertinence or surplusage, unless such alleged combination is intended to be relied on, as in cases founded on such confederacy, when it must be specially averred. A general charge of confederacy requires no denial; although where the special combination is intended to be relied on, there must be a special denial. This clause is not adopted generally in the States.¹

5. *The Charging Part* is the fifth part of the bill, in which the plaintiff, if he believes that the defendant intends to set up certain matters of defence or in avoidance, alleges the defendants' pretences and charges in evidence of them, and by so charging seeks to avoid them. This part is also used for the purpose of obtaining a discovery of matters in the defendant's case, or where the plaintiff wishes to put in issue some matter which it is not for his interest to admit, and so charges by way of pretence, which is generally held to be sufficient for such purpose.²

(S. Car.) 338; *Planters' B'k, etc., v. Walker*, 7 Ala. 926; *Chase v. Searles*, 45 N. H. 511; *Bartee v. Tompkins*, 4 Sneed (Tenn.), 623; *Randolph v. Daly*, 16 N. J. Eq. 313; *Wade v. Rusher*, 4 Bosw. (N. Y.) 537; *New York, etc., R. Co. v. Schuyler*, 17 N. Y. 592; s. c., 7 Abb. Pr. 41; *Bank of America v. Pollock*, 4 Edw. Ch. (N. Y.) 215; *Boyden v. Lancaster*, 2 Patt. & H. (Va.) 198; *Bowers v. Keesecher*, 9 Iowa, 422; *Butler v. Spann*, 27 Miss. 234; *Stone v. Knickerbocker Life Ins. Co.*, 52 Ala. 589; *Lewis v. St. Albans Iron and Steel Works*, 50 Vt. 477; *Arnold v. Arnold*, 11 W. Va. 449; *Hardin v. Swoope*, 47 Ala. 273. See also on "Multifariousness," *Colburn v. Broughton*, 9 Ala. 351; *Turnipseed v. Goodwin*, 9 Ala. 372; *Bean v. Bean*, 37 Ala. 17.

1. Mitf. Plead. (2d ed.) 40, 170; *Story's Eq. Plead.* (9th ed.) §§ 29, 30, 856; *Hinde's Chan.* 16, 17; 2 Madd. Ch. 136; *Stone v. Anderson*, 26 N. H. 506.

It is provided by Rule 21, United States Eq. Rules, *Desty's Fed. Proced.* (Pract. Series) 689, that "The plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the *charging part* of the

bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the *jurisdiction clause* of the bill, that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law; and the bill shall not be demurrable therefor."

2. 1 Harr. Pract. in Chan. 86, 87; Mitf. Plead. (2d ed.) 42, 43; 2 Madd. Chan. 135; *Story's Eq. Plead.* (9th ed.) §§ 31, 34; *Lube's Eq. Plead.* (Pract. Series) 167, sec. 220.

Inasmuch as the defendant must set up fully the equities of his cause in the stating part,—since the bill would be insufficient if it were only alleged in the charging part,—it would seem that this part would be unnecessary. *Story's Eq. Plead.* (9th ed. by Gould) sec. 32–34.

But it is provided by Rule 21 of the United States Equity Rules (cited *ante* at length under the title "Confederacy Clause," note), that this part may be omitted.

It stated that "Lord Kenyon when at bar never put in the charging part, which does little more than unfold and enlarge the statement." 2 Madd. Chan. 136, citing *Partridge v. Haycraft*, 11 Ves. 574, 575.

It is said in 2 *Swift's Digest* (Conn.) (ed. 1853), p. 233, side page 206, that "The

6. *The Jurisdiction Clause* is the sixth part of the bill, wherein the plaintiff alleges that the acts complained of are contrary to equity.¹

But the mere allegation of these facts will not confer jurisdiction unless the facts of the plaintiff's case, as set out in the stating part, are sufficient to warrant equitable interposition.²

7. *The Interrogating Part* is the seventh part of the bill, which asks not only an answer by the parties against whom the bill is brought of all the matters alleged therein upon their positive knowledge, but that they may also answer such matters according to their best information, knowledge, and belief, the object being to obtain evidence or facts which the plaintiff lacks, and which may be necessary in order to support his case, so that the defendant must either admit or deny all the matters alleged against him in the bill, or must state that he has no sufficient knowledge or belief of the same to enable him to answer. It is generally the practice, however, to add a repetition by way of special interrogatory of the particular circumstances attendant upon each fact, in order to compel a full and complete answer.³

unnecessary use of these parts of the bill [the confederacy clause and the charging part] in all cases has tended to introduce great perplexity, and has given rise to a common reproach to practitioners in this line, that every bill contains the story three times told. To guard against such a tedious prolixity, a rule of court has been established that a bill should not exceed fifteen sheets. But in this country our practitioners have very wisely avoided the prolixity and the reproach." See also Mitf. Plead. (2d ed.) 46, 47.

1. Mitf. Plead. (2d ed.) 43; Lube's Eq. Plead. (Pract. Series) 167, sec. 220; Story's Eq. Plead. (9th ed.) § 34.

2. *Townshend v. Duncan*, 2 Bland (Md.), 45, 48; Story's Eq. Plead. (9th ed.) § 34; *Flint v. Field*, 2 Anst. 543; Mitf. Plead. (2d ed.) 43; 2 Madd. Chan. 136.

It must appear from the allegations in the bill that the matter is one that cannot be properly adjusted in a suit at law, and that the plaintiff has not a complete remedy at law. *Osborn v. Ordinary of Harris County*, 17 Ga. 123; *Botsford v. Beers*, 11 Conn. 373, 569.

Where the statutes of the State make full and complete provisions for a remedy at law on trustee's and guardian's bonds, there must be some special matter shown in the bill which would take it out of the forum provided, and bring it into a court of equity. *Osborn v. Ordinary of Harris County*, 17 Ga. 123; *Newton Mfg. Co. v. White*, 47 Ga. 403.

This clause may be omitted under U. S. Rules of Equity, Rule 21, cited at length under title "The Confederacy Clause," *ante*.

3. 2 Madd. Chan. 136; Mitf. Plead. (2d ed.) 43; Story's Eq. Plead. (9th ed.) §§ 35-39, 265, 572, note; Lube's Eq. Plead. (Pract. Series) 182, *et seq.* § 239 *et seq.*; *Bullock v. Richardson*, 11 Ves. 373.

As to the *interrogating part*, this is "the prayer that defendant may be ordered to answer not only according to his positive knowledge of the facts stated, but also according to his remembrance, information, or belief. The object of the answer is to obtain proof of matters necessary to support plaintiff's case; and to this end defendant must either admit or deny all plaintiff's allegations, or deny that he has any information or knowledge thereof, and that he is unable to form any belief in regard to the same. To prevent evasion by the defendant of the matters stated and charged in the bill, and to compel a full answer, it was the old practice to add the general requisition for answer to the matters contained in the bill, certain interrogatories which were substantially a repetition of the most essential matters required to be answered, whereby to the inquiry after each fact an inquiry was added of the circumstances attendant upon it, and the variations to which it might be subject. This was called the *interrogating part* of the bill, and was founded on the matters contained in the former part of the bill; and unless such prior part warranted the interrogatories, the defendant was not compelled to answer thereto." 1 Harr. Pract. in Chan. 86, 87; Lube's Eq. Plead. (Pract. Series) 182 *et seq.*

Rule 40, United States Eq. Rules (Dist. Fed. Proc. Pract. Series, p. 700 and cases cited), provides that "It shall not hereafter

8. *The Prayer for Relief* is the eighth part of the bill, which must, of course, depend entirely upon each particular case, and consists of a special prayer for relief, followed by a general prayer depending upon the equities of the case. It is best not to omit the general prayer for relief, since otherwise the plaintiff might be without any remedy in case his special prayer was not granted, or he should have mistaken the relief to which he is entitled; although, in case he should mistake, he might be allowed to amend his special prayer.¹ Except perhaps in special cases, such as where the writ *ne exeat regno* or of injunction is sought, the prayer for general relief is sufficient, and under it the court may grant any decree which the facts stated will warrant; and so was the rule formerly.²

be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery."

Rule 41, U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series, p. 700), provides that "the interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.: and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say, 'The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3,' etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill."

Rule 42, U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series, 701), provides that, "The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill."

Rule 43, U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series, 702), provides that, "Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words 'to the end thereof,' there shall hereafter be used words in the form or to the effect following: 'To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporeal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, in-

formation, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they are respectively required to answer; that is to say, "(1) whether, etc.; (2) whether,"" etc.

Rule 40, U. S. Eq. Rules, also provides that, "It shall not be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery." Desty's Fed. Proced. (Pract. Ser.) 700.

1. Story's Eq. Plead. (9th ed.) §§ 40-43, 81, 313-317; Hinde's Chan. 17; 2 Madd. Chan. 138, 139; Mitf. Plead. (2d ed.) 45; Townshend v. Duncan, 2 Bland (Md.), 45, 48; Lube's Eq. Plead. (Pract. Series) 185-187, §§ 246-248.

"Under the general prayer for relief, a complainant may pray at the bar for such specific relief as the statements of the bill will warrant, provided it does not conflict with that specifically prayed for." Busby v. Littlefield, 31 N. H. 193, 200, citing Stone v. Anderson, 6 Post. (N. H.) 506; 1 Dan'l Ch. Pract. 434, 435; Story's Eq. Plead. 540; Cooper's Eq. Plead. 14.

"It is essential that the plaintiff should distinctly state every fact necessary to constitute such a case as gives him a right to claim relief from the defendant at the time of filing his bill." Townshend v. Duncan, 2 Bland (Md.), 45, 48.

It is provided by Rule 21, U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series, 689), that "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief."

2. Shields v. Trammell, 19 Ark. 51, 62; Kelly v. Payne, 18 Ala. 371; Johnston v. Glasscock, 2 Ala. 519; Thomason v. Smithson, 7 Port. (Ala.) 144; Danforth v. Smith, 23 Vt. 247; Hubbard v. U. S. Mort. Co., 14 Bradw. (Ill.) 40; Haworth v. Taylor,

But a claim distinct from that made by the bill upon the issue cannot be recovered under a prayer for general relief; as where the prayer was for the division of property among certain persons, it was held that it could not be divided by the same bill among other persons;¹ and where the court has obtained jurisdiction for the purpose of granting any relief, it will retain it so that full relief in the premises may be given.²

Although the special relief asked may not be allowed, yet the court will, if possible, grant such relief as the allegations will support, in order to meet the demands of justice between the parties; so where a bill asking for an assignment of a mortgage was not allowed, yet the court, upon certain averments in the bill, sustained it as a bill to redeem.³

108 Ill. 275; *Brown v. McDonald*, 1 Hill, Ch. (S. Car.) 297; *Story's Eq. Plead.* (9th ed.) §§ 40-42; *Hinde's Chan.* 17; 2 Madd. Chan. 138, 139; *Lube's Eq. Plead.* (Pract. Series) 185-187, §§ 246-248.

An exception to this rule is where the prayer is framed with a double aspect. *Simmons v. Williams*, 27 Ala. 507.

Injunction or *ne exeat regno* must be specifically prayed. *Kelly v. Payne*, 18 Ala. 371.

1. *Sheppards v. Starke*, 3 Mun. (Va.) 29, 40.

"As to the relief to be given under a general prayer, the rule is, that it must be agreeable to the case made by the bill, and not different from it, or inconsistent with it." "The case made by the bill here is the execution of the mortgage deed and the omission to have it recorded within the time prescribed by law." The plaintiff prayed specially for a decree for recording the said deed of mortgage with a general prayer that the complainant may have "such other and further relief as his case may merit."

The court below decreed that the mortgaged premises be sold to pay the mortgage debt. It was held that the decree should be reversed as not consistent with the case made by the bill. *Chalmers v. Chambers*, 6 Harr. & J. (Md.) 29.

2. *Whipple v. Farrar*, 3 Mich. 436, 446.

The true character of a bill must be determined by the material averments; and if it appears therefrom that the plaintiff is entitled to relief, and the prayer will admit of that relief being given to which the plaintiff shows himself entitled, the court will grant such relief, even if the bill be given a wrong name. *McConnel v. Gibson*, 12 Ill. 130.

The relief granted in equity must be that only which the case made by the bill warrants. *Cloud v. Whiteman*, 2 Del. Chan. 23.

Under a general prayer in a bill for

specific performance, held that rents and profits might be granted, "any relief may be given for which the basis is laid in the bill." *Watts v. Waddle*, 6 Pet. (U. S.) 389, 402.

And where the plaintiff shows that he is entitled to some relief, such relief will be given as the case made out in equity demands, and as is consistent therewith. *Danforth v. Smith*, 23 Vt. 257; *Driver v. Fortner*, 5 Port. (Ala.) 9.

3. *Lamson v. Drake*, 105 Mass. 564.

Although the prayer for special relief may be defective, relief will be granted under the general prayer, consistent with the equities of the case. *Treadwell v. Brown*, 44 N. H. 551; *May v. Lewis*, 22 Ala. 646; *Strange v. Watson*, 11 Ala. 324; *Townshend v. Duncan*, 2 Bland (Md.) 45, 48; *McMillan v. James*, 105 Ill. 194.

But relief cannot be granted under a general prayer, which is entirely distinct and independent of the relief sought under the special prayer. *Thomason v. Smithson*, 7 Port. (Ala.) 144.

It was held in *Owing's case*, 1 Bland, Ch. (Md.) 370, that it is not essentially necessary that relief should be granted exactly or in part as prayed in the bill, but that affirmative relief might be granted upon the equities of the case as made out from the pleadings and proofs between the parties. Citing *Johnson v. Johnson*, 1 Munf. (Va.) 554, note. *The Charitable Corporation v. Sutton*, 9 Mod. 356; 2 Atk. 406; *Walker v. Preswick*, 2 Ves. 622; *Taylor v. Ficklin*, 5 Munf. (Va.) 25; *McNeil v. Baird*, 6 Munf. (Va.) 316; *Fife v. Clayton*, 13 Ves. 546; *Higginson v. Close*, 15 Ves. 525; *Dorsey v. Campbell*, 1 Bland, Ch. (Md.) 356; *Harding v. Handy*, 11 Wheat. (U. S.) 120; *Stuart v. Mechanics*, etc., Bank, 19 John. (N. Y.) 496. See also on this point *Banks v. Carneal*, 10 Wheat. (U. S.) 181, 189. Opinion by *C. J. Marshall*.

It has been held, however, that, under general prayer, relief may be granted upon

9. *Prayer for Process* is the ninth part of the bill, which asks that defendant appear to answer the bill, and abide the order of the court. None are affected by the decree, as a general rule, except such as are named in the prayer of process, even though they are elsewhere named in the bill.¹

10. *Signature*. — All bills must be signed by counsel, and sometimes it is required that the facts alleged therein must be verified by complainant under oath.²

(B) ORIGINAL BILLS PRAYING FOR RELIEF. — The first division of bills for relief is into bills praying the decree of the court touching some right claimed by the plaintiff in opposition to the defendant.

1. *Specific Performance*. — A bill to compel specific performance must set up the contract which is sought to be enforced in full; and where the plaintiff was bound to perform certain acts as conditions, it is not sufficient to allege that he performed "all that he was bound to perform," but he must aver what he performed in fact.³

the equities of the case made by the bill, although it be inconsistent with the special prayer. *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430; *Dews et al. v. Cornish*, 20 Ark. 332.

"If there be no general prayer, and the special prayer cannot be granted, the plaintiff must amend his bill, or have it dismissed." *Townshend v. Duncan*, 2 Bland (Md.), 45, 48; *Driver v. Fortner*, 5 Port. (Ala.) 9.

A plaintiff may so frame his bill as that he may obtain relief in one view if the other fails. *Strange v. Watson*, 11 Ala. 324, 336; *Hobson v. McArthur*, 16 Pet. (U. S.) 182, 195.

Rule 21, U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series), 689, provides that, "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be specially asked for."

1. Story's Eq. Plead. (9th ed.) §§ 44, 80, 81; 2 Madd. Chan. 139.

A prayer for an injunction or writ of *ne exeat regno* is necessary before the prayer for process. 2 Madd. Chan. 139; Mitf. Plead. (2d ed.) 46.

Rule 23 of the U. S. Eq. Rules provides that, "The prayer for process of *subpœna* in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order

thereon, as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process." Desty's Fed. Proced. (Pract. Series) 690.

2. Story's Eq. Plead. (9th ed.) § 47; *Roach v. Hulings*, 5 Cranch (U. S.), 637.

The certificate of the counsel, as well as the affidavit of the defendant, are required. *Secor v. Singleton*, 9 Fed. Rep. 809.

A signature as "solicitor" is proper. *Stinson v. Hildrup*, 8 Biss. (U. S.) 376.

A signature on the back of the bill is sufficient. *Dwight v. Humphreys*, 3 McLean (U. S.), 104.

Bill may not be signed after filing except under order of the court. *Partridge v. Jackson*, 2 Edw. Ch. (N. Y.) 520.

Signature of firm-name sufficient. *Hamp-ton v. Coddington*, 28 N. J. Eq. 557.

An affidavit is not required in chancery, in Connecticut. *Jerome v. Jerome*, 5 Conn. 352.

A bill in equity need not be verified, except where required as evidence, in application for temporary injunctions and the like. *Hughes v. Northern Pac. R. Co.*, 18 Fed. Rep. 106, 110.

Rule 24, U. S. Eq. Rules, provides that, "Every bill shall contain the signature annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him, and the case laid before him, there is good ground for the suit in the manner in which it is framed." Desty's Fed. Proced. (Pract. Series) 690.

3. *Davis v. Harrison*, 4 Litt. (Ky.) 261.

2. *Bills for Partition.* — The titles, both of plaintiff and defendant, ought to be averred with certainty and precision.¹

3. *Bills of Peace.* — A bill of peace may be exhibited where one claims a general exclusive right, and there are very numerous parties who dispute it, and the right cannot be quieted by one or two actions at law, as in actions relating to rights of common, or to be quieted in the possession of an ancient ferry, or in disputes between lords of manors and their tenants, or in questions affecting the right of fishery, or in the possession of a water-course or the like.²

4. *Bills Quia Timet.* — Where a person apprehends that he will be subjected to future inconvenience which may possibly or probably happen or arise from the negligence or culpability of another, or where one is a legatee of property subject to the life of another in existence, and it is desired to protect this for his use from any accident which may happen to it before he shall come into possession, in such cases a bill *quia timet* may be brought to quiet such apprehensions, and remove the causes thereof; or, in the latter case, to obtain some security against the apprehended injury to his possession, as a guaranty entered into that such property will not be disposed of or destroyed.³

5. *Bills of Foreclosure.* — There is a great diversity in the system of foreclosure in the several States, and those systems which are based on the same general principles differ in many points. We believe it to be true, however, that an examination of the actual provisions as to pleading and practice will discover that the old theory of presenting facts in the bill for relief in equity and of pleadings in general, runs through all the systems to a great extent, and may now be considered as governing the pleadings

Averment of willingness of defendant to perform another agreement than that set up, which he declares not to be the actual agreement, the court will decree a performance of such other agreement if proven. Story's Eq. Plead. (9th ed.) § 394 and note.

Where the plaintiff's part of the agreement sought to be enforced has not been performed by him, here the allegations must show that he was not in fault, and that he is ready and willing to perform. 1 Fonb. Tr. Eq. 391, note d.

It must appear from the bill that the object sought is not against public policy. Earl of Kingston v. Pierpont, 1 Vern. 5.

1. Agar v. Fairfax, 17 Ves. 552; Baring v. Nash, 1 Ves. & B. 552.

2. 1 Harr. Pract. in Chan. 104; Tenham v. Herbert, 2 Atk. 484; Mayor of York v. Pilkington, 1 Atk. 282; 2 Story's Eq. Jur. §§ 852-860; Met. Eq. 143.

This bill will not lie to protect plaintiff against a multiplicity of suits, unless some of the suits have been successfully defended, and a right thereby established to

such protection. West v. The Mayor of New York, 10 Paige, Chan. (N. Y.) 539.

The right of the party must have been established, so far as his title at law is concerned, or it must appear to the court that those who controvert the title are so numerous that it is necessary to bring in all the parties interested, and so avoid a multiplicity of suits. Bush v. Western, 1 Vern. 120, 127; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281. See Harmer v. Gwynne, 5 McLean (U. S.), 313.

Where the suit affects land, it must appear that the plaintiff has been, or is, in possession, or that it is sought to have a deed given up which is defective. Shapley v. Rangeley, 1 Woodb. & M. (U. S.) 213.

3. 2 Story's Eq. Jur. §§ 825, 851; 1 Harr. Pract. in Chan. 107; Elmendorf v. Lansing, 4 John. Chan. (N. Y.) 562, was a case of this character. See title "Receivers," 4 Abb. Natl. Dig. 60, *et seq.* See Story's Eq. Plead. (9th ed.) § 43, note a; 1 Madd. Chan. 218.

and practice in actions to foreclose, at the present time, subject to certain limitations with regard to parties, their interest in the suit, and its object.¹

6. *Bills to redeem* should make a tender of the amount due on the debt, and offer to pay the sum found due.²

7. *Bills for Injunction and ne exeat regno* are in the nature of original bills praying relief, although, strictly speaking, they are bills of relief wherein ordinarily, "for the purpose of preserving property pending suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ," whence the bill takes its name of a bill for injunction or *ne exeat regno*.³

8. *Bills of Interpleader* constitutes the second division of original bills praying relief, and lie where two or more claim the same thing by different or separate interests, and a bill is brought praying the judgment of the court as to which of them it belongs; or, as is more commonly the case, it is a bill brought by a third per-

1. Jones on Mortgages, ch. xxx. §§ 1317-1366, 1451, where the mode of procedure, pleadings, parties, etc., in each State is considered at length.

"The general requisites of the complaint are, that it should allege the execution and delivery of the mortgage and of the note or bond secured by it, the names of the parties to it, the date and amount of it, when and where recorded, a description of the premises, the amount claimed to be due, and the default upon which the right of action has accrued. It must show also that the complainant is entitled to maintain the action by virtue of an assignment, bequest, or otherwise, and that the defendants have, or claim to have, certain interests in the premises or liens upon them. If the plaintiff is not the mortgagee, his right to maintain the action by virtue of an assignment, bequest, or otherwise, must be set forth with reasonable fullness and certainty. The terms and conditions of both the mortgage and the bond or note secured by it, should be set out. This may be done by proper recitals in the complaint itself, or by annexing copies of these instruments which are referred to in the complaint, and made part of it. The relief which is sought should be fully and explicitly stated." Jones on Mort. § 1452.

Writ of entry in Massachusetts and Maine for foreclosure of mortgage is substantially a suit in equity. Holbrook v. Bliss, 9 Allen (Mass.), 69; Jones on Mortgages, §§ 1276, 1296. See also on the subject, actions to foreclose. Pom. Rem. & Remed. Rights, §§ 255, 256, 333-346.

Rule 92, U. S. Eq. Rules, provides that "In suits in equity for foreclosure of mortgages in the circuit courts of the United States or in any court of the Territories hav-

ing jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court, regulating the equity practice where the decree is solely for the payment of money." Desty's Fed. Proced. (Pract. Ser.) 730, 731.

2. Jones on Mort. § 1095; Perry v. Carr, 41 N. H. 371.

3. Mitf. Plead. (2d ed.) 46.

It is provided by Rule 21, U. S. Eq. Rules (Desty's Fed. Proced. Pract. Series, 689), that "If an injunction, or a writ of *ne exeat regno*, or any other special order pending suit, is required, it shall also be specially asked for" in the prayer for relief.

Rule 55, U. S. Eq. Rules, provides that "Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court." Desty's Fed. Proced. (Pract. Ser.) 708.

son, who does not know to whom of different persons claiming the same thing in distinct or separate interests he ought to render a debt or duty, and fears an injury to his rights by some of the claimants, and he prays that they may interplead, so that the court may adjudge between them, and he be rendered safe upon payment of the money or delivery of the property; and his bill lies whether a suit is actually commenced, or he is likely to be sued: in the latter case the right of each of the opposing claimants to sue at law must exist.¹

A bill of interpleader lies in behalf of a vendee of personal property against the vendor and another claiming title thereto.²

It should sufficiently appear in a bill of interpleader, that the claims are of the same nature and character, that they are properly a subject of interpleader; and they should for this purpose be specifically set forth.³

The prayer of the bill should ask that the defendants interplead, and the matter be thus adjusted as between them, and the plaintiff saved harmless, and also that they be restrained from proceeding at law.⁴ An affidavit is generally annexed to such bill, that there is no collusion between the plaintiff or any of the parties.⁵

1. 1 Harr. Pr. in Ch. 96; Atkinson v. Manks, 1 Cow. (N. Y.) 691, 703; Eq. Draughts. (by Hughes) 204; Lube's Eq. Plead. (Pract. Series) p. 34, § 12, p. 83, § 88; Hinde's Chan. 26; Mitf. Plead. (2d ed.) 32, 47, 48; Story's Eq. Plead. (9th ed.) §§ 18, 291-298; School District v. Weston, 31 Mich. 85; Bird v. Fake, 2 Pinn. (Wis.) 69; McDonald v. Allen, 37 Wis. 108.

Such bill should be exhibited before decree had. 1 Harr. Pr. in Ch. 99; Story's Eq. Plead. (9th ed.) § 291.

A bill of interpleader "only lies where two or more persons claim the same debt or duty from the complainant by different or separate interests." Hayes v. Johnson, 4 Ala. 267.

It is not necessary that a suit be actually pending to enable a party to maintain a bill of interpleader. Gibson v. Goldthwaite, 7 Ala. 281, 288.

If each of the defendants to a bill of interpleader has a claim to matter in suit, this is sufficient ground for the bill; and this although one only has an action at law, and the other in equity. Gibson v. Goldthwaite, 7 Ala. 281, 288.

2. Darden v. Burns, 6 Ala. 362.

3. Varrian v. Berrien, 42 N. J. Eq. (15 Stew.) 1, 3.

The nature of the claims should be sufficiently alleged so that it should appear that they are properly a subject for interpleader. Clawshay v. Thornton, 7 Sim. 391, 397; Slingsby v. Boulton, 1 Ves. & B. 334.

"The appropriate allegations in every bill of interpleader are, (1) that two or

more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; (4) that he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs." Gibson v. Goldthwaite, 7 Ala. 281, 288.

In a bill of interpleader, the right of each claimant to the property debt or duty to sue him, should be admitted by the plaintiff. Morgan v. Marsack, 2 Mer. 110; Story's Eq. Plead. (9th ed.) § 292; 1 Harr. Pract. in Ch. 97.

It should also be shown by the bill that the plaintiff claims no interest for himself in the matter in controversy. Mitchell v. Hayne, 2 Sim. & Stu. 63.

Plaintiff to bill of interpleader ought to bring the money or other property into court, although this is not necessary unless required by the other side. An offer, however, to bring the same into court, is necessary. 1 Harr. Pr. in Ch. 98; Eq. Draughtsman (by Hughes), 204; Mitf. Plead. (2d ed.) 49; Story's Eq. Plead. (9th ed.) § 297; Hinde's Ch. 27; Williams v. Walker, 2 Rich. Eq. (S. Car.) 291.

In Connecticut it is not necessary in a bill of interpleader to allege a willingness, or to offer, to bring the money or thing in controversy into court. Nash v. Smith, 6 Conn. 421.

4. Richards v. Salters, 6 Johns. Ch. (N. Y.) 445.

5. Gibson v. Goldthwaite, 7 Ala. 281, 289; 1 Harr. Pract. in Chan. 93; Atkinson

Although a bill of interpleader cannot be sustained strictly as such in equity, yet under a general prayer for relief, if the plaintiff is entitled to any relief, it will be granted.¹

9. *Certiorari Bill*. — This is the third division of original bills praying relief, and lies to remove a cause from a lower to a higher court, but it is seldom used in the United States.²

(C) OTHER BILLS. — Under this head we have placed those bills which are technically in the nature of original bills not praying relief. Their kinds we have already noticed.³

We will next consider, in their order, the bills classified under this head.⁴

1. *Cross-bill*. — A cross-bill is one brought by the defendant against the plaintiff to a pending bill to obtain from him a discovery of facts within his knowledge, and necessary to the defendant in the original bill, or in case the defendant wishes to claim affirmative relief in relation to the matter of the original bill. It was first allowed on the ground that the case of the defendant might be thereby better stated than by answer; and frequently it happens that this is the only way in which the matters in litigation, and necessary to a complete decree, can be properly brought before the court.⁵

v. Manks, 1 Cow. (N. Y.) 691, 704; Mitf. Plead. (2d ed.) 49; Eq. Draughts. (by Hughes) 205.

1. The Consociated Presbyterian Society, etc., *v. Staples*, 23 Conn. 553, 555.

2. Generally, on this subject, see Story's Eq. Plead. (9th ed. by Gould) sec. 298; 1 Harr. Pract. in Chan. 100-104; Mitf. Plead. (2d ed.) 49; Hinde's Chan. 581, 582; Lube's Eq. Plead. (Pract. Series) 67, § 56, pp. 171, 172, § 222.

"The prayer of this bill is grounded upon a suggestion necessarily arising from one or some of the following circumstances: that by means of the limited jurisdiction of the court, or by reason that the cause is without the jurisdiction of the inferior courts, or that the witnesses live out of the jurisdiction, or that the defendants do, and are not able by age or infirmity, or the distance of the place, to follow the suit; or upon some substantial reasons shown, equal and impartial justice to the parties is not likely to be obtained in the inferior court, and for this purpose the bill should state the proceedings in the court below; the incompetency of that court to decide between, and administer justice to the parties, and pray the writ of *certiorari*." 1 Harr. Pract. in Ch. p. 101.

3. See title "General Division," subtitle "Other Bills."

"Bills for the purposes of cross-litigation of matters already pending before the court; of controverting, suspending, avoiding, or carrying into execution a judgment

of the court; or of obtaining the benefit of a suit to which the plaintiff is not entitled, to add to, or continue for the purpose of supplying any defects in it, — have been generally considered under the head of bills in the nature of original bills, though occasioned by, or seeking the benefit of, former bills." Eq. Draughts. by Hughes, 444.

4. See title "General Division," subtitle "Other Bills."

5. Hinde's Chan. 52-55; 1 Harr. Pract. in Chan. 135-137; Story's Eq. Plead. (9th ed.) §§ 389-402; Lube's Eq. Plead. (Pract. Series) 49, 101, 102, 201, §§ 26, 114-116, 278-282.

Rule 72, U. S. Eq. Rules, provides that "Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner, and under the same restrictions, as the answer praying relief may now be read and used." Desty's Fed. Proced. (Pract. Ser.) 721.

It is said in Trapnall, Excr., *v. Hill et al.*, 31 Ark. 345, 359, by the court, that "A cross-bill is usually brought for one of two purposes. First, to obtain a necessary discovery of facts in aid of the defence to the original bill, or to bring some matter pertinent to the defence before the court which

A cross-bill is a mode of defence to the original bill,¹ and should not be inconsistent with the answer.² This bill should be filed by the defendant to obtain affirmative relief when the equities arising out of the original case will permit.³ If the original bill, however, is without equity, there is nothing on which to found a cross-bill, and it will not be sustained.⁴

In *Plunkett v. Dillon*,⁵ the court ordered the defendant to file a cross-bill, in order to bring the whole matter into controversy, and settle the questions raised by the pleadings finally between all the parties.⁶

Where a bill was filed to foreclose a mortgage executed by the defendant to secure certain promissory notes, the answer admitted the averments of the bill, but set up an agreement claimed to have been made subsequent to the execution of the notes and mortgage, in pursuance of which the complainant was to cancel said notes and release the mortgage upon a conveyance in fee by defendant to plaintiff of part of the mortgaged premises, averring also a tender of a deed to plaintiff, in conformity with the terms of the agreement, and a refusal by the latter to receive said deed. The defendant averring a payment of the notes, and claiming that they be given up, and the mortgage cancelled, upon a question as to the sufficiency of the answer it was held that that part of the answer asking for a surrender of the notes and cancellation of the mortgage should be disregarded, and was properly the subject-matter of a cross-bill.⁷

could not, under the rules of the court, be presented by answer or plea. In such cases it is a mere mode of defence to the original suit. *Second*, It may be used to obtain full relief to all parties touching the matters in the original bill. For purposes of relief it is most commonly used where persons in opposing interests are co-defendants, . . . and a cross-bill, even by acquiescence of parties, may not have an indefinite extent, for the books seem to imply that there is a want of power to make a decree upon matters unconnected with the original suit. It should not introduce matters not embraced in the original bill, for as to such matters it is an original bill. When a cross-bill is brought against the plaintiff in the original bill as a mode of defence, it requires no equity to support it: in such cases it is treated as an auxiliary bill. . . . But where a cross-bill seeks relief, it should be equitable relief, otherwise it will be demurrable. . . . The cross-bill must grow out of matters in the original bill."

1. *Andrews v. Hobson*, 23 Ala. 219.

2. *Dill v. Shahan*, 25 Ala. 694, 703.

3. *Quick v. Lemon*, 105 Ill. 578.

The affirmative relief asked in cross-bill must be different from that prayed for in the original bill, or it will be dismissed. *Howe v. South Park Comms.*, 119 Ill. 101.

It was held in *Tarleton v. Vietis*, 1 Gilm. (Ill.) 470, that a party defendant seeking affirmative relief must do it by way of an original cross-bill; the court saying, however, that "In equity a defendant may in his answer rely on any matter which shows that the complainant is not entitled to the relief he claims by his bill." See also *Mason v. McGirr*, 28 Ill. 322; *White v. White*, 103 Ill. 438.

Held in Illinois that affirmative relief cannot be decreed upon an answer alone, but a cross-bill must be filed, or bill praying relief must be filed. *Mason v. McGirr*, 28 Ill. 322, citing *Ballance v. Underhill*, 3 Scam. (Ill.) 453; *Edwards v. Helm*, 4 Scam. (Ill.) 142; *Tarleton v. Vietis*, 1 Gilm. (Ill.) 470; *Rowan v. Bowles*, 21 Ill. 17; *McConnell v. Smith*, 23 Ill. 611.

4. *Dill v. Shahan*, 25 Ala. 694, 703.

5. 3 Del. Chan. 496.

6. But a cross-bill is not necessary when the whole matter is before the court. *Ames v. N. J. Franklinit Co.*, 12 N. J. Eq. 66; s. c., 72 Amer. Dec. 387; *Hudnit v. Nash*, 16 N. J. Eq. 550, 555.

Only parties to the original bill are properly parties to a cross-bill. *Oswald v. Givins*, Rich. Eq. (S. Car.) 326.

7. *Tarleton v. Vietis*, 1 Gilm. (Ill.) 470.

As to the averments of the cross-bill: It should state the original bill, the parties thereto, the proceedings thereon, as well as the object of it; also the rights of the party bringing the cross-bill, and the ground on which the plaintiff's claim in the original bill is resisted.¹

A cross-bill must, as to the subject-matter of it, relate only to questions raised by the original bill, or to some matter in aid of a defence to it.²

It is said to be the general rule, that a cross-bill should be filed before publication on the first bill, since both bills should proceed to a hearing together; although the reason of the rule seems hardly to have a sound legal basis, inasmuch as the courts frequently found, as they proceeded with the trial of a cause on the original bill, that they could not administer complete justice without a cross-bill. It is held, however (probably in analogy to the original reason for the existence of the cross-bill), that the court may afterwards direct a cross-bill to be filed.³

2. *Bill of Review*. — A bill of review lies for error apparent on the decree, or (by permission of the court) upon the discovery of new matter of which it must appear that the defendant first had knowledge after publication has passed.⁴ This bill must state the original bill, the proceedings had thereon, the decree, the grievance complained of, and the questions of law raised thereon, or the new matter discovered upon which it is sought to impeach the decree.⁵ Where newly discovered matter is set up as the ground

1. Story's Eq. Plead. (9th ed. by Gould) sec. 401; Hinde's Ch. 53; 1 Harr. Pract. Ch. 136; Mitf. Plead. (2d ed.) 75, 76, 77.

2. Rowan v. Sharp's Rifle Mfg. Co., 33 Conn. 1; Gage v. Mayer, 117 Ill. 632; Kidder v. Barr, 35 N. H. 235; Roberts v. Peavey, 29 N. H. 392.

A cross-bill must be upon some matter not inconsistent with but based upon the equities of the original bill, and is dependent thereon; and it may be merely in aid of the defence to the original bill, or to set up some affirmative claim. Rutland v. Paige, 24 Vt. 181.

A cross-bill which contains matters which have no connection whatever with those involved in the suit upon the original bill, and does not seek relief against the plaintiff to the first suit, is without equity, and must be dismissed. Andrews v. Hobson's Admr., 23 Ala. 219, 239.

A cross-bill is not confined to the issues raised by the original bill, although the matter of the cross-bill must relate to the matter of the original bill. Nelson v. Dunn, 15 Ala. 501; Andrews v. Hobson, 23 Ala. 219.

3. Story's Eq. Plead. (9th ed.) §§ 395, 396; Lube's Eq. Plead. (Pract. Series) 102, § 116.

After hearing had on the original bill, a

cross-bill cannot be filed except by order or permission of the court. Roberts v. Peavey, 29 N. H. 392.

4. Story's Eq. Plead. (9th ed.) §§ 402-420; Lube's Eq. Plead. (Pract. Series) 120, 121, 202, 203, §§ 152, 153, 283, 284; 1 Harr. Pract. in Chan. 137-144; Hinde's Chan. 56; Standish v. Radby, 2 Atk. 177.

"The rules of practice applicable to this subject appear to be, that bills of review must be for error apparent on the face of the decree, or for some new matter of fact relevant to the case, and discovered since publication passed, and which could not have been discovered by reasonable diligence before." Caller v. Shields, 2 Stew. & P. (Ala.) 417; Williams v. Murphy, 1 Port. (Ala.) 40; Cochran v. Rison, 20 Ala. 463.

A bill of review may be brought for errors of law apparent of record, or on the ground of newly discovered evidence or facts, which are material, and would substantially change the result, and which the exercise of reasonable diligence would not have discovered. Barnum v. McDaniels, 6 Vt. 177; Mead v. Arms, 3 Vt. 148; Brainard v. Morse, 47 Vt. 320.

5. Eq. Draughts. by Hughes, p. 445; Lube's Eq. Plead. (Pract. Series) 202, 203, §§ 283, 284; Hinde's Chan. 57; Anon. 1

for impeaching the decree, it must be shown that the matter is relevant and material, and would, if known, have probably occasioned a different determination.¹ So the errors alleged must be purely matters of law, apparent of record.²

A bill of review which seeks relief upon the ground of newly discovered facts must be filed by leave of court, and should not be allowed unless equitable and proper.³ The bill will not lie in behalf of any but parties and privies, as heirs, executors, or administrators.⁴

The prayer of the bill should be that the decree may be reviewed and reversed, or, if carried into execution, some decree of the court is asked whereby the party bringing the bill may be put in the same situation he would have been if the decree had not been executed, or that the original decree may stand when the bill is brought to review the reversal of a former decree.⁵

3. *Bills in the Nature of Bills of Review.*⁶

Ves. Jr. 99; Earl of Carlisle *v.* Globe, Nels. 52; s. c., 3 Ch. 94; Curtis *v.* Smallbridge, 2 Freem. 178; Morris *v.* Neve, 3 Atk. 35; Moon *v.* Moon, 2 Ves. 284, 598; Gould *v.* Tancred, 2 Atk. 534.

1. Livingston *v.* Hubbs, 3 Johns. Ch. (N. Y.) 124.

2. Mellish *v.* Williams, 1 Vern. 166; Lube's Eq. Plead. (Pract. Series) 121, 122, § 152.

3. P. & M. Bank *v.* Dundas, 10 Ala. 661. And should ordinarily be upon oath. Cal-ler, etc., *v.* Shields, 2 Stew. & P. (Ala.) 417.

It must appear that the use of reasonable diligence would not have enabled the party to have discovered the new matter set up as a ground for relief in this bill. Living-ston *v.* Hubbs, 3 Johns. Ch. (N. Y.) 124.

Upon a bill of review the proofs cannot be considered. Putnam *v.* Day, 22 Wall. (U. S.) 60, 65.

4. Gilb. Chan. 186; Story's Eq. Plead. (9th ed.) § 409. But see Chaworth *v.* Bush, 4 Ves. 564.

It has been said that a devisee of a testa-tor, against whom a decree is made, can bring a bill for review, and that an assignee can in no case exhibit such bill. Slingsby *v.* Hale, 1 Chan. Ca. 123; Barbonne *v.* Searle, 1 Vern. 417. But see Story's Eq. Plead. (9th ed.) § 409.

5. 1 Harr. Pract. in Chan. 139; 2 Madd. Chan. 412, 413; Story's Eq. Plead. (9th ed.) § 420, citing Dexter *v.* Arnold, 5 Mason (U. S.), 308, 309.

6. The decree must have been signed and enrolled; and herein, says *Justice Story*, lies the difference between *Bills of Review* and *Bills in the Nature of Bills of Review*. We find, however, in Hinde's Chancery the following headings: "Of *Bills of Review* to examine and reverse Decrees *signed and enrolled*," "Of *Bills in the Nature of Bills*

of Review to examine and reverse Decrees either *signed and enrolled or not*, brought by Persons not bound by the Decree." Story's Eq. Plead. (9th ed.) §§ 421-424; Hinde's Chan. 56, 66. And it is said in Mitford's Pleadings (2d ed.), 83, that, "If a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree by bill in the nature of a bill of review. The practice, however, in nearly all the States is subject to particular statutes and rules of court as to motions, petitions for rehearing, etc."

"In some of the States where the Eng-lish practice of enrolment has not been adopted, the ending of the term in chan-cery is considered as having the same effect as the enrolment, upon the right to bring a petition for rehearing; as, therefore, the term in chancery is considered as open until the next one begins; although the sittings of the court may have closed, the decree will not be regarded as enrolled, so as to be beyond the power of the court to rehear until the commencement of the next term; after that time the proceeding must be by bill of review." Story's Eq. Plead. (9th ed.) § 421, note a, citing Nowland *v.* Glenn, 2 Md. Ch. 368; Leach *v.* Jones, 11 R. I. 386. Rule 88, U. S. Eq. Rules, provides for petitions for rehearing, that "Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not appar-ent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court

4. *Bills to impeach a Decree on the Ground of Fraud* are said to be similar in many respects to bills of review.¹

It is not doubted that equity may relieve in all cases where a decree has been obtained by fraud or imposition. "For fraud infects judgments at law and decrees of all courts, and annuls the whole proceedings, particularly in the consideration of courts of equity."²

In this bill the plaintiff must state the decree, the proceedings on which it is based, also the circumstances of fraud by which the decree was procured. In framing the prayer, regard must of necessity be had to the character and extent of the fraud and the circumstances of the case.³

5. *Bills to suspend or avoid the Execution of a Decree.*⁴

6. *Bills to carry a Decree into Execution.* — Where, from neglect or otherwise, it becomes impracticable to carry the decree into execution, a bill may be exhibited to execute or confirm the decree, and settle and ascertain the rights of the parties; or, in case some third party claiming in a similar interest to those who were parties to the original bill finds it necessary to have the decree carried into execution in order to determine his own rights, he may obtain relief by this bill, or it may be brought by an assignee of the original parties.⁵

This bill must state the reason and circumstances why the decree has not been and cannot be carried into execution without further order and assistance of the court, and should pray that all necessary acts to be done by the defendant in the premises may be decreed and ordered done.⁶

7. *Bills in the Nature of Bills of Revivor.* — The reason of the existence of this bill is that a devisee or assignee of a party plaintiff might not bring a bill to revive a suit abated by the death of such plaintiff. But their remedy was by a bill in the nature of a bill of revivor.⁷

shall have been entered and recorded, if an appeal lies to the supreme court; but if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." Desty's Fed. Procd. (Pract. Series) 728.

Bills in the nature of bills of review pray that the cause may be reviewed as to the proceedings on the original bill, that the other party may answer the same, and that relief may be granted according to the nature of the case made by the new bill. Hinde's Chan. 66; 1 Harr. Pract. in Chan. 144.

1. Lube's Eq. Plead. (Pract. Series) 203, § 285; *Ex parte Smith*, 34 Ala. 455.

2. 1 Harr. Pract. in Chan. 146; Wells *et al. v. Wall*, 1 Oregon, 295.

3. Lube's Eq. Plead. (Pract. Series) 203, § 285; 1 Harr. Pract. in Chan. 147; Story's Eq. Plead. (9th ed.) § 428; Hinde's Chan. 67; Mitf. Plead. (2d ed.) 84, 85; Penny *v. Martin*, 4 Johns. Ch. (N. Y.) 566.

Where a bill is brought to correct a mistake, the mistake must be set out with certainty. *Coles v. Bowne*, 10 Paige (N. Y.), 526.

4. There is a class of bills which are of rare occurrence, and are known as *Bills to suspend* or avoid the execution of a decree. They are said to be "merely in the nature of a petition in the cause, only that the cause being concluded by the pronouncing of the final decree, the parties must be again brought before the court by an original bill." Lube's Eq. Plead. (Pract. Series) 203, 204, § 286; Story's Eq. Plead. (9th ed.) § 428; Mitf. Plead. (2d ed.) 85.

5. Hinde's Chan. 68; 1 Harr. Pract. in Chan. 148; Mitf. Plead. (2d ed.) 86; Story's Eq. Plead. (9th ed.) §§ 429-432; Coop. Eq. Plead. 98, 99, 100.

6. Lube's Eq. Plead. (Pract. Series) 204, § 286.

7. See title "*Bills of Revivor*," *post*;

In case a party dies whose interest is not determined by his death, but is transmitted in such a manner that the title may be litigated in court, as in case of a devisee, a bill of revivor will not lie; but an original bill in the nature of a bill of revivor may be exhibited. This bill must state the original bill, the abatement and proceedings thereon, and the manner of the transmission of the interest of the party deceased; and the validity of the transmission, as well as the rights secured thereby, must be charged.¹

8. *Bills in the Nature of a Supplemental Bill.*²

(D) ORIGINAL BILLS NOT PRAYING FOR RELIEF. — And next as to *bills not praying relief*. These, as we have seen, are, (1) Bills to perpetuate Testimony. (2) Bills for Discovery.³

1. *Of Bills to perpetuate Testimony.* — These lie when no immediate action can be brought, and the witness is aged or infirm, or likely to die, or for some other reason his evidence is likely to be lost before the plaintiff could avail himself of it, unless such bill could be entertained. Courts allow such bills to prevent a failure of justice. Such bill will lie to aid a trial at law in special cases, even where there can be an immediate investigation, since it may be necessary to preserve evidence which might be lost otherwise.⁴

In a bill to perpetuate testimony, the plaintiff's title ought to be succinctly and clearly shown: all material facts, as manner, place, time, and the like, ought to appear with all necessary certainty.⁵

1 Harr. Pract. in Chan. 149; Mitf. Plead. (2d ed.) 88; Story's Eq. Plead. (9th ed.) §§ 377-387; Lube's Eq. Plead. (Pract. Series) 131, §§ 170, 171; Hinde's Chan. 69.

It has been held that a bill lies in the nature of a bill of revivor to revive and carry into execution a decree against a municipal corporation providing for the abatement by the corporate authorities of a public nuisance; and any citizen of the State might properly interfere as relator. *State v. Mayor, etc., of Mobile*, 24 Ala. 701.

1. Mitf. Plead. (2d ed.) 88; Hinde's Chan. 69; 1 Harr. Pract. in Chan. 149.

2. "If the interest of a plaintiff or defendant suing or defending in his own right wholly determines, and the same property becomes vested in another person not claiming under him, the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but that, by an original bill in the nature of a supplemental bill, the benefit of the former proceeding may be obtained. A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the

court ought to grant the benefit of the former suit to or against the person so become entitled, and pray the decree of the court adapted to the case of the plaintiff in the new bill." Mitf. Plead. (2d ed.) 89, 90.

3. See title "Bills not praying Relief," *ante*.

4. *Bellamy v. Jones*, 8 Ves. 31; *Angell v. Angell*, 1 Sim. & Stu. 83, 89, 90; *Bagnold v. Green*, Cary's Rep. 67; *Dorset v. Girdler*, Pre. Cha. 531; *Cooper's Eq. Plead.* 53; *Hinde's Chan.* 32; 1 Harr. Pract. in Chan. 110; *Story's Eq. Plead.* (9th ed.) §§ 299-310.

Rule 70, U. S. Eq. Rules, provides for the taking of testimony *de bene esse* upon application of the plaintiff, and notice to the adverse party "after any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any of them is a single witness to a material fact." *Desty's Fed. Proced.* (Pract. Ser.) 720.

5. *Jerome v. Jerome*, 5 Conn. 352, 556.

Bill to perpetuate testimony must "state the plaintiff's title to the thing in question, or his interest in the subject, the matter touching which the plaintiff is desirous of acquiring evidence. The interest which the plaintiff has, or pretends to have or claim, to

-2. *Of Bills of Discovery.*—A bill of discovery as distinguished technically from other bills (which are in reality bills of discovery), is one whereby the plaintiff seeks to discover facts resting within the knowledge of the defendant, or to obtain discovery of documents, deeds, etc., in his possession, or in aid of an action at law to enable the plaintiff to prosecute or defend, and to enjoin the prosecution of a cause until discovery is made. A bill strictly of discovery should not pray relief.¹

The facts sought to be discovered by a bill of discovery must be set out with certainty and clearness, and it must also be stated that the defendant has it in his power to make the discovery.²

It must also appear that the defendant's answer is necessary, in order to discover the facts sought for relief by the bill, and that they cannot be otherwise proven.³

contest the title of the plaintiff in the subject of the proposed testimony, that the witnesses are aged and infirm and likely to die before the time of trial can arrive, or that they are about to quit the kingdom, . . . or are beyond sea, or that the facts to be examined are of great importance, and no other but a single witness, although neither aged or infirm, or only two witnesses to be examined, is or are privy to such facts, whereby the plaintiff is in danger of losing his or their testimony, and that the facts about which the examination is sought, cannot be immediately investigated in a court of a law, an examination of the witnesses is then prayed, also a *subpoena* to show cause, if they can, to the contrary; but the bill should pray no other relief." *Eq. Draughts*, by Hughes, 360, citing *Lord Dinsley v. Fitzhardinge Berkely*, 6 Ves. 251; *Allan v. Allan*, 15 Ves. 130. "The facts must be particularly stated." *Bartlett v. Hawker*, cited 1 Madd. Ch. Pr. 193; *Knight v. Knight*, 4 Madd. Rep. 1; *Fitzburgh v. Lill*, Amb. 65; *Bellamy v. Jones*, 8 Ves. 30; *Shirley v. Earl Ferrers*, 3 P. Wms. 77, 6th ed.; *Rearson v. Ward*, 1 Cox, 177; *Harrkin v. Middleditch*, 2 Bro. Ch. Ca. 640; *Lord Cholmondely v. Lord Oxford*, 4 Bro. Ch. Ca. 156; *Rose v. Garmel*, 3 Atk. 439; *Vaughan v. Fitzgerald*, 1 Scho. & Lefr. 316; *Shelley v. —*, 13 Ves. 57.

1. Generally, on this subject, see 3 Amer. & Eng. Ency. of Law, title "Bill of Discovery;" 1 Harr. Pract. in Chan. 115-122; *Hinde's Chan.* 36-42; *Mitt. Plead.* (2d ed.) 52; *Eden on Injunct.* 78; *Hare on Discovery*, 119; *Wigram on Discovery*, 15; *Story's Eq. Plead.* (9th ed.) §§ 311-325; *McIntyre v. Mancius*, 3 Johnoch (N. Y.), 45; *Kittredge v. Claremont Bank et al.*, 1 Woodb. & M. (U. S.) 244.

To sustain a bill for discovery and relief, it must be averred and shown that plaintiffs have not other and sufficient evidence without such discovery. *Norwich &*

Worcester R. Co. v. O'Brien, 17 Conn. 372.

It is sufficient in case of a bill of discovery to compel purchaser for value and without notice to show his title to plead absence of notice. "You cannot attach upon the conscience of the party any demand whatever where he stands as a purchaser, having paid his money, and denies all notice of the circumstances set up in the bill." In the plea it is sufficient to aver lack of notice without denying the facts from which notice was inferred. *Gerrard v. Saunders*, 2 Ves. Jr. 454, 458.

2. *Horton v. Moseley*, 17 Ala. 794.

3. *Perrine v. Carlisle*, 19 Ala. 686; *Horton v. Moseley*, 17 Ala. 794.

"Where the bill is for discovery and relief, the plaintiff must show affirmatively that his right cannot be established at law without the aid of the discovery which he seeks, and the discovery must be established by the answer, in order to entitle the court to maintain the bill for relief. But a party may have a bill for discovery, not only where he is destitute of other evidence to establish his case, but also to aid such evidence, or to render it unnecessary." *Stacy v. Pearson*, 3 Rich. Eq. (S. Car.) 148.

The Frame of the Bill.—"As the object of a court of equity in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If, therefore, the plaintiff in a bill for discovery does not show by his bill a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or liable to be so, and does not also show that the discovery which he prays is material to enable him to support or defend a suit, he shows no title to the discovery, and consequently a demurrer

In a bill for discovery, in aid of a defence at law, the nature of the defence must be stated.¹

It is held in New Hampshire, that, upon the return of an execution unsatisfied, a creditor might maintain a bill in equity for discovery of all the estate, both real and personal, of the debtor; and this is so upon general principles of equity, outside of any statutory provision in that State.²

(E) BILLS NOT ORIGINAL are divided (as has been noted)³ into (1) a Supplemental Bill, (2) a Bill of Revivor, (3) a Bill of Revivor and Supplement.⁴

1. *Of Supplemental Bills.* — A supplemental bill will lie when any matter arises subsequent to the commencement of the suit which gives a new interest to a person not a party to the bill, or occasions a change of interest as to the parties, which does not take away plaintiff's own entire right to sue, or, in case of more than one party plaintiff, which does not take away the rights of all the plaintiffs to sue. A supplemental bill will also lie when matter arises subsequent to the filing of the original bill whereby the plaintiff would be entitled to *more extensive relief* than under the original bill. This should be brought in by way of a supple-

will hold." *Eq. Draughts.* by Hughes, 373; *Young v. Colt*, 2 Blatchf. (U. S.) 373, 376; *Brown v. Swann*, 10 Pet. (U. S.) 497, 501.

"To the maintenance of a bill upon the ground of discovery, it is not sufficient simply to allege that there are facts of which the complainant cannot make proof without a discovery. It must appear that those facts are *material* in making out the right to relief." *Dickinson v. Lewis*, 34 Ala. 638.

It is said in Connecticut, that the practice of alleging that the matter sought to be discovered of the defendant rested solely in his own knowledge, and that plaintiff could not prove them otherwise than by the discovery sought, rested upon the principle early declared that defendant could not be called upon to discover, on oath, the matters charged in the bill, unless no other evidence of the matters could be had, and, after a disclosure, the plaintiff is not permitted to produce other evidence of the facts sought to be discovered of the defendant, although it was thereafter declared by statute in that State that such disclosure of defendant should not be conclusive. *Pollard v. Lyman*, 1 Day (Conn.), 156.

And it is now provided in that State, that "When a plaintiff in an action for equitable relief shall require of the defendant a discovery in oath respecting the matters alleged in the plaintiff's complaint, the disclosure by the defendant shall not be deemed conclusive, but may be contradicted like any other testimony according to the practice in equity." *Gen. Stat. Rev.* 1887, 251, § 1062.

"A bill for a discovery and injunction at law must state some particular matter, which the complainant has the right to seek discovery of as material to his defence, and without which he cannot proceed to trial. A mere inquiry, because the grounds of the suit at law are unknown, cannot be maintained, being a fishing-bill." It must also appear that the aid sought is required. *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 292.

1. *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280.

A bill of discovery, in aid of an action pending in another court, will not be sustained when that court can itself compel the discovery sought. *Rindskopf v. Platto*, 23 Reporter, 76.

Where a bill is brought for discovery and relief, and the relief is demurrable, the bill fails. *Mellish v. Richardson*, 12 Price, 530; *Baker v. Mellish*, 10 Ves. 544.

Where plaintiff is entitled to discovery only, and prays relief, a demurrer lies. *Albrecht v. Sussman*, 2 Ves. & B. 328; *Gordon v. Simpkinson*, 11 Ves. 509; *Collis v. Swayne*, 4 Bro. C. C. 480.

There are numerous cases in England sustaining the point, that where a bill is for discovery and relief a demurrer will be sustained; but a more liberal doctrine prevails in the United States. See *Story's Eq. Plead.* (9th ed.) § 312, and discussion in the note.

2. *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 228.

3. See title "Bills not Original," *ante*.

4. *Eq. Draughts.* by Hughes, 401-425.

mental bill, provided he is entitled under the original bill to one kind of relief; the rule being, that, if the court obtains jurisdiction for the purpose of temporary relief, it may retain it generally, as in case of a bill for *ne exeat* and injunction.¹

1. *Candler v. Petit*, 1 Paige (N. Y.), 168; *Eq. Draughts*, by Hughes, 402; *Story's Eq. Plead.* (9th ed.) §§ 332-344.

A supplemental bill is brought to add parties, or put some new fact in issue when too late to amend. *Goodwin v. Goodwin*, 3 Atk. 370.

Supplemental bill will not lie where amendment can be had. *Baldwin v. Mac-koun*, 3 Atk. 317.

Defendants may amend by supplement in the following cases:—

"1. In small and immaterial matters."

"2. Where a mistake has crept into the engrossment."

"3. Where new matter has been discovered since the original answer put in."

"4. In cases of surprise."

"5. In mistakes of names." *Stout v. Shew*, 1 Pinn. (Wis.) 438, 443, citing,—

(1) *Burney v. Chambers*, Bunby, 248;

(2) *Gainsborough v. Gifford*, 2 P. Wms. 426;

(3) *Dolder v. Bank of England*, 10 Ves. 285;

(4) *Verney v. McNamara*, 1 Eq. Cas. Abr. 29;

(5) *Griffiths v. Wood*, 11 Ves. 63. And citing, as cases where not allowed, *Pierce v. Grove*, 3 Atk. 522; s. c., *Amb. 65*; 2 *Anst.* 363.

(The numbers to the citations correspond to those above under "Cases.")

All matters subsequent to the original bill are brought in by way of a supplemental bill, or a bill of revivor. *Brown v. Higden*, 1 Atk. 291.

In a suit against both husband and wife, and the suit becomes defective by the death of the husband, whereby a new interest is created to the wife, a supplemental bill should be brought. *Neale v. Smith*, 1 Jac. & Walk. 665.

Events occurring subsequent to filing the original bill are properly the subject of a supplemental bill. *Jones v. Jones*, 3 Atk. 217; *Barringer v. Burke*, 21 Ala. 765; *Hill v. Hill*, 10 Ala. 527.

A supplemental bill cannot, by the adding of matters subsequent to the commencement of the suit, give life to an original bill so defective as that no valid decree can be based thereon. *Candler v. Petit*, 1 Paige (N. Y.), 168.

"A strictly supplemental bill is always based on facts that have occurred since the filing of the bill. These may be necessary to aid the complainant in obtaining the relief sought, or in obtaining new or

additional relief." The court in *Allen v. Taylor*, 2 Green's Ch. (3 N. J. Eq.) 436.

A supplemental bill will not lie where amendment can be had. *Baldwin v. Mac-koun*, 3 Atk. 817.

Where the facts arising subsequent to the commencement of the action are sufficient of themselves to form a ground of action without reference to the original bill, then the plaintiff should file a new bill instead of a supplemental one. *Milner v. Milner*, 2 Edw. Ch. (N. Y.) 114. In *Prouty v. Lake Shore, etc., R. Co.*, 85 N. Y. 272, this is distinguished, the court saying "that the facts were entirely distinct from the original cause of action occurring subsequent thereto, and might well constitute another and new cause of action."

As to the new matter which arises subsequent to the inception of the suit and before decree granted, this refers to some interest created after the suit was brought in favor of some one not a party to the original bill, the difference between a bill of revivor and a supplemental bill in this respect being, that where, after a suit has abated, if the same interest is continued in the legal representative of the deceased, or the same right preserved as in case of the marriage of a *feme sole*, here a bill of revivor lies; but where a new party is added in whom a new interest has been created, then a supplemental bill lies. Amendments, however, are so liberally allowed by the courts of the several States of the United States that the necessity for a supplemental bill exists in only a few cases, the distinction perhaps being that a person may amend where he might have inserted the same matter in the original bill; but where a new matter has arisen subsequent to bringing the bill, then this should be stated in a supplemental bill; so also where the case has progressed so far that an amendment cannot be made, then a supplemental bill will lie; and if the facts set up in a supplemental bill are such as ought to come in by way of amendment, then this is ground for demurrer. *Stafford v. Howlett*, 1 Paige (N. Y.), 200; *Candler v. Petit*, 1 Paige (N. Y.), 168.

It is held in Vermont that matters arising subsequent to filing a bill, and when the parties are at issue, may properly be brought in by plaintiff by amendment or supplemental bill upon leave of court, or, if the defendant, then a cross-bill may be filed. *Blaisdill v. Nason*, 16 Vt. 179, 186.

Rule 57, U. S. Eq. Rules, provides that

New parties may be added by supplemental bill, although this is most generally done by amendment.¹ As to the allegations, it is said to be a common rule that every matter entitling the plaintiff to relief must be averred, and matters subsequently occurring cannot be set up by way of a supplemental bill to supply a defect arising upon the original bill in not properly charging the facts relied on.²

Statements in the original bill should not be repeated in the supplemental bill. The prayer only of the bill should be stated, or, if there has been a decree, then the decree.³

A supplemental bill is filed by leave of court,⁴ and, when allowed, is considered by the court as an addition to and part of the original bill, and, together with that, constitutes one amended bill.⁵

"Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by the judge of the court." *Desty's Fed. Proced. (Pract. Series)* 710. See also Rule 58, U. S. Eq. Rules; title "Revivor," *post*.

1. *Dow v. Jewett*, 18 N. H. 240, 359.

Where it is desired to make a child who is born pending the suit, a party, this must be done by way of a supplemental bill, and not by amendment. *Anon.* 2 Moll. 312; *Hildyard v. Field*, 25 L. T. 784; *Anon.* 2 Moll. 312. But see *Shippen v. Brown*, 1 Jur. N. S. 698; *Leyland v. Leyland*, 10 W. R. 149; 6 L. T. N. S. 149; *Knox v. Knox*, 2 Ir. Eq. 33; *Egremont v. Thompson*, 4 L. T. Ch. 448; 17 W. R. 900 (decided under 15 & 16 Vict. c. 86, s. 52).

In case of husband and wife defendants, and death of husband, whereby the suit becomes defective, a supplemental bill is necessary, and answer put in during coverture is not binding upon her. *Neale v. Smith*, 1 Jac. & Walk. 665, case where wife bound by answer; *Shelberry v. Briggs*, 2 Vern. 249.

Where supplemental bills in the nature of a bill of revivor seeks only to add new parties as defendants, then it is not necessary to make the defendants to the original bill parties to the supplemental bill. *The Farmers' Loan & Trust Co. v. Seymour*, 9 Paige (N. Y.), 538; 1 Harr. Pract. in Chan. 125

2. *Land v. Cowan* 19 Ala. 297; *Vaughan v. Vaughan*, 30 Ala. 329.

3. *Ongé v. Truelock*, 2 Moll. 31.

"A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray that all defendants may appear and answer the charges it contains. For if the supplemental bill is not for discovery merely, the cause must be heard upon the supplemental bill at the same time it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter." *Eq. Draughtsman* by Hughes, 402.

Where, without objection of defendant, and with leave of court, a supplemental or amended bill was filed in a cause for divorce, setting up the facts alleged in the original bill, it was held that this was a ground for admitting testimony of facts, etc., coming after filing the original bill, and before the filing of the supplemental bill, in support of plaintiff's case. *Feigley v. Feigley*, 7 Md. 537.

When the bill shows sufficient to give the court jurisdiction, the plaintiff is not confined to the relief sought, but may, by a supplemental bill, set up matter occurring after the filing of the original bill, which would entitle him to other or more extensive relief. *Candler v. Petit*, 1 Paige (N. Y.), 168.

4. *Bowie v. Minter*, 2 Ala. 406.

5. *Potier v. Barclay*, 15 Ala. 439; *Gillet v. Hall*, 13 Conn. 426, 434; *Bowie v. Minter*, 2 Ala. 406; *Ramey v. Green*, 18 Ala. 771; *Smith v. Bryan*, 3 Madd. 428; 1 Harr. Pract. in Chan. 91.

The supplemental bill and original bill are heard at the same time, unless the cause has already been heard: then gen-

A party who, *pendente lite*, takes an assignment from a party in interest in the suit, may file a supplemental bill to make himself a party.¹

When the filing of a supplemental bill without leave of court is irregular, held that, in the absence of an objection to such irregularity, it will be considered as waived.²

Where the original bill failed as to the injunction, a supplemental bill for an injunction based on subsequent facts was permitted to be filed.³

Whenever a supplemental bill can equally subserve the purposes of justice, it is better to file it than bring an original bill, by reason of the expense; and this holds although two kinds of relief are asked for, which are different in character, but which grow out of the same instrument, and spring from the same privity between the parties, as in a case where the relief asked for in both the original and supplemental bills might have been properly prayed for in the original bill had the facts existed at the time of bringing it; but as they arose subsequently, and thereby entitled the plaintiff to more extensive aid, they might properly be made subject-matter of a supplemental bill; and such bill containing such facts, and praying such relief, was allowed to be filed.⁴

2. *Of Bills of Revivor.* — These are a continuance of the original bill, when by death of some party, or the marriage of a female plaintiff, the suit has abated.⁵

erally, but not necessarily, the hearing is on the supplemental bill. 1 Harr. Pract. in Chan. 125.

1. *Whitbeck v. Edgar*, 4 Sandf. Ch. (N. Y.) 428.

2. *Allen v. Taylor*, 3 N. J. Eq. 437.

3. *Candler v. Petit*, 1 Paige (N. Y.), 168; *Allen v. Taylor*, 2 Green's Ch. (N. J.) 436; *Bostwick v. Menck*, 8 Abb. Pr. N. S. (N. Y.) 170.

4. *Allen v. Taylor*, 3 N. J. Eq. (2 Green's Ch.) 437.

5. *Equity Draughts*, by Hughes, 401; *Story's Eq. Plead.* (9th ed.) §§ 354-376; *Wharam v. Broughton*, 1 Ves. 179, 182; 1 Harr. Pract. in Chan. 126-133; *Lube's Eq. Plead.* (Pract. Series) 131-136, 133, §§ 168-177; *Clark v. Mathewson et al.*, 12 Pet. (U. S.) 164, 171; *Cullum v. Batre*, 2 Ala. 415.

A bill of revivor lies in behalf of either plaintiff or defendant. *Finch v. Winchelsea*, 1 Eq. Abr. 2.

"Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains as an heir at law, executor or administrator, so that the title cannot be disputed at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be

continued by bill of revivor merely. If a suit abates by the marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed. The person of the husband is the sole fact to be ascertained, and therefore the suit can be continued in this case by bill of revivor merely." *Eq. Draughts*, by Hughes, 413.

Rule 56, U. S. Eq. Rules, provides that "Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of *subpœna* shall as of course be issued by the clerk, requiring the proper representatives of the other party to appear, and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course." *Desty's Fed. Proced.* (Pract. Series) 709.

Rule 58, U. S. Eq. Rules, provides that "It shall not be necessary, in any bill of

So much of the original bill should be alleged, in a bill to revive against new parties, as to show plaintiff's title to revive.¹

When a bill of revivor, or a bill in the nature of revivor, is filed by one who was a stranger to the original bill, all the parties to the original bill, who are interested in the further proceeding, should be made parties thereto, either as plaintiffs or defendants.²

A bill may be a compound bill of review of supplement and of revivor, and is maintainable as such.³

3. *Of Bills of Revivor and Supplement.* — These are not only to revive the original suit, but to supply defects, or to set up new facts arisen subsequent to the institution of the suit.⁴

revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it." *Desty's Fed. Proced.* (Pract. Series) 710.

1. *Phelps v. Sproule*, 4 Sim. 318.

"A bill of revivor must state the original bill, and the several proceedings therein, and the abatement. It must show a title to revive, and charge that the cause ought to be revived and stand in the same condition with respect to the parties in the bill of revivor as it was with respect to the parties in the original bill at the time the abatement happened, and it must pray that the suit may be revived accordingly." *Eq. Draughtsman*, by Hughes, 413; *Adamson v. Hall*, Turn. R. 258.

2. *Farmers' Loan and Trust Co. v. Seymour*, 9 Paige (N. Y.), 538.

Upon death of co-defendant and abatement of bill, the legal representative of co-defendant is properly made a party by a bill of revivor, and not by amendment. *Webb v. Wardle*, 5 N. R. 426.

Where a suit is brought by members of a corporation, in their individual characters, the suit abates and becomes defective; otherwise in case where brought by the corporation. *Blackburn v. Jepson*, 3 Swan, 138.

In a suit by both husband and wife, the wife is not bound to prosecute upon the husband's decease. *Breedon v. Vaughan*, Dick. 566.

Where suit is abated by death of one of the parties, it is only necessary in a bill of revivor to make the representatives of the deceased parties defendants: the other parties to the original bill need not be made parties to the bill of revivor. *Farmers' Loan & Trust Co. v. Seymour*, 9 Paige (N. Y.), 538.

Where a co-defendant dies, if it is intended to make his personal representative a party, a bill of revivor must be brought. *Webb v. Wardle*, 5 N. R. 426.

Where a suit abates by the death of a sole plaintiff, an order to revive will be granted against his administrator. *Ward*

v. Shakeshaft, 1 Dr. & Sm. 607; 7 Jur. N. S. 1227.

Upon death of sole plaintiff, before decree, and after hearing, an order to revive will be made. *Petre v. Petre*, 1 W. R. 362; 1 Drew. 371.

This case comes under the stat. 15 & 16 Vict. c. 86, § 53.

An order to revive was had against the personal representative of a defendant who had deceased before answer made. *French v. Semple*, 35 Beav. 376.

Where a defendant dies, his personal representative cannot be brought before the court by amendment. *Webb v. Wardle*, 11 Jur. N. S. 278.

An order may be made to revive against the devisee of a sole plaintiff who died after the decree. *Bedford v. Bedford*, 35 Beav. 342.

A devisee has not such a privity to the devisor as to enable him to bring a bill of revivor. *Backhouse v. Middleton*, 3 Ch. Rep. 39.

This, however, is not so broad a doctrine as would seem; since the devisee may bring an original bill, being in the nature of a bill of revivor, and thereby obtain his rights under a decree. *Clare v. Wordell*, 2 Vern. 548.

A bill of revivor lies in a suit against a man and his wife where the husband dies. *Pate v. Frevil et ux. et al.*, Cho. Cas. in Chan. (Reprint 1870) 120.

A bill of revivor may be had on behalf of creditors. *Pitt v. Richmond*, 1 Eq. Abr. 3.

An assignee of a lease cannot maintain a bill of revivor in a suit *de* same. *Cheesebroke v. Haselwood*, Choyce, Cas. in Ch. (Reprint of 1870) 147.

A question as to justice of the decree should not be raised by answer to a bill of revivor. *Clare v. Warden*, Dick. 20.

3. *Whiting v. Bank of the United States*, 13 Pet. (U. S.) 6, 13.

4. *Eq. Draughtsman* by Hughes, 401; *Coop.* 84; *Mittf. Plead.* (2d ed.) 65, 66; *Story's Eq. Plead.* (9th ed.) § 387; *Bowie v. Minter*, 2 Ala. 412.

A party may introduce new matter into a bill of revivor and supplement to supply defects in the original bill arising by reason of the occurrence of subsequent events, but only when there is a case made by the plaintiff upon the original bill.¹

V. Nature and Modes of Defence. — 1. *Nature of Defence.* — Justice Story divides defences in equity into two kinds: *First*, those which do not go to the merits of the case, but are merely dilatory in that they suspend or avoid or dismiss the suit; *Second*, those which go to the merits of the case, and seek to avoid and overthrow the plaintiff's bill of action, and are peremptory and permanent.²

These defences are further divided: the first, or those which are merely dilatory, into four parts; viz., (1) to the jurisdiction; (2) to the person, either plaintiff or defendant; (3) to the form of proceedings; and (4) that the pendency of some former suit prevents the carrying on of the action. The second, or those peremptory and permanent, are divided into two parts, — the one which denies the plaintiff's right to bring any suit as that the plaintiff has no claim, or the defendant no interest, or that there is a want of necessary privity between the parties; the other part being, that, whatever original right existed, it has determined, either by act of the parties or by operation of law.³

2. *Modes of Defence.* — The modes of defence available to a party against whom the bill is exhibited are, (1) demurrer, (2) plea, (3) answer, (4) disclaimer, (5) by two or more of them combined.

(A) DEMURRERS. — 1. *As to Demurrers generally.* — A demurrer generally lies for some defect apparent upon the face of the bill, by which the party setting up the demurrer asks the judgment of the court whether he shall be compelled to answer, and may be to the whole bill or to some particular part. A demurrer admits the truth of all well-pleaded facts, but denies that the plaintiff has a right to obtain relief by his bill.⁴

It is a compound of the two bills, and, in its frame and procedure thereon, reference must be had to this fact. Hinde's Chan. 51.

1. Eastman v. Batchelder, 36 N. H. 141, 154.

2. Story's Eq. Plead. (9th ed.) § 434.

3. Story's Eq. Plead. (9th ed.) §§ 434, 435.

4. 1 Harr. Pract. in Chan. 280; Hinde's Chan. 146, 147; 2 Madd. Chan. 224; Hughes's Eq. Draughts. chap. x. p. 622; East India Co. v. Henchman, 1 Ves. Jr. 289.

"A demurrer is an allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that, as they are therein set forth, they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason apparent on the face

of the bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer." Story's Eq. Plead. (9th ed.) § 446.

The following are the different kinds of demurrers noted in Hughes's Equity Draughtsman, which see, also forms there given: —

Demurrer to a bill of interpleader for the want of the necessary affidavit and also for want of equity.

Demurrer to a bill for the examination of witnesses *de bene esse*, the bill not alleging that an action has been commenced, or that there is any impediment to an action being brought.

Demurrer for multifariousness.

Demurrer for want of equity and also

Where the objection to being compelled to answer is apparent on the face of the bill or adverse pleading, so that no question of fact can arise, this is reached by demurrer.¹

A demurrer admits facts, not matters of law, and such facts only as are well pleaded.²

A demurrer begins in the old forms by protestation; and the several causes of demurrer, whether to the whole or a part of the bill, must be expressed; and if it be to a particular part, then it must clearly state what part is meant to be covered.³

for multifariousness to a bill for discovery in relation to two distinct and several actions at law against the plaintiff in equity.

Demurrer for want of parties to a bill by creditor of a testator.

Demurrer for want of parties.

Demurrer to so much of a bill as sought a discovery which might subject the defendant to a charge of compounding a felony, accompanied by an *answer* to other parts of the bill.

Demurrer on the ground that the plaintiff does not appear by the bill to have proved the will of his testator.

Demurrer to part of a bill that plaintiff's remedy is at law respecting a part of the premises; that he has shown no title to the other part: and *plea in bar* as to so much of the bill as sought to set aside the conveyance of other part of the premises; of the indentures by conveyance, by lease, and release, for a valuable consideration; supported by an *answer* denying fraud or any undue influence having been used.

Demurrer to an amended bill, the plaintiff's title to redeem having been obtained after filing of the original bill, and the *answer* to it.

Demurrer for want of equity to a supplemental bill.

"The person asking interference of a court of equity, is not bound, as the price of such interference, to bring the whole matter into equity. Thus, where a bill was filed to restrain a defendant from setting up a certain plea in an action at law on equitable grounds which the plaintiff might have equally availed himself of at law, it was held by Lord Westbury, C., that it was not demurrable merely because it did not go on to pray compensation on any other consequential relief in equity." White & Tudor's Lead. Cases in Eq. part 2, vol. 2, 1300.

"Upon a demurrer, every reasonable presumption is to be made in favor of, rather than against, the bill. It is only in cases where it clearly appears from the face of the bill that the complainant's equity is barred, that the bill will be dismissed upon demurrer for that cause." The court in *Lincoln v. Purcell*, 2 Head (Tenn.), 143.

That the defendant has some interest, must appear, or demurrer will lie. *Fenton*

v. Hughes, 7 Ves. 287; *King of Spain v. Machado*, 4 Russ. 225, 240; *Clarkson v. De Peyster*, 3 Paige (N. Y.), 335.

It must appear from the bill that a party defendant has an interest in the subject-matter of the bill, or a general demurrer will lie. *Crane v. Deming*, 7 Conn. 387.

In addition to an interest in the suit, the plaintiff must have a formal title, or demurrer will lie. *Tourton v. Flower*, 3 P. Wms. 369, 371.

1. Lube's Eq. Plead. (Pract. Series) 43, 44, 147, 207, §§ 22, 24, 189, 190, *et seq.*

"The causes of demurrer are merely upon matter in the bill, or upon the omission of matter, which, by the rules of the court, ought to be therein, or attendant thereon, and not upon any foreign matter alleged by the defendant. The principal ends of a demurrer are to avoid a discovery which may be prejudicial to a defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends be attained, there is little use in the demurrer." Hinde's Chan. 147.

As a general rule, what is good as a defence, by way of plea, is also good as a demurrer, if the facts sufficiently appear by bill. Hinde's Chan. 149.

2. *Hall v. Dana*, 2 Aik. (Vt.) 381; *Gage v. Bailey*, 115 Ill. 646; *Gr. Tower M. Mfg. etc., Co. v. Cady*, 96 Ill. 430; *Nancy v. Trammel*, 3 Mo. 306; *Dillon v. Barnard*, 21 Wall. (U. S.) 430, 437; *Thompson v. Nat'l Bank*, 106 Mass. 128; *Pearson v. Tower*, 55 N. H. 215.

Only so much of the bill as the demurrer extends to, is taken as true; that is, every thing necessary to support the plaintiff's case, which is well charged in the bill. So if a defendant obstinately insists upon his demurrer, and refuses to answer where the court is of opinion that sufficient matter is alleged to oblige him to answer, and for the court to proceed upon, the court will decree the matter of the plaintiff's bill. 1 Harr. Pract. in Chan. 293, 294.

3. Eq. Draughts. by Hughes, ch. x. p. 623; *Devonsher v. Newenhara*, 2 Scho. & Lef. 199; Hinde's Chan. 149; 1 Harr. Pract. in Chan. 294.

The old forms contain the following words: "This defendant, by protestation,

There may be separate demurrers to separate and distinct parts of a bill, or there may be a demurrer to the whole bill; or to a part only.¹

A demurrer cannot be good in part, and bad in part, nor good to part of the bill only when made to the whole bill; or when only made to a part, it must be good to the full extent of the part which it covers, or it will not hold.²

In case the whole matter should be exhibited here, if the plaintiff brings his bill for a part only, this is cause for demurrer, for causes of action should not be split; and this rule obtains to prevent multiplicity of suits.³

A defendant cannot demur and plead or demur and answer to the same matter, for the answer will overrule the demurrer.⁴

A demurrer may be for some cause which is only a matter of mere form, occasioned by a slip, inaccuracy, or mistake in the bill, which being formal only may be amended in these particulars upon leave of court.⁵

A demurrer should be filed in proper time. If it is not put in till the pleading and evidence are in, and the case is submitted for a final decree, it is too late, and especially so where a clear case for equitable relief is presented by the trial.⁶

2. *Demurrers, General and Special.* — A general demurrer is to the whole bill, and sets up no particular cause. If there exists some special matter which is cause for demurrer, this is met by a special demurrer.⁷

3. *Demurrer, Ore Tenus.* — Where the defendant sets up a demurrer, he will not be confined to the causes assigned therein, but may demur *ore tenus* for other causes.⁸

4. *Demurrers to Bills of Relief.* — We shall next consider demurrers under the following heads: (1) Demurrers to Bills of Relief, (2) Demurrers to Bills of Discovery, (3) Demurrers to Bills not Original.

not confessing or acknowledging all or any of the matters or things mentioned to be true in such manner and form as the same are thereby set forth and alleged, doth demur," etc. Hinde's Chan. 168, *et seq.*; Hughes, Eq. Draughts. 623, 624.

1. Eq. Draughts. by Hughes, 623.

2. Story's Eq. Plead. (9th ed. by Gould) secs. 443, 692; 1 Harr. Pract. in Chan. 294; Baker v. Pritchard, 2 Atk. 388, 389; The mayor, etc., of London v. Levy, 8 Ves. 403; Hankin v. Middleditch, 2 Bro. Chan. 641; Kuypers v. Reformed Dutch Church, 6 Paige, Ch. (N. Y.) 570; Shed v. Garfield, 5 Vt. 39.

A demurrer to the whole bill, with exception to a small part, is good as to form. Hicks v. Raincock, 1 Cox, 40; Lube's Eq. Plead. (Pract. Series) 224.

3. Purefoy v. Purefoy, 1 Vern. 29.

4. Jones v. Strafford, 3 P. Wms. 30; 2

Madd. Chan. 226; Miller v. Furse, Bail. Eq. (S. Car.) 187.

If one defendant demurs, and his co-defendant pleads, the plea does not overrule the demurrer. Dakin v. Union Pacif. R. Co., 5 Fed. Rep. 665.

5. Hinde's Chan. 163.

6. Trapnall v. Hill, 31 Ark. 345, 355.

7. Story's Eq. Plead. (9th ed.) § 455.

A special demurrer should specifically designate the parts intended to be covered by it. Atwill v. Ferrett, 2 Blatchf. (U. S.) 39.

8. Vanhorn v. Duckworth, 7 Ired. Eq. (N. Car.) 261; Robinson v. Smith, 3 Paige (N. Y.), 222; Boyd v. Hoyt, 5 Paige (N. Y.), 65; 2 Madd. Chan. 227, citing Pitts v. Short, 17 Ves. 213. *Contra*, Broderip v. Phillips (note to 1 Vern. p. 78, note 1); Tourton v. Flower, 3 P. Wms. 371; Durant v. Redman, 1 Vern. 78; Lube's Eq. Plead. (Pract. Series) 226.

First, of demurrers to bills of relief. These are (1) to the jurisdiction, (2) to the person, (3) on account of deficiency in the frame of the bill or in its substance.¹

a. Of Demurrers to the Jurisdiction.—These may be, that no relief can be granted in any court of justice;² or, that the matter is properly cognizable in a court of law, and therefore not within the jurisdiction of a court of equity;³ or, that some other court of equity possesses sole jurisdiction.⁴

b. Of Demurrers to the Person.—As to who are proper parties to sue and be sued in equity, has been fully discussed.⁵ And we will only add here, that if those incapable to sue alone exhibit a bill, and it appears upon its face that such incapacity exists, and

1. 2 Madd. Chan. 229; Story's Eq. Plead. (9th ed.) § 466.

The divisions given in Mitford's Pleadings (2d ed. 102) correspond very nearly with those given in 1 Harrison's Pract. in Chan. (280-296), only that in the latter work there does not seem to be any special application to bills of relief as distinguished from bills of discovery and bills not original. Mitford's division is as follows (Bills of Relief): (1) That the subject is not within the jurisdiction of a court of equity; (2) that some other court of equity has the proper jurisdiction; (3) that the plaintiff is not entitled to sue by reason of some personal disability; (4) that he has no interest in the subject, or no title to institute a suit concerning it; (5) that he has no right to call on the defendant concerning the subject; (6) that the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff; (7) that for some reason founded on the substance of the case the plaintiff is not entitled to relief; (8) that the bill is deficient to answer the purpose of complete justice; (9) that distinct objects are confounded in the same bill.

2. This question, it would seem, could hardly arise in the United States, since ample provision is made by the Constitution, wherein the judicial power is extended so as to cover such cases which may arise principally in matters purely of a political nature, or those of disputed boundaries between the States. For a full discussion on this point, see Story's Eq. Plead. (9th ed. by Gould) secs. 468-472, citing *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Soulard v. United States*, 4 Pet. (U. S.) 511; *United States v. Percheman*, 7 Pet. (U. S.) 51; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Worcester v. Georgia*, 6 Pet. (U. S.) 515; *Carneal v. Banks*, 10 Wheat. (U. S.) 181; *Fairfax v. Hunter*, 7 Cranch (U. S.), 603; *New York v. Connecticut*, 4 Dall. (U. S.) 3; *Rhode Island v. Massachusetts*, 13 Pet. (U. S.) 23; s. c., 14 Pet. (U. S.) 210.

3. Eq. Draughts. by Hughes, 622-640; *Hinde's Chan.* 155; *Mitf. Plead.* (2d ed.) 103 *et seq.*; 1 Harr. Pract. in Chan. 282 *et seq.*; Story's Eq. Plead. (9th ed.) §§ 472-485.

A bill will be dismissed upon demurrer where it appears that the plaintiff has a full and complete remedy at law. *Aholtz v. Gotha*, 114 Ill. 241.

"That an objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer, is so well established that it has been constantly assumed." *Farley v. Kittson*, 120 U. S. 303, 315, 316, citing *Billing v. Flight*, 1 Madd. 230; *Steff v. Andrews*, 2 Madd. 6; *Varick v. Dodge*, 9 Paige (N. Y.), 149; *Phelps v. Garrow*, 3 Edw. Ch. (N. Y.) 139; *Rhode Island v. Massachusetts*, 14 Pet. (U. S.) 210, 258, 262; *National Bank v. Insurance Co.*, 104 U. S. 54, 76.

A general demurrer for want of equity will be overruled "unless the court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill can make it a proper subject of equitable jurisdiction." *Bleeker v. Bingham*, 3 Paige (N. Y.), 246.

General demurrer for want of equity lies where one is made a party who has no interest. *Hodge v. North. Missouri R. Co.*, 1 Dill. (U. S.) 104.

4. This question is one concerning which no difficulty ought to be experienced, as the jurisdiction of the several courts of the United States, and the different States, is well defined. Story's Eq. Plead. (9th ed.) §§ 490-492; 1 Harr. Pract. in Chan. 287.

In order to show that the (United States) court has jurisdiction, a bill against a corporation should state in the introduction, or stating part, that the corporation was brought into existence by the laws of another State. This is properly stated in the introduction, but is sufficient if shown anywhere in the pleadings. *Muller v. Dows*, 94 U. S. 444.

5. See title "Parties," and sub-titles thereto, *ante*.

no next friend or proper legal custodian is named, this is cause for demurrer, or if the parties are sued, or sue, in the wrong capacity, these are all grounds for demurrer, provided always and of course, that the defect is apparent on the face of the bill.¹

c. Next, of *Demurrers to the Matter of the Bill*. — These relate both to substance and form, and are, as to substance, for want of interest in the plaintiff or defendant in the thing demanded by the bill, or that the defendant is not answerable to the plaintiff.

(1) *Demurrers as to Substance*. — It is material that the plaintiff must show in the bill, that, as to himself, he has an interest in the subject of the suit, and a right to bring the same, also some claim of interest in the defendant whereby he is a necessary party, and sufficient interest to make him liable to the plaintiff's demands.² It must also be shown by the bill that the defendant is one upon whom plaintiff has a right to call for his demand; for if it do not appear that he is liable, this is a good ground for demurrer. This may exist where there is a want of the necessary privity between the parties.³ We have already stated what is necessary to be alleged in order that the bill may be sustained.⁴

(2) *Of Demurrers as to Form*. — These are for uncertainty, want of proper parties, and multifariousness.

(a) *For Uncertainty*. — In framing the bill, care must be taken to state the case with sufficient certainty as to enable the defendant to know what he has to answer, and the court to clearly understand what is claimed by the bill; for if the bill be uncertain in this respect, or is loosely or inartificially drawn, this is ground for demurrer.⁵

(b) *For Want of Proper Parties*. — This is good cause for demurrer when apparent on the face of the bill. We have sufficiently shown, under the head of parties, the reasons of the rule which requires all who are interested to be made parties in suits in equity, and have also shown the exceptions to the rule; so that it is unnecessary to do more here than note a few cases, remembering that a full examination of the text-books and the decisions indicate that no inflexible rule can be given which shall determine in all cases who should be made parties, the matter being largely in the discretion of the court, and subject to rules and statutes relating to amendments, which are liberally allowed.⁶

1. 1 Harr. Pract. in Chan. 281; Hinde's Chan. 151; Story's Eq. Plead. (9th ed.) §§ 493-498; 2 Madd. Chan. 232, 233; Mitf. Plead. (2d ed.) 135, 136.

2. 1 Harr. Pract. in Chan. 287; Hinde's Chan. 153, 158; Mitf. Plead. (2d ed.) 135 *et seq.*; Story's Eq. Plead. (9th ed.) §§ 503-526.

3. Mitf. Plead. (2d ed.) 141, 142; Story's Eq. Plead. (9th ed.) § 520; 1 Harr. Pract. in Chan. 288.

4. See title "Bill in Equity," *ante*.

5. See title "Bill in Equity," *ante*; Story's Eq. Plead. (9th ed.) § 528.

6. See titles "Parties" and "Multifariousness," *ante*; Story's Eq. Plead. (9th ed.) §§ 541, 544; 1 Harr. Pract. in Chan. 281; Hinde's Chan. 151, 152; 2 Madd. Chan. 234; Chapman v. Hamilton, 19 Ala. 121; Allen v. Woodruff, 96 Ill. 11; Toulmin v. Hamilton, 7 Ala. 362; Gould v. Hayes, 19 Ala. 438.

If a bill for partition of lands shows that persons not made parties have like interest in the lands, it is demurrable for want of parties. Taylor v. King, 32 Md. 42.

If a complete decree can be made upon

Where a bill in chancery was brought to foreclose a mortgage, the object being to pay the debt of one P., the mortgagor, and to have it determined whether the mortgage should not be discharged of record, it was held that P. should be made a party, and that a demurrer to the bill, because he had not been named therein as such, would be sustained. Leave, however, was given to amend.¹

A bill must be filed in the name of the party in interest: if brought in the name of his agent, a demurrer lies.²

(c) *Non-Foinder or Misjoinder of Parties.* — *Demurrers.* — A demurrer will lie for non-joinder or misjoinder of parties, either plaintiffs or defendants; but only the one improperly joined can take advantage of such misjoinder.³

It is a well-established rule, that, where two parties join as plaintiffs in the bill, both must not only have an interest therein, but both must be entitled to relief; or demurrer will be sustained if it appears on the bill that one of the plaintiffs is not entitled to relief.⁴

If the interests of those made parties to the bill, and those not made parties, are inseparable, so that a decree cannot be made without prejudice to those not named in the bill, a demurrer lies; or if those not named may be made parties, the bill may be amended. But in such cases, if they are without jurisdiction, or for other reasons cannot be joined, the bill must fail.⁵

the bill between the parties, it is not a ground of demurrer that all interested are not made parties. 1 Harr. Prac. in Ch. 77.

Demurrer for want of parties must show proper parties. *Dwight v. Central Vt. R. Co.*, 9 Fed. Rep. 785; *Dias v. Bouchaud*, 10 Paige (N. Y.), 445; *Chapman v. Hamilton*, 19 Ala. 121.

1. *Matcalt v. Smith*, 6 McLean (U. S.), 416.

2. *Oakley v. Bend*, 3 Edw. Ch. (N. Y.) 482; *Leigh v. Thomas*, 2 Ves. 312.

The court will order the case to stand over to bring in necessary parties. *Bishop of Winchester v. Beavor*, 3 Ves. 314.

Ordinarily, under the liberal practice of courts of equity, a bill will never be dismissed for want of parties. *Lucas v. Bk. of Darien*, 2 Stew. (Ala.) 280; *Batre v. Auze*, 5 Ala. 173; *Alderson v. Harris*, 12 Ala. 580; *Goodman v. Benham*, 16 Ala. 625; *Stone v. Hale*, 17 Ala. 557.

An objection for want of parties should be taken in the court below, or it cannot be dismissed; and it will be dismissed upon objection there taken, and refusal of plaintiff to amend. *Andrews v. Hobson*, 23 Ala. 219.

Where the averments of a bill are so uncertain that it cannot be determined who are the necessary parties, demurrer will lie. *Whitaker v. De Graffenreid*, 6 Ala. 303.

3. *Peoria, etc., R. Co. v. Pixley*, 15 Bradw. (Ill.) 283; *Erwin v. Ferguson*, 5 Ala. 158; *Lyne v. Marcus*, 1 Mo. 410; *Stookey v.*

Carter, 92 Ill. 129; *Watertown v. Cowen*, 4 Paige (N. Y.), 510; *Toulmin v. Hamilton*, 7 Ala. 362.

Either defendant may demur for misjoinder of parties plaintiff. *Christian v. Crocker*, 25 Ark. 327.

Only such defendants, however, as are improperly joined, may demur. *Christian v. Crocker*, 25 Ark. 327.

"Both multifariousness and misjoinder of complainants should be taken advantage of by demurrer, a plea, or by answer especially for that purpose. The court, at the hearing, if the misjoinder or multifariousness is such as to prevent or impede the proper relief, will, of its own motion, dismiss the bill on that account. But the general rule is, that the defendant, by answering the matter of the bill, waives the objection, and cannot urge it at the hearing. The subjects are both proper matters for a special demurrer." *Veghte v. Raritan Water Co.*, 19 N. J. Eq. 142, 144; *Green v. Richards*, 23 N. J. Eq. 32; *Annin v. Annin*, 24 N. J. Eq. 185.

Demurrer may be good as to some defendants, and bad as to others, where several join. *Eq. Draughtsman by Hughes*, ch. 10, 622; *The Mayor, etc., of London v. Levy*, 8 Ves. 403; *Miller v. Furse*, Bail. Eq. (S. Car.) 187.

4. *Vaughn v. Lovejoy*, 34 Ala. 437.

5. *Carson v. Robertson*, Chase (U. S.), 475.

As long as parties are joined, it is not

(d) *For Multifariousness.*—Where a bill is multifarious, it may be demurred to if the defect is apparent on the bill, as where inconsistent causes of action, and the like, are set up. But this matter has been discussed at length in the preceding pages.¹

Where all the executors of an estate were made parties to a bill together with a mortgagee of trust property with notice of the trust,—the trust property having been purchased with money of the estate for certain of the *cestuis que trust* under the will,—and it appearing that the matters in suit by the bill were entirely distinct and unconnected with each other, the bill was upon *demurrer* held bad for multifariousness.²

(e) *The Statute of Frauds.*—Where a bill is brought for the specific performance of a contract, and it appears upon the face of the bill that it is objectionable by reason of the statute of frauds, a demurrer may be interposed.³

(f) So the *Statute of Limitations* is a ground for demurrer, when it is apparent on the bill itself that the case is within the statute.⁴

(g) And *Laches*, or lapse of time, whereby the plaintiff is not entitled to relief, should, when disclosed by the bill, be taken advantage of by demurrer.⁵

material whether they be plaintiffs or defendants. *Geisse v. Beall*, 3 Wis. 367, 393.

"There are cases in which, notwithstanding a misjoinder of plaintiffs, the court has permitted a decree to be made at hearing. It has been done when it has appeared that justice could be done to all parties, notwithstanding the misjoinder." *Lambert v. Hutchinson*, 1 Beav. 277, 286.

1. See title "Multifariousness," *ante*. See also Story's Eq. Plead. (9th ed.) §§ 530-540; Mitf. Plead. (2d ed.) 147; 1 Harr. Pract. in Chan. 289; *Bark v. Harris*, Hard. 337; *Hestor v. Weston*, 1 Vern. 463; *Ward v. Northumberland*, 2 Aust. 469.

"To prevent confusion, and to preserve as much simplicity as possible in suits in chancery, it is a settled rule neither to permit several complainants to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one complainant to demand several matters of distinct natures against several defendants." *Richardson v. McKinson*, Litt. Sel. Cas. (Ky.) 320.

Where joint and separate claims are set forth in one bill, a demurrer will hold. *Harrison v. Hogg*, 2 Ves. Jr. 323.

Demurrers for multifariousness "may be divided into two kinds: 1. Frequently the objection raised to the bill, though termed multifariousness, is, in fact, properly speaking, a misjoinder; that is to say, the cases or claims asserted in the bill are of so different a character, that the court will not

permit them to be litigated in one record. . . . 2. But what is more familiarly understood by multifariousness as applied to a bill, is where a party is brought as a defendant upon a record with a large portion of which and the case made by which he has no connection whatever. In such case he has a right to demur." *Gartland v. Nunn*, 11 Ark. 720.

"The objection that the bill is multifarious can only be raised by demurrer, by strict practice; but some courts have held that it may also be raised by answer. The practice is well settled that multifariousness cannot be urged as a ground of reversal on appeal or error to a decree on a bill taken *pro confesso*." *Gilmore v. Sapp*, 100 Ill. 302.

Multifariousness may be availed of by *demurrer*; although when it does not appear on the bill itself, but is only disclosed by the answer, an objection may be made at the hearing. *Abbot v. Johnson*, 32 N. H. 9.

Case of bill held not multifarious. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105.

2. *Cocks v. Varney*, 42 N. J. Eq. (15 Stew.) 514.

3. *Chambers v. Lecompte*, 9 Mo. 575.

4. *Wisner v. Barnet*, 4 Wash. (U. S.) 631, 638.

5. *Maxwell v. Kennedy*, 8 How. (U. S.) 210; *Speidel v. Henrici*, 120 U. S. 377, 387, citing *National Bank v. Carpenter*, 101 U. S. 567; *Lansdale v. Smith*, 106 U. S. 391; *Maxwell v. Kennedy*, 8 How. (U. S.) 210.

5. *Of Demurrers to Bills of Discovery.* — Outside of such rules as are equally applicable to bills of relief, and also to bills of discovery, there are certain causes of demurrer particularly applicable to bills of discovery.¹

These additional causes are principally, that the discovery, if obtained, cannot be material; that the situation of the defendant

1. "A bill for a discovery merely, is generally liable to the same grounds of demurrer as any other bill. But a demurrer to a bill for a discovery merely, will not hold for want of parties, for the plaintiff seeks no decree. 2 Eq. Ca. Abr. 170. Nor, in general, for want of equity in the plaintiff's case, for the same reason; nor because the plaintiff may have remedy at law, for he cannot have the discovery which leads to the remedy; . . . nor because a bill is brought for discovery of part of a matter, for that is merely a demurrer, because the discovery would be insufficient. But it should seem a demurrer would hold to a bill for discovery of several distinct matters against several distinct defendants." *Hinde's Chan.* 163.

"The principal ends of a demurrer are to avoid a discovery which may be prejudicial to the defendant, or to cover a defective title, or to prevent an unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer." *Story's Eq. Plead.* (9th ed.) § 447.

If it appear that the action, in aid of which the discovery is sought, is pending in another court, which may of itself compel the required discovery, demurrer will be sustained. *Hinde's Chan.* 163.

Where a bill "seeks a discovery of the parties interested, a demurrer for want of necessary parties will not hold." *Mitf. Plead.* 146, cited in *Bay State Iron Co. v. Goodall*, 39 N. H. 223.

A demurrer will lie to so much of a bill as seeks for a disclosure of title-deeds, there being no affidavit annexed to the bill that the same were not in the plaintiff's custody or power. *Eq. Draughts.* by *Hughes*, 622, 640, and notes.

Upon a bill for discovery and relief, where discovery only should be sought, a demurrer will be sustained. *Muckleston v. Brown*, 6 Ves. 62; *Gordon v. Simpkinson*, 11 Ves. 509.

It is said by *Justice Story* (*Eq. Plead.* 9th ed. by *Gould*, sec. 312), that, "If a bill, therefore, which is maintainable in equity solely as a bill for discovery, should contain a prayer for relief also, it will, in England (although not in America), be open to a demurrer to the whole bill; and the party will not be allowed to maintain his bill for the discovery only, for he is bound to shape his bill according to what he has a right to

pray. But the defendant may, nevertheless, if he chooses, demur to the relief only, and answer as to the discovery sought. Indeed, if he files a plea only to the relief, he is bound to put in answer giving the discovery; for in such a case he professes that he will give the discovery, and his plea will be bad without it." The American cases cited are, *Laight v. Morgan*, 1 Johns. Cas. (N. Y.) 429; s. c., 2 Caines' Cas. (N. Y.) 344; *Leroy v. Veeder*, 1 Johns. Cas. (N. Y.) 417; *Leroy v. Servis*, 1 Caines' Cas. (N. Y.) 3; s. c., 2 Caines' Cas. (N. Y.) 175; *Kimberly v. Sells*, 3 John. Ch. (N. Y.) 467; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 294; *Higginbotham v. Burnet*, 5 Johns. Ch. (N. Y.) 184; *Brownell v. Curtis*, 10 Paige (N. Y.) 210; *Livingston v. Story*, 9 Pet. (U. S.) 632, 658; *Mitchell v. Green*, 10 Met. (Mass.) 101.

A demurrer should in its frame have reference to the nature of the bill, as whether it be for discovery alone, or for discovery and relief. *Story's Eq. Plead.* (9th ed. by *Gould*) sec. 458a.

Defendant must demur to the discovery, in order to avail himself of an objection to it by way of argument. *Payne v. Hathaway*, 3 Vt. 212.

"Where the complainant is not entitled either to discovery or relief upon the whole case stated by the bill, he may demur to the relief as well as the discovery; and he cannot, by demurring to the discovery of particular facts, compel the court to decide the whole case as upon a general demurrer to the bill." *Kuypers v. Reformed Dutch Church*, 6 Paige (N. Y.), 573.

Where a demurrer is put in to the whole discovery sought, and the plaintiff is entitled to any part, the demurrer will be overruled. *Treadwell v. Brown*, 44 N. H. 551; *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39; *Livingston v. Story*, 9 Pet. (U. S.) 632.

"It is the settled practice of the court when the defendant wishes to avoid a full answer; and to raise the question that the plaintiff has no equity upon his own showing, he must demur to the 'relief and discovery,' on the ground that it is not material for him to answer, inasmuch as the plaintiff, admitting every thing for the sake of argument, has not made out a case." *Weisman v. Heron Mining Co.*, 4 Jones, Eq. (N. Car.) 112, 117.

renders it improper for a court of equity to compel a discovery; that the plaintiff shows no title to the discovery.¹

a. Discovery must be Material; that is, the plaintiff must show that the discovery sought is material, or a demurrer may be had to the relief prayed by the bill, as where a bill to establish an agreement for a separate maintenance for the defendant's wife prayed a discovery of ill-treatment of the wife to make her recede from the agreement.²

b. Demurrer to Discovery by Reason of the Situation of the Party. — That the situation of the party is such as that it would be improper to compel a discovery, is a sufficient cause of demurrer. This lies in case where the discovery might tend to criminate the defendant, or where the discovery thus sought might render him liable to pains and penalties, or to forfeiture, or might cause him to forfeit his interest, or hazard his title.³

c. That Plaintiff shows no Title to the discovery sought, is matter for demurrer, as that there is no privity between the plaintiff and defendant as to entitle the former to the discovery.⁴

6. Demurrers to Other Bills. — There are some other bills, original and not original, to which distinct causes of demurrer lie; although, for the most part, the same causes of demurrer will hold as to them.⁵

a. Bills of Interpleader. — The bill must show that each of the parties asked to interplead claims a right, or demurrer will lie.⁶ So a demurrer will lie to a bill of interpleader for want of an

1. Compare the causes stated in the last note, for demurrer to bills of discovery, with those for demurrer to bills of relief, mentioned in this article. Story's Eq. Plead. (9th ed.) § 547 *et seq.*; Hinde's Chan. 159 *et seq.*

In Mitford's Eq. Plead. p. 148, the following division is made of *demurrers to discovery*: (1) That the case made by the bill is not such wherein a court of equity assumes a jurisdiction to compel a discovery; (2) That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery; (3) That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him, even for the purpose of discovery; (4) That there is no privity of title between the plaintiff and defendant which can give the plaintiff a right to the discovery; (5) That the discovery, if obtained, cannot be material; (6) That the situation of the defendant renders it improper for a court of equity to compel a discovery.

2. Hinde's Chan. 162; Story's Eq. Plead. (9th ed.) § 564 *et seq.*; Hincks v. Nelthrope, 1 Vern. 204.

3. Claridge v. Hoare, 14 Ves. 59; Brown-

sword v. Edwards, 2 Ves. 243, 245; East India Co. v. Campbell, 1 Ves. 247; Hincks v. Nelthrope, 1 Ver. 204; Chauncey v. Tahourdin, 2 Atk. 393; Mitf. Plead. (2d ed.) 157; Wallis v. Duke of Portland, 3 Ves. 494; Page v. Neal, 1 Ver. 107; Hinde's Chan. 160; 2 Madd. Chan. 231; Story's Eq. Plead. (9th ed.) § 553. But see Chetwynd v. Lindon, 2 Ves. 451.

"When he wishes to avoid an answer in respect to a particular matter on the ground that it would criminate him, or disclose matter confided to him as counsel, or an affair of State, he must answer the other parts of the bill, and 'demur' to the discovery of such particular matter." Weisman v. Heron Mining Co., 4 Jones, Eq. (N. Car.) 112, 117.

Plaintiff may waive the penalties where he alone is entitled to them, and thus do away with the ground for demurrer, and so compel a discovery. Mitf. Plead. (2d ed.) 158.

4. Mitf. Plead. (2d ed.) 154; Hinde's Chan. 162, 163; Story's Eq. Plead. (9th ed.) § 571.

5. Hinde's Chan. 164.

6. Story's Eq. Plead. (9th ed.) § 292; 1 Harr. Pract. in Chan. 97; Hinde's Chan.

164.

affidavit that the plaintiff does not collude with the defendants or any of them.¹

b. Of Demurrers to Bills of Revivor.—It is necessary that this bill show sufficient ground for reviving the suit, that there is a proper privity between the parties, and that the parties seeking to revive have the requisite interest therein, and a title to revive, or a demurrer lies.²

c. Of Demurrers to Supplemental Bills.—A demurrer lies to a supplemental bill where it is sought by it to introduce into the case matters immaterial and not relevant to the relief asked for in the original bill; or when, by reason of mistake in pleading, the supplemental bill has been filed; or where it brings matter into the case arising before the filing of the original bill, and when the bill might have been amended; or where it seeks to bring into the case a party who neither has nor claims an interest in the subject-matter of the original bill.³

d. Of Demurrers to Cross-bills.—A cross-bill having nothing in its nature different from the first species of bills, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems no cause of demurrer to such a bill which will not equally hold to the first species of bills. And a demurrer for want of equity will not hold to a cross-bill filed by a defendant in a suit against the plaintiff in the same suit, touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court without being put to show a ground of equity to support its jurisdiction, a cross-bill being generally considered as a defence.⁴

A demurrer to a *cross-bill* will also be sustained in cases where the bill fails to show an equitable title in the party to the relief sought, or where (since it is generally considered a defence) it seeks to set up new and distinct matter from that in the original bill, or if it is not filed in conformity with the usual practice of court.⁵

1. Eq. Draughts. by Hughes, 622, 640; L'd Redes. Tr. 49, 126; Hinde's Chan. 164.

A bill for *perpetuation of testimony* and for relief unites distinct subjects, and cannot be sustained. Jerome v. Jerome, 5 Conn. 352, 356.

2. Hinde's Chan. 165; Story's Eq. Plead. (9th ed.) § 617 *et seq.*; Harris v. Pollard, 3 P. Wms. 348; Mitf. Plead. (2d ed.) 164.

3. Hinde's Chan. 165, 166; Story's Eq. Plead. (9th ed.) §§ 612-616; Mitf. Plead. (2d ed.) 164.

4. The above in relation to demurrers to cross-bills we have taken from Hinde's Chan. (ed. 1786) p. 166. We find that the same language is used by Mitford in his work on Pleadings (2d ed.), p. 165; and also by Justice Story (Eq. Plead. 9th ed. § 628).

5. Story's Eq. Plead. (9th ed.) §§ 630-632.

As to Demurrers to Bills of Review.—Where the bill is brought for matters apparent upon the record, there should be a plea of the decree and a demurrer against opening the enrolment. Where the bill is brought for review for discovery of new matter, a demurrer can seldom lie, although it has been said that a demurrer may properly be set up where new matter is alleged which is not relevant. Hinde's Chan. 166, 167; Mitf. Plead. (2d ed.) 166, 167; Story's Eq. Plead. (9th ed.) §§ 634-638.

A motion to dissolve a temporary injunction operates as a demurrer. Titus v. Mabee, 25 Ill. 232.

A demurrer may be amended by leave of court. Baker v. Mellish, 11 Ves. 68, 70.

(B) PLEAS. — 1. *Plea defined.* — A plea is a special answer set up by a defendant to a bill or some part thereof, setting forth and relying on one or more facts stated in the plea, as a cause why the suit should be delayed, dismissed, or barred.¹

2. *Pleas in General.* — Where a bill is so drawn that matters which would otherwise be cause of demurrer, do not appear upon the face of the bill, the defendant may then plead and set up the matter which would be ground for a demurrer.²

A plea should reduce the cause to one single point, thence creating a bar to the suit.³

And it should be so framed, as that, if true, it will put an end to the cause.⁴

It should not, therefore, set up two defences, for this would be bad for duplicity.⁵

A plea differs from a demurrer in that the former may be good in part, and bad in part, the latter not.⁶

Citizenship when intended to be denied, and it is properly set forth in the bill, is available by plea, and not by answer.⁷

Rule 31, U. S. Eq. Rules, provides that "No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel, that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact." *Desty's Fed. Proc.* (Pract. Series) 694.

1. 1 Harr. Pract. in Chan. 244; Cooper's Eq. Plead. 223; Mitf. Plead. (2d ed.) 177; Story's Eq. Plead. (9th ed.) § 649; Beames' Eq. Plead. 123; 1 Harr. Pract. in Chan. 244; Adams' Eq. 236; Hinde's Chan. 170; Rule 31, U. S. Eq. Rules, cited *ante*, title "Demurrer." Certificate of counsel required.

"A demurrer is confined to the single point of law; but a plea opens the two questions of law and fact, to either of which the opposite party may except. The demurrer, in the first mode of defence in equity, is taken on the complainant's own statement by his bill, and consequently the facts cannot be disputed. In the third mode, the defendant puts forward a new statement of his own; and this must be by plea, that the complainant may have an opportunity to reply, and put him to proof of the new facts." *Lube's Eq. Plead.* (Pract. Series) 159, § 209.

"A plea is a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer, which the bill required. If the plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the

truth of the matter pleaded." *Roche v. Morgell*, 2 Sch. & Lef. 725.

2. Story's Eq. Plead. (9th ed.) § 449.

What is good by way of plea, is also a ground for demurrer, if the facts appear upon the face of the bill. *Mitf. Plead.* (2d ed.) 175.

The object of a plea is said to be to save the expense of witnesses, and that in consequence not every defence good in equity is good by way of plea. *Hinde's Chan.* 170.

3. 1 Harr. Pract. in Chan. 244; Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 384; *Chapman v. Turner*, 1 Atk. 54; *Spangler v. Spangler*, 19 Bradw. (Ill.) 28.

A plea admits the truth of the facts stated in the bill, as to the point on which it rests, unless they are controverted by facts stated in the plea. 1 Harr. Pract. in Chan. 244.

4. *Allen v. Randolph*, 4 Johns. Ch. (N. Y.) 693; *Bolton v. Gardner*, 3 Paige (N. Y.), 273.

A plea should state the facts and averments in support of it. 1 Harr. Pract. in Chan. 244.

A plea is bad that alleges mere conclusions of law. *National Bank v. Insurance Co.*, 104 U. S. 54, 76.

5. *Didier v. Davison*, 10 Paige (N. Y.), 515; Story's Eq. Plead. (9th ed.) § 656; *Nobkissen v. Hastings*, 2 Ves. Jr. 84; *Goodrich v. Pendleton*, 3 Johns. Ch. (N. Y.) 385.

6. *Nobkissen v. Hastings*, 4 Bro. C. C. 254; *French v. Shotwell*, 5 Johns. (N. Y.) 555; *Aff'd*, 20 Johns. (N. Y.) 668; *Lea-craft v. Dempsey*, 4 Paige (N. Y.), 124; *Kirkpatrick v. White*, 4 Wash. (U. S.) 595.

7. *Dodge v. Perkins*, 4 Mason (U. S.), 345; *Wood v. Mann*, 1 Sumn. (U. S.) 578.

A plea that is covered as to any portion of it by the answer, is overruled by the answer.¹

Where a plea is set down for argument, no replication being filed, all the facts stated therein are admitted as to their truth, only their sufficiency in point of law to prevent the recovery sought being denied.²

Upon a bill for the recovery of certain property the title to which was claimed by virtue of a deed of gift, the defendant set up a plea of *non est factum*, and alleged title in himself; upon motion made and denied to strike out the plea of *non est factum*, and exception thereto held, that, where any instrument was annexed to the bill as an exhibit, the defendant might deny its execution, and thus compel the plaintiff to prove the same.³

Pleas are to bills of relief, bills of discovery, and bills not original.

3. *Pleas to Bills praying Relief* are to the jurisdiction, to the person, and in bar of the suit.⁴

a. Pleas to the Jurisdiction. — We have seen in what cases demurrers to the jurisdiction will lie. A demurrer must be to matters apparent on the face of the bill; but when the want of jurisdiction does not so appear on the face of the bill, then the defect is properly reached by a plea to the jurisdiction. The question of jurisdiction can seldom arise here, as the jurisdiction of courts of equity is well ascertained in this country.⁵

b. Pleas to the Person. — These are somewhat in the nature of a plea in abatement at law, and traverses the right of a party to sue or be sued, as (1) that he is incapable alone of exhibiting a bill, or (2) that he is not the person he is alleged to be, or (3) that he is laboring under some temporary disability as to his legal status.⁶

(1) Infants, married women, lunatics, and the like, are incapable of suing by themselves, but must sue by their next friend, or committee, or guardian. It is a good plea, therefore, if any of these sue alone. (2) A plea that one is not the person he is alleged to be, is a good plea in abatement of the suit; as where one sues as administrator of an intestate, it may be pleaded that the supposed

1. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 115; *Bangs v. Strong*, 10 Paige (N. Y.), 11; *Souzer v. Myers*, 2 Paige (N. Y.), 574.

Defendant may not put in a plea after he has submitted to make answer, although he may answer an amended bill where plaintiff has amended after answer. *Ritchie v. Aylwin*, 15 Ves. 79.

2. *Farley v. Kittson*, 120 U. S. 303, 314, 315.

Plea in equity is not evidence for defendant. *Farley v. Kittson*, 120 U. S. 303, 317, citing *Heartt v. Corning*, 3 Paige (N. Y.), 566.

3. *Oliver v. Persons*, 30 Ga. 391.

4. *Hinde's Chan.* 170; *Mittf. Plead.*

(2d ed.) 177, 178; 1 Harr. Pract. in Chan. 244.

5. See title "Demurrers," *ante*.

It is no bar to a proceeding in equity, that the property is not within the jurisdiction. *Massie v. Watts*, 6 Cranch (U. S.), 148, 158.

Want of jurisdiction not apparent on the face of the bill is available by plea. *Fremont v. Merced Mining Co., McAl.* (U. S.) 267.

In a plea to the jurisdiction, must show what other court has jurisdiction. *Derby v. Athol*, 1 Ves. 202, 203; *Strode v. Little*, 1 Ver. 58.

6. *Hinde's Chan.* 172.

intestate was living; or, in case of an administrator, that he was not administrator. (3) Alienage is said to be inapplicable as a plea, except where the plaintiff is an alien enemy, or the suit affect lands; and even then the exception does not always hold, as in cases where the alien enemy is here by virtue of protection of the government.¹

c. Of Pleas in Bar. — These are generally in avoidance of the matter set up in the bill, and is of some matter *dehors* the record, and may be (1) of the statute of limitations, of frauds and perjuries, or some other statute which creates a bar; or (2) some matter of record; or (3) some matter *in pais*.²

(1) *Plea of the Statute of Limitations.* — Where the statute of limitations is relied on by the defendant, this is ground for demurrer if it appear on the face of the bill; otherwise it should be taken advantage of by plea.³

(2) *The Statute of Frauds and Perjuries.* — A party must specially plead the statute of frauds, or insist on it in his answer.⁴

1. Mitf. Plead. (2d ed.) 185-193; 1 Harr. Pract. in Chan. 246-250. 2 Madd. Chan. 241-243; Hinde's Chan. 172-175; Story's Eq. Plead. (9th ed.) §§ 722-734.

2. 1 Harr. Pract. in Chan. 250 *et seq.*; 2 Madd. Chan. 244 *et seq.*; Hinde's Chan. 175 *et seq.*; Mitf. Plead. (2d ed.) 194 *et seq.*; Lube's Eq. Plead. (Pract. Series) 146, 207, 220; Story's Eq. Plead. (9th ed.) § 748 *et seq.*

3. Worthy *v.* Johnson, 8 Ga. 236. The statute of limitations may be pleaded in equity. Mitf. Plead. (2d ed.) 212; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90; Stackhouse *v.* Barnston, 10 Ves. 466.

A corporation may plead the statute of limitations. Wych *v.* East India Co., 3 P. Wms. 309.

The statute may be pleaded to a bill to redeem after the mortgagee has been in possession a long period of time, as thirty years. Aggas *v.* Pickerill, 3 Atk. 225.

Length of time, as well as the statute of limitations, may be pleaded in bar. Edsell *v.* Buchanan, 2 Ves. Jr. 83.

Ordinarily the statute cannot be pleaded in bar of an account. Anon. 2 Freem. 22.

So in Goodrich *v.* Pendleton, 3 Johns. Ch. (N. Y.) 385, 391, it was held that the rules of pleading required the defendant, when setting up the plea of the statute of limitations, "to answer particularly and precisely the charges in the bill which go to destroy the bar created by the statute," that "The rule is, that the equitable circumstances charged in the bill, and which will avoid the statute, must be denied by the answer as well as by the general averment in the plea; and the answer in support of the plea (and which is indispensable to its support) must be full and clear, and contain a particular and precise denial

of the charges, or it will not be effectual to support the plea. The court will intend that the matters so charged against the pleader are true, unless they be fully and clearly denied. The facts necessary to render the plea a defence must be clearly and distinctly averred, so that the plaintiff may take issue upon them; and the answer in support of the plea must contain particular and precise averments to enable the plaintiff to meet them, as the object of the answer is to give the plaintiff an opportunity of taking exceptions to the traverse of the facts and circumstances charged in the bill, which, if true, would destroy the bar set up."

The defence of the statute of limitations is good at equity as well as in law. Gardner *v.* Watson, 18 Bradw. (Ill.) 386.

"A pure plea of the statute (of limitations) is no bar where there are circumstances stated in the bill which take the case out of it as an offer to account, an acknowledgment of the debt, a promise to pay, or to do what was right and just, or a promise to pay when assets came to hand, unless the plea be accompanied with an averment or answer destroying the force of those circumstances." The Chancellor in Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 134.

A plea of the statute of limitations need not ordinarily be accompanied by an answer, an exception being where some matter of equity is set forth in the bill, in order to avoid the statute. West Portland, etc., Assoc'n *v.* Lounsedale, 17 Fed. Rep. 205.

When the statute of limitations is relied on as a defence in equity, it should be set up by way of plea or answer. Dick *v.* Doughten *et al.*, 1 Del. Chan. 321.

4. Tarleton *v.* Vietes, 1 Gilm. (Ill.) 470.

Where a bill was exhibited in chancery to obtain a decree for the specific performance of a contract for the sale of lands, held that a party defendant can take advantage of the statute of frauds in no other way "than by either denying the sale, or pleading or relying on the statute in his answer."¹

It was declared in *McClure v. Otrich*,² that the statute of frauds, to be made available to a bill for specific performance, must be set up by way of plea or answer.³

(3) *Pleas as to Matters of Record and in Pais*. — A former decree, wherein the rights of the parties have been adjudicated, is a good plea in bar.⁴

(4) *A Plea of the Pendency of another Suit in Equity* is said to be a good plea in bar.⁵

(5) *Purchaser for a Valuable Consideration*. — Where the defendant is a purchaser for a valuable consideration, without notice, this is a good plea in bar. It must appear, however, by such plea, what the actual consideration was, and also that it was paid in good faith; and the plea or answer must not evade, but must positively deny the fact of notice, as well as every circumstance from which notice might be inferred, and this although notice is not set up in the bill.⁶

(6) *Other Pleas in Bar*.⁷

1. *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436.

But in *Givens v. Calder*, 2 Desau. (S. Car.) 172, the court said, "That in case of a parol agreement not tintured with fraud, if the defendant chose to avail himself of the statute, it is not necessary that he should by answer confess or deny the agreement, the law having declared it void; neither ought he to be compelled to deny part performance of it, although charged in the bill."

2. 118 Ill. 320.

3. In *Esmay v. Gortan*, 18 Ill. 486, it was held that on a bill for specific performance in the absence of a plea of the statute of frauds, parol evidence was admissible to establish the contract.

Plea of statute of frauds and answer also filed denying the contract, the answer overrules the plea. *Wildbahn v. Robindaux*, 11 Mo. 659.

4. *Anon.* 3 Atk. 809; *Kinsey v. Kinsey*, 2 Ves. 577.

Plea of former decree must show when it was instituted, and so much of the original bill must be set forth as to show the same point to have been in issue. *Foster v. Vassal*, 3 Atk. 587; *Child v. Gibson*, 2 Atk. 603.

A final decree duly enrolled, and which dismisses the bill, is a bar to another suit upon the same subject-matter between the same parties. *Cochran v. Cowper*, Admr., 2 Del. Chan. 27.

Bill dismissed upon demurrer only cannot be pleaded in bar. There must be a decree upon the merits as to the same matter and between the same parties. *Moss v. Ashbrooks*, 12 Ark. 369.

5. *Lyon v. Lyon*, 21 Conn.; *Huggins v. York Bldg. Co.*, 2 Atk. 44; *Neve v. Weston*, 3 Atk. 557.

6. *Gilder v. Gilder*, 1 Del. Chan. 339.

A plea of purchase for a valuable consideration must specially deny all allegations in the bill of particular and special notice. A general denial is not sufficient. *Radford v. Wilson*, 3 Atk. 815.

7. Plea of stated account is a good plea in bar to a bill for account. *Sumner v. Thorpe*, 2 Atk. 1.

A plea of award is good, not only to the merits of the case, but to the discovery. *Tittenson v. Peat*, 3 Atk. 539.

Arbitrators may plead in bar an award where a submission has been made to arbitrate under rule of court and an agreement to be restrained from suing in equity. *Lingood v. Croucher*, 2 Atk. 395.

An injunction may be pleaded in bar where a subsequent suit is brought for the cause enjoined. *White & Tudor's Lead. Cas.* in Eq. 1406.

Compromise or release can be availed of by plea only, and not by answer. *Lockwood v. Bates' Ass'ee et al.*, 1 Del. Chan. 435.

The courts do not favor pleas in bar which seek to take advantage of a want of

4. *Pleas to Bills of Discovery.* — Outside of pleas to bills for relief, there are some additional grounds of pleas, which are applicable principally to bills of discovery. These are divided into pleas to the jurisdiction to the person, and in bar.¹

a. *As to Pleas to the Jurisdiction.* — Where the case of the plaintiff is such that jurisdiction cannot be assumed by a court of equity to compel a discovery in his favor here if the case be so stated by the bill as that it cannot be reached by a demurrer, the matter necessary to show want of jurisdiction may be set up by way of plea.²

b. *Of Pleas to the Person.* — These may be for want of interest in the plaintiff, or the want of sufficient interest to entitle him to call on the defendant for a discovery; as where a bill is brought by one in the capacity of heir or administrator to obtain discovery of title from one in possession of property which belonged to the deceased, a plea may be set up that some other person is heir or administrator, or that the person alleged to be deceased is living.³

Other pleas, such as that plaintiff is an alien enemy, and the like, have been considered.⁴

c. *As to Pleas in Bar.* — A plea for want of parties is in bar to the whole bill, discovery and relief.⁵

(1) *The Statute of Limitations* may be pleaded to the debt, but not to a bill of discovery as to when the debt was due.⁶

(2) *Award.* — In the absence of a charge of collusion or gross misbehavior, an award is also a good plea to the merits, and also to the discovery.⁷

(3) So also is a *Release or Compromise* a good plea.⁸

(4) And that one is a *Purchaser for a Valuable Consideration* without notice is also a good plea to prevent an answer to an averment of title by the plaintiff.⁹

(5) *Penalty and Forfeiture.* — That *the situation of the defendant* is such that a discovery would subject him to a legal prosecution,

equity in the case set up by the plaintiff. *Piatt v. Oliver*, 1 McLean (U. S.), 295.

1. Story's Eq. Plead. (9th ed.) § 816, *et seq.*

If a bill prays a discovery only, and the plea is to discovery and relief, it is bad. *Asgil v. Dawson*, Bunb. 70.

A plea is bad which contains exceptions of matters hereinafter mentioned. *Salkeld v. Science*, 2 Ves. 107.

A plea that is double will not stand, especially where it sets up inconsistent matters. *Nobkissen v. Hastings*, 2 Ves. Jr. 84.

"The proper office of a plea is not like an answer to meet all the allegations of the bill, nor like a demurrer, admitting those allegations to deny the equity of the bill, but it is to present some distinct fact which of itself creates a bar to the suit, or to the part to which the plea applies,

and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large." *Farley v. Kittson*, 120 U. S. 303, 314.

2. Mitf. Plead. (2d ed.) 222.

3. Mitf. Plead. (2d ed.) 223.

4. See title "Parties," *ante*.

5. *Plunket v. Penon*, 2 Atk. 51.

6. *Mackenworth v. Clifton*, 2 Atk. 51.

7. *Tittenson v. Peat*, 3 Atk. 529; *South Sea Co. v. Bumstead*, 2 Eq. Cas. Abr. 80; *Mitchell v. Harris*, 2 Ves. Jun. 129; *Gartside v. Gartside*, 3 Aust. 736; *Champion v. Wenham*, Ambl. 245.

8. *Leonard v. Leonard*, 1 Ball & Beat. 328.

9. *Hart v. Middlehurst*, 3 Atk. 377. But see title "Pleas to Bills of Relief," subtitle "Pleas in Bar," *ante*. See also title "Demurrers," *ante*.

or to a penalty or forfeiture, or that it would betray matters coming to his knowledge as a counsel, is a good matter of a plea.¹

5. As to *Pleas to Bills to perpetuate Testimony*, these are subject in general to many of the pleas applicable to other original bills, as that the plaintiff has no interest, or that defendant is equally entitled to the protection of a court of equity, or that defendant is a purchaser without notice for a valuable consideration. But in addition it may be pleaded that there is no necessity for the testimony to be perpetuated, in that the suit can be tried at once at law.²

6. *Of Pleas to Bills not Original.* — These are pleas to supplemental bills, and pleas to bills of revivor.

a. *Pleas to Supplemental Bills.* — Where no right exists in the plaintiff to file a supplemental bill, or the matter of the supplemental bill might have been inserted into the original bill by way of amendment thereto, as where it did not arise subsequent to filing the original bill; or if matter is inserted into the original bill by way of amendment, which ought properly to have been matter for a supplemental bill, as where it arose subsequent to the original bill, these, when the matter cannot be reached by a demurrer, is ground for a plea.³

b. *Pleas to Bills of Revivor.* — Where the plaintiff has no right in himself to revive the suit at all, or there is no sufficient cause to revive, or if the legal representative or person entitled to revive is barred by the statute of limitations, or where there is a want of proper parties, or the bill is wrongly filed in place of some other bill, these may all be availed of by the defendant by way of plea or demurrer; and in those cases where a demurrer will not lie, a plea is proper.⁴

7. *Pleas to Other Bills* in the nature of original bills.

a. *Pleas to Cross-bills.* — Generally, all pleas which are available to original bills are good pleas to cross-bills, except, however, that pleas which go to the jurisdiction of the court, and the person of the plaintiff, will not lie to a cross-bill, since the original bill affirms the sufficiency of both. But if the bill be exhibited in the name alone of a plaintiff incapacitated from suing alone, as in case of an infant, *feme covert*, and the like, this is good ground for a plea to the person.⁵

b. *Pleas to Bills of Review.* — To a bill of review, the proper defence is said to be by plea of the decree, and demurrer against

1. Story's Eq. Plead. (9th ed.) §§ 824, 825; 1 Harr. Pract. in Chan. 271-273; Mitf. Plead. (2d ed.) 223, *et seq.*; Hinde's Chan. 182, *et seq.*

These subjects have already been fully considered. See title "Demurrer," *ante*. It being remembered that a plea differs from a demurrer in that it reaches matters not apparent on the face of the bill.

2. Hinde's Chan. 190.

3. Story's Eq. Plead. (9th ed.) §§ 827, 828; Hinde's Chan. 190; Mitf. Plead. (2d ed.) 230; 1 Harr. Pract. in Chan. 274.

4. Story's Eq. Plead. (9th ed.) §§ 829-831; Mitf. Plead. (2d ed.) 228 *et seq.*; Hinde's Chan. 190, Coop. 302; 1 Harr. Pract. in Chan. 273.

5. Mitf. Plead. (2d ed.) 230; Hinde's Chan. 190; Story's Eq. Plead. (9th ed.) § 832.

opening the same; and where any other matter outside of the decree is relied on against the opening of the enrolment, this must also be pleaded; and where a bill of review is brought alleging discovery of new matter, any plea is good which would have avoided such matter if set out in the original bill.¹

c. Pleas to Bills to impeach a Decree on the Ground of Fraud. — Where a bill of this kind is exhibited, it may be defended by a plea of the decree and a denial of the fraud.²

d. Pleas to Bills to carry a Decree into Execution. — If the plaintiff filing such a bill is not entitled to have the relief sought, this fact may be pleaded by the defendant if it does not appear upon the face of the bill so as to admit of a demurrer.³

(C) THE ANSWER. — If the defendant does not demur or plead, he must answer.⁴ And if any part of the bill is not covered by a demurrer, plea, or disclaimer, this must be answered.⁵

An answer may not be required to interrogatories which the substantive allegations of the bill do not support, although, if an answer be made and replied to, it is properly in issue.⁶

The defendant should set up in his answer, in a clear and

1. Hinde's Chan. 190; Story's Eq. Plead. (9th ed.) §§ 833-835; 1 Harr. Pract. in Chan. 274.

If a supplemental bill be brought upon the ground of the discovery of new matter, and there is none, this is properly met by a plea or demurrer. *Lewellin v. Mackworth*, 2 Atk. 40.

In *Catteral v. Purchase*, 1 Atk. 290, a demurrer was put in to a bill of review.

"It has been already mentioned that a part of the constant defence to a bill of review has been said to be by a plea of the decree; but that a demurrer seemed to be the proper defence, and that the books of practice give the form of a demurrer only to such a bill." Mitf. Plead. (2d ed.) 231.

2. 1 Harr. Pract. in Chan. 274; Story's Eq. Plead. (9th ed.) § 836.

3. Hinde's Chan. 191; Story's Eq. Plead. (9th ed.) § 837; Mitf. Plead. (2d ed.) 232.

4. Lube's Eq. Plead. (Pract. Series) 234 et seq. § 340 et seq.; 2 Madd. Chan. 259.

Except, perhaps, in cases where a cross-bill may be brought. 1 Harr. Pract. in Chan. 222.

Rule 44, U. S. Eq. Rules, provides that "A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer. Desty's Fed. Proc. (Pract. Ser.) 702.

5. Mitf. Plead. (2d ed.) 244.

"Defendant should either demur or plead

to the discovery whenever he is entitled to do so," since he must answer fully, if at all, except where the discovery might tend to criminate him, or where he is a purchaser without notice and for value. *Jerrard v. Saunders*, 2 Ves. Jr. 458.

Held, in *Vermont*, that "defendant may refuse to answer the whole bill, and answer only in part, by setting up grounds why he should not answer all." *Hunt v. Gookin*, 6 Vt. 462, citing *Mazarredo v. Maitland*, 3 Mad. 70; *Somerville v. Mackay*, 16 Ves. 382; *Phillips v. Prevost*, 4 Johns. Ch. (N. Y.) 205; 2 *Swift's Digest* (Conn.), 202; *Murray v. Coster*, 4 Cow. (N. Y.) 617; *Jacobs v. Goodman*, 3 Brown, 488, note; *Selby v. Selby*, 4 Bro. C. C. 121.

Defendant is not compelled to answer immaterial matters. *Dinsmoor v. Hazelton*, 22 N. H. 535.

If defendant answers to the whole bill, he waives his right to demur to the whole bill. *Adams v. Howard*, 9 Fed. Rep. 347.

6. Atty.-Genl. v. Whorwood, 1 Ves. Jr. 538, 539.

"The rule is, you are not only to question in the interrogatory part, but make charges in the charging part, otherwise you cannot accept. But the defendant, though not bound to answer it, has done so, which being replied to, it is put in issue properly; consequently that informality in the matter of charging (for it is no more) is supplied by the answering to it, for a matter may be put in issue by the answer as well as by the bill, and, if replied to, either party may examine to it." *The Lord Chancellor in Atty.-Genl. v. Whorwood*, 1 Ves. Jr. 534, 538, 539.

definite manner, all the facts he intends to rely on; and he will be bound to the matters therein averred, and may not go beyond them, although they may come up in evidence.¹ And he should not only answer literally the charges of the bill, but in addition should, as to the substance of each charge, confess or traverse it.²

An answer should be positive, certain, and not argumentative;³ nor should it contain any thing scandalous or impertinent.⁴ No matter, however, which is relevant, and tends to disprove the case shown by the bill, is impertinent.⁵

An answer as to facts expressly charged, to be within the knowledge of the defendant, must be positive, and not his remembrance or belief. If facts are not within his knowledge, he must answer as to his information or belief.⁶ If the defendant's answer is not full and complete as is required by the rules of pleading, he may be compelled to answer over.⁷

1. Home Insurance Co. of Texas v. Myer, 93 Ill. 271; Johnson v. Johnson, 114 Ill. 611; Russell, etc., Co. v. Mallory, 10 Blatchf. (U. S.) 140.

2. May v. Williams, 17 Ala. 23; Warren v. Warren, 30 Vt. 530.

All the facts alleged in the bill must be denied or admitted. Tucker v. Cheshire R. Co., 21 N. H. 29. And this is so as to matters specifically charged. Wharton v. Wharton, 1 Sim. & Stu. 235, 236.

"To so much of the bill as is necessary and material for the defendant to answer, he must speak directly and without evasion, and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge; and whenever there are particular, precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges." 1 Harr. Pract. in Chan. 222.

3. Faulder v. Stuart, 11 Ves. 296.

4. 1 Harr. Pract. in Chan. 222; Eq. Draughts. by Hughes, p. 569.

5. Saltmarsh v. Bower, 22 Ala. 221.

6. Woods v. Morrell, 1 Johns. Ch. (N. Y.) 104, 107; Grimstone v. Carter, 3 Paige (N. Y.), 421.

An answer should admit or deny every material fact alleged in the stating part of the bill of which he personally has knowledge. If he "has any information upon a material matter alleged in the bill, aside from the bill itself, he is bound to state his belief of the truth or falsity of the allegation." Devereaux v. Cooper, 11 Vt. 103.

"The answer of a defendant to charges in a bill must be direct and positive, and not from information, hearsay, and belief, to entitle it to a claim, to be responsive to the bill and make it evidence, except, perhaps,

where the facts, answered by a defendant against his interest, are from information, and he states additionally that he believes them to be true." Arline v. Miller, 22 Ga. 330.

"Where material matters are stated in the bill, which, *prima facie*, are within the knowledge, information, or belief of the defendant, if in his answer he fails to deny them, or to express his belief of their falsity, and does not state that he cannot form any belief respecting their truth, they must be considered as admitted. . . . A vague manner of denial of such matters is always received unfavorably. . . . He (defendant) cannot be allowed to shelter himself behind equivocal, evasive, or doubtful terms, and thus mislead the complainant, nor behind a literal denial which amounts to no more than a *negative pregnant*, or an evasion of the point of substance. Particular charges must be answered particularly and precisely. A general answer, even when it included an answer to all the particular charges, is insufficient." Grady v. Robinson, 28 Ala. 289, citing several authorities; Clark v. Jones, 41 Ala. 349; Thorington v. Carson, 1 Port. (Ala.) 257.

7. Cleghorn v. Rutherford, 26 Ga. 152.

With the exceptions "of a demurrer to the discovery of a particular matter, and a plea in respect to some particular matter, as to which a discovery is asked for, the general rule is, that a 'defendant, if he answers at all, must answer fully' to all allegations which are material to the equity set up by the bill." Weisman v. Heron Mining Co., 4 Jones, Eq. (N. C.) 112. Rule 39, U. S. Eq. Rules, provides that, "The rule that, if the defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And

Upon a bill praying for the discovery of title, and alleging fraud, the statute of limitations cannot be pleaded, but defendant must answer as to the fraud.¹

It is said that the fact that the plaintiff does not sustain the character in which he sues, is a good averment in an answer to enable a defendant to protect himself from discovery and account.²

A bill should be dismissed where the answer unequivocally denies the allegations of the bill, and the cause is set down for hearing; and this is so where new matter is set up in evidence.³

When defendant denies or traverses any fact contained in the bill, he must do so directly, and not by way of negative pregnant. He must specifically answer the particular charges of the bill; that is, he must answer the substance positively and with certainty, and is not compelled to answer literally all the divers circumstances set out in support of a fact.⁴

An answer should not properly set forth deeds *in hæc verba*, though the bill so prays. The defendant need only aver his readiness to give copies of them, or may set forth so much of them as is material for the plaintiff to know.⁵

An answer overrules a plea when both set up the same thing.⁶

Where a demurrer is overruled, the same matter may be insisted on in the answer.⁷

An answer may be used for the purpose only of showing what

the defendants shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar, of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea touching the matters set forth in the bill to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea." Desty's Fed. Proced. (Pract. Series) 698.

1. Bicknell v. Gough, 3 Atk. 558.

Defendant is not compelled in all cases to set up the statute of limitations by way of a plea; but he may set up the whole matter of defence by way of answer, claiming the benefit of so much as is in bar, and may, upon hearing, have as full benefit of the statute as if he had pleaded it. Norton v. Turvil, 2 P. Wms. 145; 1 Harr. Pract. in Chan. 222.

2. Bentley v. Cleaveland, 22 Ala. 814.

3. Atkinson v. Manks, 1 Cow. (N. Y.) 691, 703.

4. 1 Harr. Pract. in Ch. 223.

"With regard to the sufficiency of the answer, the general rule is, that to so much of the bill as is material and necessary for the defendant to answer, he must speak directly and without evasion, and not by way of *negative pregnant*. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively and with certainty; and particular precise charges must be answered particularly and precisely, and not in a general manner, even though the general answer may amount to a full denial of the charges." The court in Woods v. Morrell, 1 John. Ch. 104, 107.

5. 1 Harr. Pract. in Ch. 223.

6. 1 Harr. Pract. in Chan. 225; Taylor v. Luther, 2 Sumn. (U. S.) 228; Stearns v. Page, 1 Story (U. S.), 204. See Lewis v. Baird, 3 McLean (U. S.), 56.

Rule 37, U. S. Eq. Rules, provides that "No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea." Desty's Fed. Proced. (Pract. Ser.) p. 697.

7. Dormer v. Fortescue, 2 Atk. 282; Crawford v. The William Penn, 3 Wash. (U. S.) 684.

is admitted; but as to new matter appearing therein, this must be admitted.¹

The defendant may not be compelled to make any discovery which would subject him to criminal prosecution; and this extends not only to the express matter charged, but the defendant is also not obliged to confess any fact pertaining thereto which would aid in the prosecution of a crime. It must, however, appear either by the bill exhibited, or by the defendant's plea, that he would be subjected to punishment by his answers.²

An answer, so far as it is responsive to a bill, is legal evidence.³

But an answer, or an allegation in an answer, which is not responsive, is not evidence.⁴

Where an answer responsive to the bill is made under oath, it can only be rebutted by the testimony of two witnesses, or the testimony of one witness supported by corroborating circumstances equivalent to one witness.⁵

1. *White v. Morrison*, 11 Ill. 362.

2. *Wolf v. Wolf's Exct'r*, 2 Harr. & G. (Md.) 382.

The court cites from *Claridge v. Hoar*, 14 Ves. 57, 65, the following: "A defendant has a right to insist that he is not to be compelled to answer not only the broad and leading fact, but any fact the answer to which may furnish a step in the prosecution, if any person should choose to indict him." *Harrington v. Southcote*, 2 Ves. 389, 394; *Fuller v. Hooper*, 2 Ves. 245.

3. *Blaisdell v. Nason*, 16 Vt. 179, 186; *Blaisdell v. Bowers*, 40 Vt. 126; *Fenno v. Sayre*, 3 Ala. 458, and cases cited; *Edmondson v. Montague*, 14 Ala. 370; *Garrett v. Garrett*, 29 Ala. 439, 441; *Easterwood v. Linton*, 36 Ala. 175; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280.

"An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only so far as it is responsive to the bill." *Farley v. Kittson*, 120 U. S. 303, 317.

An answer of a defendant who is not a party to the issue on trial, cannot be used as evidence in the cause. *Wellborn v. Rogers et ux.*, 24 Ga. 558; *Blaisdell v. Nason*, 16 Vt. 179, 186.

But not so when made upon information and belief only when a traverse is put into the answer. *Loomis v. Fay*, 24 Vt. 240. See *Allen v. Mower*, 17 Vt. 61; *Grafton Bank v. Doe*, 19 Vt. 463.

Nor is an answer of a defendant evidence against his co-defendant or for him. *Blodgett v. Hobart*, 18 Vt. 414.

The rule that the answer must be responsive does not extend (as to its being evidence) to cases where the hearing is upon the bill and answer alone, the answer being taken as true in such cases. *Cherry v.*

Belcher, 5 Stew. & P. (Ala.) 133. But see *Forrest v. Robinson*, 2 Ala. 215.

4. *Cartledge, Guardian, v. Cutliff*, 29 Ga. 758.

Where an answer introduces matters in avoidance of the matters set up in the bill, and which is not responsive, this cannot be taken as evidence. *Keiffer v. Barney Bros.*, 31 Ala. 192.

"Where the answer is not responsive to the bill, or sets up affirmative allegations in opposition to or in avoidance of the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations; and the defendant is as much bound to establish the allegations so made by independent testimony as the plaintiff is to sustain his bill." The court in *Wells v. Houston*, 37 Vt. 245, 247.

As to an answer which is not responsive to a bill, see *Wells v. Houston*, 37 Vt. 245; *Mott v. Harrington*, 12 Vt. 199; *Sanborn v. Kittredge*, 20 Vt. 632.

Rule 41, U. S. Eq. Rules, provides that "If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may, nevertheless, be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section three of the act of Congress of July 2, 1864." *Desty's Fed. Proced. (Pract. Series)* p. 700.

5. *Morrison v. Durr*, 122 U. S. 518;

Where a bill was brought by a wife against her husband for divorce, and a supplemental bill was thereafter filed claiming alimony, and alleging that the defendant, in order to defeat the plaintiff's claim for alimony, had, by collusion with his sister, deeded all his property to her for a grossly inadequate consideration; that the sister had taken the deed knowing of the bill; and after notice by the plaintiff, who had warned her not to pay the consideration, and praying by the bill that the defendants be required to answer the allegations of the bill, and that the deed be set aside and declared void, — these matters were denied in the answer of each of the defendants, and the deed was claimed to have been executed and delivered in good faith, and upon a valuable consideration. There was no direct evidence adduced, as disclosed by the record, other than the mere inadequacy of consideration for the deed, which evidence in itself was declared insufficient to prove the fraud alleged; and the court declared that “an answer of the defendant responsive to the bill denying the allegations therein made in regard to his motives and intentions, is conclusive upon that question, unless overcome by the testimony of two witnesses, or of one with corroborating circumstances.”¹

Bona fide Purchaser. — A bill in equity was filed by the Attorney-General in the name of the United States, for the purpose of having a patent of land of 9,565⁹⁵/₁₀₀ acres from the United States to a pre-emptor cancelled, the ground being that there was no improvement or actual settlement on the land. The affidavits, it was claimed, had falsely set out the necessary facts of settlement and improvement; and it was also alleged that the patents were procured by means of a fraudulent conspiracy between certain persons named in the bill, and that the pre-emptors were in fact fictitious persons. An *answer* was filed by the defendant denying the allegations of fraud specifically, and averring in addition that it was a purchaser *bona fide*, and for a valuable consideration, without notice of any of the claimed fraudulent acts of the per-

Mey v. Gulliman, 105 Ill. 272; Laberge v. Chauvin, 2 Mo. 179; Gamble v. Johnson, 9 Mo. 605; Johnson v. McGruder, 15 Mo. 365; McQueen v. Chonteau, 20 Mo. 222; Shields v. Trammell, 19 Ark. 51, 63, 64; Atkinson v. Manks, 1 Cow. (N. Y.) 191; Jordan's Admr. v. Fenno, 13 Ark. 593; Clark v. Bailey, 2 Strob. Eq. (S. Car.) 143; Garrett v. Garrett, 29 Ala. 439; Johnson v. Slawson, Bail. Eq. (S. Car.) 463; Durham v. Taylor, 29 Ga. 166.

“Where an answer alleges as facts what the defendant could not personally know, though it may be responsive to the bill, the rule requiring two witnesses, or one witness with corroborating circumstances, or very strong corroborating circumstances, to counterveil its effect, does not apply; but such an answer merely puts the complainant to

prove the allegations denied.” Conner v. McIlvaine, 4 Del. Chan. 30.

An answer partly corroborated by one witness, and contradicted by one witness only, prevails. Vermont v. Delaire, 2 Desaus. (S. Car.) 323.

The rule that, where an answer is responsive, there must be two witnesses, or one witness and corroborating circumstances, to overcome it, was not adhered to in a Georgia case, where it was said that such answer might be overcome by circumstances alone. Robinson v. Hardin, 26 Ga. 344.

Testimony of defendant does not add any weight to sworn answer which it did not before have. Catlett v. Dougherty, 114 Ill. 568.

1. Feigley v. Feigley, 7 Md. 537.

sons named in the bill. Replications were filed, and the case came duly to trial and a hearing, upon which the patents were declared to be of no validity, and were ordered to be delivered up for cancellation. An appeal was taken to this court. Held, that a defence of a purchaser in good faith for value and without notice, was good; and the decree below was reversed, and the bill ordered dismissed.¹

1. *Supplemental Answer.* — The court refused to allow a supplemental answer to be filed under the following circumstances: The defendant demurred; upon its being overruled, an answer was filed; to this the plaintiff replied, and thereafter the defendant obtained a reference to a master to take testimony on his behalf; then, upon motion and affidavit, a continuance of the case was had to obtain the testimony of a certain witness. From the time of filing the answer, to the request to put in a supplemental answer, about eleven months elapsed. The supplemental and the original answers were also inconsistent.²

The court will not permit a penal statute affecting complainant's right to be set up as a defence by way of supplemental answer.³

A supplementary answer stands in place of an amended answer,⁴ and is allowed for similar matters, as in cases of supplemental bills, but for many other causes, as that the facts necessary to be alleged were omitted by reason of ignorance of them, or through misrepresentation by the plaintiff.⁵ Such answer should, however, only be of new matter arising subsequent to filing the original answer.⁶

1. *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 316, citing the *Maxwell Land Grant Case*, 121 U. S. 325, 379, 381.

Other Cases of Answers. — The rule that, where allegations are neither confessed nor denied in the answer, they must be proven at the hearing, applies to substance rather than form; and if, by any fair interpretation, the answer can be construed to be an admission of material facts, it will be so construed. *Surget v. Byers*, 1 Hempst. (U. S.) 719.

Defendant should not put in a plea for want of the necessary parties. The defect is properly set out in an answer. *U. S. v. Gillespie*, 6 Fed. Rep. 803.

An answer, being a mode of defence, can contain no prayer other than to be dismissed. *Cullum v. Erwin*, 4 Ala. 452; *Goodwin v. McGehee*, 15 Ala. 232.

An answer is not required to a bill of *revivor*. 1 Harr. Pract. in Chan. 127.

Rule 59, U. S. Eq. Rules, provides that the answers must be verified, and that "Every defendant may swear to his answer before," etc. *Desty's Fed. Proced.* (Pract. Series) p. 711.

Rule 60, U. S. Eq. Rules, provides that answers may be amended, and declares that "After an answer is put in, it may be

amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and may be resworn at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer so as to be distinguishable therefrom." *Desty's Fed. Proced.* (Pract. Series) p. 711.

2. *Stout v. Shew*, 1 Pinn. (Wis.) 438, 443.

3. *Stout v. Shew*, 1 Pinn. (Wis.) 438, 448.

4. *Stout v. Shew*, 1 Pinn. (Wis.) 438.

5. *Strange v. Collins*, 2 Ves. & B. 163;

Tidswell v. Boyer, 7 Sim. 505.

6. *Suydam v. Truesdale*, 6 McLean (U. S.), 459.

2. *Demurrers, Pleas, and Answers.* — A defendant may demur to one part of a bill, and plead or answer to another part.¹ But he may not demur and plead or demur and answer to the same part of a bill, for the plea and answer overrules the demurrer.² Nor may the defendant demur, plead, and answer to the whole bill at the same time.³

The matter set forth in a supplemental answer should be a meritorious ground of defence, or in aid or explanation of the answer itself, and not allege matter which is entirely new and distinct ground of defence. *Stout v. Shew*, 1 Pinn. (Wis.) 438.

Rule 46, U. S. Eq. Rules, provides that "In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer." *Desty's Fed. Proc.* (Pract. Series) p. 703.

1. *Bull v. Bell*, 4 Wis. 54.

Rule 32, U. S. Eq. Rules, provides that "The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it; and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded." *Desty's Fed. Proc.* (Pract. Ser.) p. 695.

Rule 33, U. S. Eq. Rules, provides that "The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." *Desty's Fed. Proc.* (Pract. Series) p. 696.

Rule 36, U. S. Eq. Rules, provides that "No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to." *Desty's Fed. Proc.* (Pract. Series) p. 697.

"A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim to another; but all these defences must clearly refer to separate and distinct parts of the bill; for though a defendant may plead to one part of a bill, and demur to another, yet he cannot, because of the inconsistency, plead and demur to

one and the same part of the bill; and, besides, the plea overrules the demurrer, and for the same reason he cannot answer and demur to the same part of the bill; neither can he plead to that which he has already answered, for the answer overrules the plea *a fortiori* the demurrer." 1 *Harr. Pract.* in *Chan.* 297.

2. *Jones v. Earl of Strafford*, 3 P. Wms. 79, 80; *Eq. Draughts.* by *Hughes*, 622.

3. *Crescent City, etc., Co. v. Union, etc., Co.*, 12 Fed. Rep. 225.

Other Cases of Demurrers, Pleas, and Answers. — The defendant may not answer in part to the discovery, and demur to the other part. *Abraham v. Dodgson*, 2 *Atk.* 157; *Eq. Draughts.* by *Hughes*, 622.

Nor may he demur to the discovery, and not to the relief, since the relief may be had without the discovery. *Eq. Draughts.* by *Hughes*, 622.

Want of necessary parties not apparent on the bill itself must be availed of by plea or answer. *Bay State Iron Co. v. Goodall*, 39 N. H. 223; *Carey v. Brown*, 92 U. S. 171; *Robinson v. Smith*, 3 *Paige* (N. Y.), 222, 230.

Misjoinder of parties may be availed of by demurrer or answer. *Bunce v. Gallagher*, 5 *Blatchf.* (U. S.) 481.

"If a plea is coupled with an answer to any part of the bill covered by the plea, and which by the plea the defendant consequently declines to answer, the plea will, upon argument, be overruled. The reason of this doctrine is, that pleas are put in *ante litem contestatam*, because they are pleas only why the defendant should not answer; and therefore, if he does answer to any thing to which he may plead, he overrules his plea, for the plea is only why he should not answer; and if he answers, he waives the objection, and, of course, his plea." *Joyce v. Gunnel*, 2 *Rich. Eq.* (S. Car.) 259.

When defendant "wishes to avoid a full answer, on the ground that there is some fact which defeats the plaintiff's equity, he must allege the fact by plea, so that the plaintiff may take issue; and when he wishes to avoid an answer to some particular matter, on the ground that there is a fact which excuses him from making a discovery in respect thereto, he must answer the other parts of the bill, and allege the fact by plea, as that he is a purchaser for a valuable consideration without notice, and

(D) **DISCLAIMER** is where the defendant by answer denies that he claims or has any title to the thing in demand in the bill, and disclaims or renounces all claim thereto.¹

(E) **REPLICATIONS.** — A replication is matter set up by the plaintiff in avoidance or denial of the answer or plea of the defendant whereby the plaintiff generally asserts the truth and sufficiency of the allegations of the bill.²

Where replication is had to a plea, and issue is joined thereon as to the facts, then, if they are proven true, it is admitted that they are sufficient in law to bar the plaintiff's right to recover. The English practice in chancery, in this respect, prevails here; and the bill will also be dismissed upon proof of the truth of the facts pleaded in bar, without reference to other equities in the bill.³

The plaintiff may set up the statute of limitations in his replication, or he may amend his original bill.⁴

A new case cannot be made by the replication. This is matter of amendment of the original bill.⁵

Where a replication is filed, the matter alleged in the answer in avoidance of the relief prayed for by the bill must be proved.⁶

therefore is not obliged to discover his title." *Weisman v. Heron Mining Co.*, 4 Jones's Eq. (N. Car.) 112, 117.

"Multifariousness as to subjects or parties within the jurisdiction of a court of equity cannot be taken advantage of by a defendant except by demurrer, plea, or answer to the bill, although the court in its discretion may take the objection at the hearing or on appeal, and order the bill to be amended or dismissed."

The court in *Hefner v. North-Western Life Ins. Co.*, 123 U. S. 747, 751, citing *Oliver v. Piatt*, 3 How. (U. S.) 333, 412; *Nelson v. Hill*, 5 How. (U. S.) 127, 132, and further declared that "a fortiori it does not render a decree void so that it can be treated as a nullity in a collateral action."

The distinctions in England as to demurrer, plea, and answer, have not been adopted in *Connecticut*; and many other novel principles and changes have been introduced. 2 *Swift's Digest* (Conn.), 271 *et seq.* Although the Practice Act passed in 1879 is the code system of *Connecticut*; and for the general rules in regard to equitable pleadings and procedure in that State, recourse must now be had to it.

Defendant may demur or plead or answer; and when he objects to the structure of the bill and its completeness, it is his duty to do so if he expects to take advantage of an exception. *Surget v. Byers*, 1 Hempst. (U. S.) 719.

1. 1 Harr. Pract. in Chan. 296.

"The defendant cannot by a disclaimer deprive the complainant of the right of requiring a full answer from him, unless it is evident that the defendant ought not,

after such disclaimer, to be continued a party to the suit." *Ellsworth v. Curtis*, 10 Paige (N. Y.), 105, 107.

2. 1 Harr. Pract. in Chan. 299; Mitf. Plead. (2d ed.) 255; Lube's Eq. Plead. (Pract. Series) 244, 245, §§ 353, 354; *Hinde's Chan.* 284, 289; *Story's Eq. Plead.* (9th ed.) § 877; 2 Madd. Chan. 275. See U. S. Eq. Rule 29, cited under title "Amendment," *post*.

3. *Farley v. Rittson*, 120 U. S. 303, 314, 315.

If replication be made to a plea, this puts the distinct averments of the plea in issue, and nothing more; since, if the plea be established, this is a bar to the bill so far as the plea covers it. *Bogardus v. Trinity Church*, 4 Paige (N. Y.), 178.

Where *no replication* is filed, the *answer*, so far as the facts are well pleaded therein, is admitted as true. *Gallagher v. Roberts*, 1 Wash. (U. S.) 320. See *Jones v. Brittan*, 1 Woods (U. S.), 667; *Parton v. Prang*, 2 Pat. Off. Gaz. 619.

Rule 38, U. S. Eq. Rules, provides, that "If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof; and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose." *Desty's Fed. Proced* (Pract. Series) 698.

4. *Piatt v. Vattier*, 9 Pet. (U. S.) 405.

5. *Vattier v. Hinde*, 7 Pet. (U. S.) 252.

6. *White v. Morrison*, 11 Ill. 361.

"Special replications in chancery are

(F) EXCEPTIONS have been defined as the allegations of a party in writing, alleging that some pleading or proceeding in a cause is insufficient, or not perfectly answered in a certain point or points, particularly expressed and set forth in such exceptions.¹

But, says Daniel, J., in *Surget v. Buyers*,² Pleadings, "it is well understood, are viewed with very little regard to form in courts of equity, where exceptions are never allowed, if they are made under circumstances calculated to effect a surprise on either party, and might have been made at a different stage of the case, and consistently with fairness to all. This is a tribunal which addresses itself to the consciences of men, which looks to the substance of things, and acts upon the maxim '*Ut res magis valeat quam pereat*.'"

In a case in the United States courts, it was held that where a suit can be maintained against one of several defendants alone, whose interests are capable of being severed from the other respondents, a mere formal objection, or objection to the jurisdiction, as that some of the parties defendant were not properly before the court, would not be sustained.³

After an answer has been made to a bill, and a committee has been appointed, and made its report upon the facts, the bill will not be dismissed for want of necessary parties then objected to for the first time; but the court will order it to stand over, and proper parties to be added.⁴

To an insufficiency in the answer, an exception may be taken; but the court will not sustain a captious exception when the real

now disused. A general replication only puts in issue the truth and sufficiency of the matters stated in the bill and answer. If it is necessary for the plaintiff to put in issue any fact on his part in avoidance of the matters set up by the defendant, he must do it by proper charges in his bill. He may in his original bill anticipate the defence that will be made, and allege any matters necessary to explain or avoid it; or, omitting all reference to the defence, he may, on the coming in of the answer, introduce the new matter in the case by an amendment to the bill." The court in *White v. Morrison*, 11 Ill. 361.

A distinct matter set up in avoidance is to be taken as true without proof; but this may be avoided by a replication, and thus put the defendant on his proof of such fact. *Atkinson v. Manks*, 1 Cow. (N. Y.) 691, 703.

Rule 45, U. S. Eq. Rules, provides that, "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct." *Desty's Fed. Proced.* (Pract. Series) 702.

Rule 66, U. S. Eq. Rules, provides that, "Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed." *Desty's Fed. Proced.* (Pract. Series) 714.

1. 1 Harr. Pract. in Chan. 228.

2. 1 Hempst. (U. S.) 715, 718.

3. *Nesmith v. Calvert*, 1 Wood. & M. (U. S.) 34.

4. *New London B'k v. Lee*, 11 Conn. 112, 121; *Chipman v. Hartford*, 21 Conn. 488.

grounds of the controversy are disclosed or admitted by the pleadings, so an exception may be taken to the whole bill or portions of it.¹

So where, upon a bill in equity, after a committee was appointed and the matter investigated fully, an objection that there is a misjoinder or a want of parties comes too late, and will not be heard: in such case the defendants will be considered as waiving their objections.²

An objection made to the jurisdiction after an answer put in to the merits, and after the replication is filed, and the evidence published, comes too late.³

(G) AMENDMENTS. — The courts are very liberal in granting leave to amend a bill. The case of *Perry v. Perry*⁴ well illustrates this. A bill was exhibited in which the plaintiff sought to enforce a resulting trust in land, brought against an infant and a widow of one P. The bill alleged the purchase of certain land, specifically described, of one H., and the conveyance of the same to P. in trust for the plaintiff; that plaintiff paid for the land partly in cash, and that three promissory notes of P. were given for the balance, which notes were secured by mortgage of the premises; that subsequently the plaintiff furnished the money to take up said notes, and to pay the interest thereon, except a small balance which the said P. had agreed to assume and pay in consideration of certain acts done by the plaintiff; and that the premises were in the occupation of the plaintiff. The defendant demurred, upon the grounds that "The bill nowhere alleges, except inferentially, that P. is dead. It does not assert that he died seized of the alleged trust, or that the respondents have or claim any title to the premises in question. The bill contains no prayer for general

1. *Surget v. Byers*, 1 Hempst. (U. S.) 719; 1 Harr. Pract. in Chan. 228; *Blaisdell v. Stevens*, 16 Vt. 179.

2. *Chipman v. Hartford*, 21 Conn. 488, 499.

3. *Nesmith v. Calvert*, 1 Wood. & M. (U. S.) 34.

"Courts will take notice of the omission, though no demurrer be interposed for want of proper parties when it is manifest that the decree" can affect their interests. *Herrington v. Hubbard*, 1 Scam. (Ill.) 569, 573.

It has been decided that laches need not be pleaded. It is sufficient if it appears at the hearing, and the court will order accordingly. *Credit Co. v. Arkansas, etc.*, R. Co., 15 Fed. Rep. 46.

A motion to dismiss for that the complainant has an adequate remedy at law, comes in too late after the case is put on trial on its merits, and no demurrer has been filed. *Hargrave's Adm'r v. Jones*, 27 Ga. 233.

Rule 53, U. S. Eq. Rules, provides that

"If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties." *Desty's Fed. Proced. (Pract. Series)* 707.

Rule 61, U. S. Eq. Rules, provides as to when exceptions to answers may be taken, and declares that, "After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient." *Desty's Fed. Proced. (Pract. Series)* 712.

4. 65 Me. 399.

nor for particular relief. It fails to specify the relief desired, or the mode and manner in which it is to be afforded. . . . It does not allege that those notes (of P.) were furnished by the complainant, or at his instance, or for his benefit," nor was it "alleged that the title to the premises in controversy" was in the infant. The demurrer was sustained, but the court ordered that the plaintiff might amend on terms if he deemed it advisable.

An amendment cannot generally be had where an issue is made upon the original bill, and there has been an examination of witnesses, except, perhaps, where the plaintiff discovers the necessity of adding new parties, which the court may permit to be done at any time by amendment.¹

Amendments for the purpose of bringing in proper parties who have been omitted, is a matter of discretion with the court.²

An amendment may be allowed after a decision by the court in favor of a demurrer, if the real merits and justice of the case demand it.³

So, facts necessary to the bill, and existing before the filing of the same, are properly matter for amendment.⁴

An amended complaint supersedes the original, and relates back as to the commencement of the action to the filing of the original bill.⁵

Where a bill is brought alleging the conveyance away of certain lands by a judgment creditor, and praying that a judgment be declared a lien on said lands, and the bill is found defective as

1. *Dow v. Jewell*, 18 N. H. 340, 359; *Bleeker v. Bingham*, 3 Paige (N. Y.), 246.

2. 1 Harr. Pract. in Chan. 76.

3. *Hunt v. Rousmaniere's Adm'rs*, 2 Mason (U. S.), 294, 342.

4. *Candler v. Petit*, 1 Paige (N. Y.), 168.

5. *Barber v. Reynolds*, 33 Cal. 497.

Amendments in chancery relate to, and are a part of, the original bill, and have the same effect as if originally a part of it. *Hoyt v. Smith*, 28 Conn. 466.

Rule 28, U. S. Equity Rules, provides that "The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matter whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do, of course) after a copy has been so taken, before any answer, or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are

numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby." *Desty's Fed. Proced.* (Pract. Series) 692.

Rule 29, U. S. Eq. Rules, also provides that "After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the court, or a judge thereof, may, in his discretion, direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of a court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause." *Desty's Fed. Proced.* (Pract. Series) 693.

to necessary allegations showing the fraud against the plaintiff, it was held that such bill might be amended at the final hearing, and such defect supplied.¹

Where no ground for proceeding under the original bill exists to the plaintiff, and matter arises subsequently whereby he became entitled to relief, this is properly matter for a new bill, which he should file.²

EQUIVALENT.³

ERASURE.—See ALTERATION OF INSTRUMENTS.

ERECT.⁴

1. *Foster v. Knowles*, 42 N. J. Eq. (15 Stew.) 226.

2. *Candler v. Petit*, 1 Paige, Ch. (N. Y.) 168.

Costs are discretionary in chancery. *Sapp v. Phelps*, 92 Ill. 588, 595.

As to Decrees.—Rule 86, U. S. Eq. Rules, provides that, "In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered and adjudged, and decreed as follows: viz.' Here insert the decree or order." *Desty's Fed. Proc.* (Pract. Series) p. 727.

The various subjects under equity pleadings are treated of in the following textbooks: *Adams's Doctrine of Equity*, 68 Law Library; *Adams's Equity*, 3d Amer. ed. 1855; *Beames's Pleas in Equity*, 1815; *Bliss on Code Pleading*; *Boone's Law of Mortgages*; *Boone on Code Pleading*; *Barbour's Parties in Law and Equity*, 1864; *Barton's Suit in Equity*, Amer. ed. 1877; *Bispham's Principles of Equity*, 3d ed. 1882; *Brown on Statute of Frauds*, 4th ed. 1880; *Calvert's Parties to Suits in Equity*; *Desty's Federal Procedure*; *Daniell's Chancery Pleading and Practice*, 3d Amer. ed. 1865; *Edwards's Parties in Chancery*, 1832; *Field's Federal Courts*, 1883; *Field's Lawyers Briefs*; *Farren's Bill in Chancery*, Amer. ed. by Stone, 1866; *Herman on Estoppel and Res Adjudicata*, 1886; *Hawes's Parties to Actions*; *Hinde's Chancery*; *Harrison's Practice in Chancery*; *Hughes, Equity Draughtsman*, by; *Hunter's Suits in Equity*, 104 Law Library; *High on Receivers*, 1876; *Jones on Chattel Mortgages*, 1881; *Jones on Pledges*, 1883; *Jones on Mortgages*, 1878; *Kelly's Contracts of Married Women*, 1882; *Kerr on Fraud and Mistake*; *Langdell's Equity Pleading*, 1877;

Lube's Equity Pleading; *Law of Nuisance by Wood*; *Mitford's Chancery*; *Maddock's Chancery*; *Perry on Trusts*; *Schouler's Executors and Administrators*, 1883; *Story's Equity Pleading*, 9th ed. by Gould, 1879; *Story's Equity Jurisprudence*; *White's Supplement and Revivor*, 1843; *Wigram's Law of Discovery*; *Williams on Executors*, 1877, *American notes by Perkins*; *White & Tudor's Leading Cases in Equity*; *Willard's Equity Jurisprudence*; *Walker on Patents*, 1883; *Wiltzie on Mortgage Foreclosures*, 1885; *Wait's Actions and Defences*.

3. It seems that a power granted to the assignee in a deed of assignment for the benefit of creditors, to sell and dispose of goods, and collect accounts, "converting the same into cash or its equivalents," is not a power to sell on credit. "It may be doubted," said the court, "if this can be construed to empower the assignee to sell for any thing but money. The meaning of the provision is not clear. It is not easy to conceive what is intended to be embraced by the use of the words 'its equivalents'; but to be equivalent to cash must be something as commercially as good as cash, or, as we take it, something that could readily be converted into cash at a fixed price." *Kellogg v. Muller*, 4 S. W. Rep. (Texas) 361.

4. **A Bequest to erect a Charitable Foundation** imports that land is to be bought, unless the will manifests a purpose that it is to be otherwise procured. *Atty.-Gen. v. Parsons*, 8 Ves. Jr. 186.

A Building Erected is a Building Completed.—A prisoner was indicted under a statute of New York making it a felony to set fire to or burn "any building erected for the manufacture of cotton or woollen goods, or both." It was proved upon the trial that the whole frame of the structure fired, designed for a factory, was not up at the time; that the part which had been raised was not entirely enclosed; the floors were not laid, the stairs were not up, and no part of the building ready for occupation, or substantially ready for the reception

EROSION.—The gradual eating away of the soil by the operation of currents or tides. The proprietorship of lands may be lost by erosion.¹

of the machinery. It was *held*, *Grover, Peckham, and Folger, J. J.*, dissenting, that this was not a building erected within the statute. Said the court, "A 'building erected' is quite distinct from a 'building being erected.' . . . To erect, when used in connection with a house, or church, or factory, is to build; and neither can be said to be erected until they are built, completed." *McGary v. People*, 45 N. Y. 153.

Do Alterations in a Building constitute an Erection of a Building?—Under a statute which provided that "no building shall be erected within the town of Boston, and used and improved" as a livery-stable, within one hundred and seventy feet of a church, it was *held* that the enlarging and fitting up as a livery-stable of a dwelling-house that was built before the act was passed, was an erection of a livery-stable. *Hastings v. Aiken*, 1 Gray (Mass.), 163. To elevate and enlarge a wooden building so as to materially alter its character, is an offence within the meaning of a city ordinance passed "to prevent the erection of wooden buildings" within certain limits of the city. *Douglass v. Com.*, 2 Rawle (Pa.), 262. But in *Booth v. State*, 4 Conn. 65, it was *held* that, where a wooden building erected originally for a meeting-house, and subsequently used for a joiner's shop, was extensively repaired, and converted into a dwelling-house, such repairs and alterations did not constitute the erection of a wooden dwelling-house within the statute to secure the city of New Haven from damage by fire. Said the court, "That a former building was extensively *repaired*, and *converted* to a new use, is not disputed; but whether regard be had to etymology, or the popular meaning of language, no dwelling-house was *built* or *erected*."

The Painting of a House is a Part of its Erection.—In *Martine v. Nelson*, 51 Ill. 422, it was *held* that house-painters are within the protection of a mechanics' lien law that secures a lien to persons who "furnish labor or materials for erecting or repairing" a building. . . . "If the builder," said the court, "protects the walls of his house from the action of the elements by covering them with a coat of paint or stucco, is it reasonable to say he has not used these materials in *erecting* his house?"

When is a Removal of a Building an Erection of a Building?—Under a statute creating a mechanics' lien "for labor performed or furnished in the erection, alteration, or repair of a building or struc-

ture upon real estate," it was *held* that no lien exists for labor performed or furnished in the removal of a building. "We can have no doubt," said the court, "that the word 'erection' in the statute means 'construction.' . . . The moving a building is quite as technical and well-understood a phrase as the erection of a building, or altering a building, or repairing a building; and, in the ordinary use of language, no person would understand that either the erection, alteration, or repair of a building involved its removal from one place to another,"—*Trask v. Searle*, 121 Mass. 229,—nor is the removal of a building an erection of a building within a statute that forbids the erection of wooden buildings in certain cases. *Brown v. Hunn*, 27 Conn. 332. But an indictment for burning in the night-time a "building erected for public use," according to the terms of a statute, is sustained by proof of burning in the night-time a building removed by a city, and afterwards fitted up as a schoolhouse and engine-house. Said the court, "The removal of a building to a new position, and there fitting it up for its intended occupancy, is as much 'erecting' it there as if all the materials had been brought there and put together." *Commonwealth v. Horriggan*, 2 Allen (Mass.), 159. See also *Burling's Estate*, 1 Ashm. (Penn.) 377.

A Greenhouse is an Erection.—A covenant in a lease to yield up at the expiration of the term "all erections and improvements erected, made, or set up during the term," is broken by the removal of the sashes and framework of a greenhouse erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar thereon. Said *Bosanquet, J.*, "Erection and improvement are not technical words. I think the greenhouse was an improvement within the meaning of the covenant; and it was undoubtedly an erection." *West v. Blakeway*, 2 Man. & G. 757.

A Scaffold is an Erection.—The bottom of a shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine for the purpose of working a vein of coal which was on a level with the scaffold. It was *held* that this scaffold was "an erection used in the conducting the business" of a "mine" within the statute 7 & 8 Geo. IV. c. 30, s. 7, and that the damaging it with intent to destroy it, or to render it useless, was felony. *Reg. v. Whittingham*, 9 Car. & P. 234.

1. *Mulry v. Norton*, 100 N. Y. 433.

ERRONEOUS. — Deviating from the law. It is never used by courts or law-writers as designating a corrupt or evil act.¹

ERROR.² — See also MISTAKE; ERROR, WRIT OF.

ERROR, WRIT OF. — See APPEAL; BILL OF EXCEPTIONS; CERTIORARI; SCIRE FACIAS; SUPERSEDEAS.

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I. Writ of Error Coram Nobis. — Definition. — In the trial of a cause, if matters exist which are not brought into issue, such as affect the validity and regularity of the proceeding itself, at common law, the writ of error *coram nobis* was issued in order to gain justice. It is called *coram nobis* because the record and process upon which it is founded are stated in the writ to remain "before us;" that is, in the court in which the error is: this writ always lies in the same court where the record is. Matters which affect the validity and regularity of the proceeding are such as the death of one of the parties at the beginning of the suit; the appearance of an infant in a personal action, by an attorney, and not by guardian; the marriage of a woman at the beginning of the suit

1. Thompson v. Doty, 72 Ind. 338.

2. The word "errors" in a contract with a telegraph company which exempts the company from liability for "delay, error, and remissness" in the transmission of a message, implies sending or delivering a wrong message, or a correct message to the wrong person, and not a failure to deliver any message at all. Baldwin v. U. S. Tel. Co., 54 Barb. (N. Y.) 515; s. c., 6 Abb. (N. Y.) Pr. N. S. 423.

A receipt given by the consignees of goods to a carrier, acknowledging their receipt in good order, and in which the consignees are requested to give notice of any errors therein in twenty-four hours,

subject to the condition that the carrier will otherwise consider itself discharged, does not exempt the carrier from liability for damages caused by negligence in transporting the goods, although no notice was given thereof to the carrier. Said the court, "Construing the word 'errors' with relation to the subject-matter, it would mean errors in the delivery, as in a less or greater number of packages, or packages directed to different persons; errors which it is necessary to correct at once. . . . The word 'errors' in this connection means mistakes, not waste or negligence." Sanford v. Housatonic R. Co., 11 Cush. (Mass.) 155.

when her husband is not joined with her.¹ This writ *coram nobis* does not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact already adjudicated. If a defendant appears and confesses judgment, he cannot controvert that fact after the expiration of the term for the purpose of setting aside the judgment.²

If a plaintiff in error die pending the writ, and the superior court reverses the judgment, the defendant in error may bring *coram nobis*, and assign the death of the plaintiff to the former writ as error.³ When a judgment is given on the verdict of a jury, it is not that the former judgment be reversed, but that it be recalled and revoked.⁴

The writ of error *coram nobis* is returnable before some superior tribunal who requires the record and proceedings to be certified to such tribunal for its revisory action.⁵

1. Hurst v. Fisher, 1 Watts & S. (Pa.) 438; Kemp v. Cook, 18 Md. 130.

2. Richardson v. Jones, 12 Gratt. (Va.)

53.

3. Beall v. Powell, 4 Ga. 525.

4. Fellows v. Griffin, 9 Smed. & M. (Miss.) 362.

5. Camp v. Bennett, 16 Wend. (N. Y.) 48. If the facts to be investigated were in the King's Bench, the writ would be *coram nobis*, "before us," as the record remains in the court where the king constructively is: if the writ issue from the common pleas, the writ would be *coram vobis*, "before you," since then the record remains before the justices of that court. Tidd's Pr. 1136-7. For further information on this subject, see Kemp v. Crook, 18 Md. 130; Land v. Williams, 12 Smed. & M. (Miss.) 362; Boughton v. Brown, 8 Jones (N. Car.), 393; Teller v. Wetherell, 6 Mich. 46.

A defendant was summoned by a wrong name, and was unable to find the declaration, and therefore did not appear; then he asked for the writ of *coram nobis*, which was overruled. It was his own fault that he did not plead the misnomer, or take judgment of *non pros.* Brandon v. Diggs, 1 Heisk. (Tenn.) 472.

If proceedings are founded upon facts, which the court presumes to exist, but contrary to this presumption the party is insane, or an infant, or a *feme covert*, or has died before verdict, and the court renders judgment, then the writ of *coram nobis* will issue. Day v. Hamburg, 1 Brown (Pa.), 75.

The writ of *coram nobis* is now superseded by motion, and is falling into disuse. Freeman on Judg. (1886) sect. 93.

The writ of error *coram nobis* has never been used in this State, and is falling into disuse in England. Its place is supplied by motion in the court where, and during

the term when, the error occurred. It is an obsolete writ. McKindley v. Buck, 43 Ill. 488.

Proceedings by writs of error *coram nobis* have been superseded by the more summary mode of a direct application to the court by motion. Prickett v. Legerwood, 7 Pet. (U. S.) 144; Sloo v. Bank, 1 Scam. (Ill.) 428.

When a judgment is taken against an infant, dead person, *feme covert*, where the character of such party is unknown to the court, and not made to appear of record, it must be reviewed, in the first place, in the court where the judgment was rendered. The judgment in such a case is supposed to have been rendered upon a misapprehension of facts, and hence the errors are required to be corrected in the same court.

By the common law the ordinary method of rectifying such errors is by writ of error *coram nobis*; but this writ has become obsolete by the modern practice which accomplishes the same result by motions. Life Association v. Fassett, 102 Ill. 315.

A writ of error *coram nobis* is not a *superseas* in itself; but it prevents the party in whose favor the judgment is, from taking out execution except by leave of the court or a judge. Semple v. Turner, 6 M. & W. 152.

The statute 27 Eliz. ch. 8 gave to the Exchequer Chamber substantially general powers in revising the errors of the Court of King's Bench. 2 Tidd's Pr. 1059-60; 2 Sellon's Pr. 388-9. But error *coram nobis* lies not in the Exchequer Chamber. 2 Sellon's Pr. 400-1; 1 Tom. L. Dict. 653.

In New York, under the common-law practice, the court of errors has no jurisdiction to reverse a judgment of the Supreme Court, for error in fact, unless the question has first been examined and

II. Writ of Error Generally.—Definition.—A writ of error is a writ issuing from a superior court, commanding an inferior court of record to send up the entire record of a contested procedure. The mode of revising the procedure of a court not of record, is by *certiorari*.¹

When the inferior court is supposed to have committed an error, the aggrieved party has a right to remove the cause to the higher court, in civil actions, without the consent of the opposite party.² He does this by suing out a writ of error from the superior court, which commands the judges of the inferior court to send the record to the superior court, there to be examined. The object of this writ is to correct an error of law committed in the course of the proceedings below, which is not amendable or cured at common law, or by some statute of amendment or jeofails.³

A writ of error is in the nature of a suit or action, when it is to restore the party who obtains it to the possession of any thing which is withheld from him; and it is considered a new action, and not the continuation of one already commenced.⁴ The record of the court imports absolute verity, and can only be reviewed by

decided upon a writ of error *coram nobis* in that court. *Davis v. Packard*, 6 Wend. (N. Y.) 327.

When an error in fact is committed in legal proceedings, the court in which the error is may correct it by a writ of error, *coram nobis*, or on motion. The writ of error *coram nobis* has been disused and superseded by the more summary mode of a direct application to the court for the correct exercise of its own powers over its proceedings and those of its officers. *Beaubien v. Hamilton*, 3 Scam. (Ill.) 213.

When an infant appears in a suit by attorney instead of guardian, the writ of error of *coram nobis* will lie. *Castelline v. Mundy*, 4 B. & Adol. 90; *Marshall v. Jackson*, 4 E. & B. 669, note; *Beven v. Chesire*, 3 Dowl. 70.

But if the judgment was in the infant's favor, his infancy cannot then be assigned for error by the plaintiff. *Bird v. Pegg*, 5 Barn. & Ald. 418. It will lie when the plaintiff or defendant is a *feme covert* at the beginning of the suit. *King v. Jones*, 2 Lord Ry. 1525; *Dick v. Talhausen*, 4 H. & N. 695; *Evans v. Chester*, 2 M. & W. 847.

Facts thus affecting the validity and regularity of the legal proceeding itself, however late discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon writ of error *coram nobis* because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment. 2 Tidd's Pr. 1191; 1 Manning, 490.

No court can reverse or annul its own final decision or judgment for errors of fact

or law, after the term at which they have been rendered, unless for clerical mistake, except upon bills of review in cases of equity, upon writs of error *coram nobis* in cases at law, or upon motion, which in practice has superseded the writ of error *coram nobis*. *Sibbald v. United States*, 12 Pet. (U. S.) 488; *Bronson v. Schulten*, 104 U. S. 410; *Schell v. Dodge*, 107 U. S. 630; *Phillips v. Negley*, 117 U. S. 665; *Cannon v. United States*, 118 U. S. 355.

A writ of error *coram nobis* will not lie after affirmance of the judgment in the appellate court. *Lambell v. Pettyjohn*, 1 Strange, 690; *Burligh v. Harris*, 2 Strange, 975.

A petition for a writ of error *coram nobis* was properly dismissed which showed that the judgment was rendered sixteen months after service of process, and that the petitioner, without examination, supposed the process was issued in another suit on the same instrument against a co-obligor. *Jackson v. Milsom*, 6 Lea (Tenn.), 514.

A petition for a writ of error *coram nobis* is fatally defective which relies upon errors of law without assigning any error of fact sufficient to justify a reversal of the judgment. *Dinsmore v. Boyd*, 6 Lea (Tenn.), 689.

1. *Sayres v. Commonwealth*, 88 Pa. St. 291; *Tarlton ex parte*, 2 Ala. 35.

2. *Drowne v. Stimpson*, 2 Mass. 441.

3. *Colley v. Latimer*, 5 Serg. & R. (Pa.) 211; *Wall v. Wall*, 2 Har. & G. (Md.) 79; *Chase v. Davis*, 7 Verm. (Vt.) 476; *Gregg v. Betha*, 6 Port. (Ala.) 9.

4. 2 Tidd's Pr. 1141; *International Bank v. Jenkins*, 104 Ill. 143.

direct proceedings upon it. The common law for this purpose gives the writ of error, and the statute gives an appeal.¹

The writ of error cannot be supported unless the error in law be of a substantial kind, because the statutes of amendments and jeofails make errors of mere form no ground for arresting the judgment; such objections are now insufficient to found a writ of error, though at common law the case was different.²

1. *When it will lie.*—A writ of error will lie after final judgment in bar is entered. It does not lie before final judgment from an interlocutory judgment or decree. There must be a final decision of the cause before either party can have it reviewed in the superior court; and this decision must be such as settles the rights of the parties respecting the subject-matter of the suit, and which concludes them until it is reversed or set aside.³

a. *What are Final Judgments.*—The general rule as to what are final judgments, is that no judgment or decree will be considered final, unless all the issues of law necessary to be determined were settled, and the case completely disposed of so far as the court had jurisdiction or power.⁴

1. *Whitaker v. Bramson*, 2 Paine, C. C. 209; *Moore v. Greene*, 19 How. (U. S.) 69; *Costock v. Crawford*, 3 Wall. (U. S.) 396.

2 *Stephen on Plead.* (1882) 145.

A writ of error is a suit at law, or in equity. *Powell's App. Ct. Pr.* 46, 346; *Freeman on Judg.* sect. 205.

An error in law, and error in fact, may be joined in a writ of error under Massachusetts law, and more than one error in fact may be assigned in a writ of error. *Eliot v. McCormick*, 141 Mass. 194.

A writ of error is a writ of right, allowable at common law, and will issue by the Supreme Court to the district courts, in the absence of statutory provisions regulating the procedure for prosecuting the writ. *Reece v. Knott*; 3 Utah Ter. 436.

A petition in error to review the decision of the court of common pleas, rendered in a case appealed from the board of county commissioners under sec. 896 Rev. Stat., can be maintained. *Mannix v. Commissioners*, 43 Ohio St. 210.

An omission to give a charge to which a party would have been entitled, is not error unless the same was requested on the trial, and refused. *Fry v. Currie*, 91 N. Car. 436.

The writ of error lies to bring up proceedings, according to the course of the common law, and it is not appropriate for the review of an order of the circuit court, setting aside the appointment of an administrator. *Brinsmade's Appeal*, 52 Mich. 537.

A writ of error is in the nature of a new suit, and any person who brings himself within the saving of the statute is entitled

to it as of right. *Ridgely v. Bennett*, 13 Lea (Tenn.), 206; *Mowry v. Davenport*, 6 Lea (Tenn.), 80.

3. *Dunham v. Braiman*, 1 Root (Conn.), 551; *Drowne v. Stimpson*, 2 Mass. 445; *McLaren v. Allen*, Minor (Ala.), 117.

4. *Young v. Grundy*, 6 Cranch (U. S.), 51; *Rutherford v. Fisher*, 4 Dalk. (U. S.) 22; *Winn v. Jackson*, 12 Wheat. (U. S.) 135; *Montgomery v. Anderson*, 21 How. (U. S.) 386.

The whole of the matter in issue must be finally disposed of as to all parties, in order to have a final judgment from which an appeal or writ of error can be taken. *Martin v. Crow*, 28 Tex. 614.

No further questions can come up before the court on a final judgment in carrying the decree into effect. Such a decree is final, otherwise it is interlocutory. *Humiston v. Stainthrop*, 2 Wall. (U. S.) 905; *Whiting v. Bank*, 13 Pet. (U. S.) 6.

If the decree or order is made for the purpose of carrying a judgment, already entered, into effect, it is not final. *Smith v. Trabue*, 9 Pet. (U. S.) 4; *Callan v. May*, 2 Black (U. S.), 541.

This writ seems to lie in all cases where an appeal is not allowed, in order to prevent a failure of justice. *Langworthy v. Baker*, 23 Ill. 430.

A plaintiff, by voluntarily dismissing his suit, waives all errors the court may have committed, and he cannot assign them for error. No writ of error lies in favor of a party taking a voluntary non-suit. *Newman v. Dick*, 23 Ill. 278.

A plaintiff, in an action, may prosecute a writ of error to reverse a judgment in his

own favor. 2 Tidd's Pr. 1134; Capron v. Van Noorden, 2 Cranch (U. S.), 126.

The writ will lie to the superior court to reverse the decision of the lower court for fining a person for contempt. *Stokeley v. Commonwealth*, 1 Va. 330; *Bickley v. Commonwealth*, 1 J. J. Marsh. (Ky.) 572; *Kearney ex parte*, 7 Wheat. (U. S.) 88.

Under the common-law procedure, no appeal lies from a conviction of criminal contempt, as every superior court of record is supposed to be the exclusive judge of contempt against its own dignity or authority. *Ex parte Crittenden*, 62 Cal. 534; *New Orleans v. Steamship Co.*, 20 Wall. (U. S.) 392; *Tyler v. Hammersly*, 44 Conn. 393; *Lockwood v. State*, 1 Ind. 161; *Watson v. Williams*, 36 Miss. 331; *State v. Galloway*, 5 Cold. (Tenn.) 326; *Shattuck v. State*, 51 Miss. 50; *Phillips v. Welch*, 11 Nev. 187; *Hays v. Fischer*, 102 U. S. 121; *Hogan v. Alston*, 9 Ala. 627; *Ex parte Martin*, 5 Yerg. (Tenn.) 456; *Re Cooper*, 32 Vt. 253; *Ex parte Summers*, 5 Ired. (N. C.) 149; *Cossart v. State*, 14 Ark. 538; *First Cong. Church v. Muscatine*, 2 Iowa, 69; *Casey v. State*, 25 Tex. 380; *State v. Giles*, 10 Wis. 101; *Kernodle v. Cason*, 25 Ind. 362; *Code of Cal. sect. 1222*; *State v. Thurmond*, 37 Tex. 340; *Easton v. State*, 39 Ala. 551; *State v. Towle*, 42 N. H. 540. But other authorities hold a contrary view. *In re Pryor*, 18 Kans. 72; *Haines v. People*, 97 Ill. 161; *Baltimore R. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Stokeley v. Commonwealth*, 1 Va. 330; *Ex parte Robbins*, 69 N. Car. 309; *In re Walker*, 82 N. Car. 95; *Bickley v. Commonwealth*, 2 J. J. Marsh. (Ky.) 572; *Whitern v. State*, 36 Ind. 196, overruling former decisions; *Ex parte Wright*, 65 Ind. 504; *Beck v. State*, 72 Ind. 250; *Bond v. Bond*, 69 N. Car. 97; *Hundhausen v. Ins. Co.*, 5 Heisk. (Tenn.) 702.

In remedial proceedings, as for contempt to enforce civil remedies, such as process of execution of order, judgments or decrees, and which are regarded as controversies between private parties, and not as prosecutions of the State, an appeal will lie. *People v. Healey*, 48 Barb. (N. Y.) 564; *Romeyn v. Caplis*, 17 Mich. 449; *People v. Spaulding*, 10 Paige (N. Y.), 284; *Bank v. Bank*, 18 Wis. 490; *Forbes v. Willard*, 37 How. Pr. (N. Y.) 193; *Haines v. Haines*, 35 Mich. 138; *Matter of Doves*, 81 N. Car. 72; *Re Pierce*, 44 Wis. 411; *Watrous v. Kearney*, 79 N. Y. 496; *Hundhausen v. Ins. Co.*, 5 Heisk. (Tenn.) 703.

Under the code of Georgia, a judgment dismissing an attachment is subject to review on writ of error. To maintain his attachment, it was the right of the plaintiff to have judgment dismissing it reviewed by a separate writ of error. *Sutherlin v.*

Underwriter, 53 Ga. 442; *Bruce v. Conyers*, 54 Ga. 680.

A decree is final which settles the rights of the parties as to property, and directs a conveyance to be made at a future time. *Lewis v. Putton*, 3 B. Mon. (Ky.) 453.

A decree is none the less final, because some future orders of the court may become necessary to carry it into effect. *Johnson v. Everett*, 9 Paige (N. Y.), 636; *Dickenson v. Codwise*, 11 Paige (N. Y.), 189; *Stovall v. Banks*, 10 Wall. (U. S.) 583.

The judgment or decree must be such, that, in case of affirmance, the court below would have nothing to do but execute the judgment or decree. *Whiting v. Bank*, 13 Pet. (U. S.) 6; *Forgay v. Conrad*, 6 How. (U. S.) 204; *Beebe v. Russell*, 19 How. (U. S.) 285; *Thompson v. Dean*, 7 Wall. (U. S.) 342; *St. Clair Co. v. Livingston*, 18 Wall. (U. S.) 628; *Parcels v. Johnson*, 20 Wall. (U. S.) 654; *R. R. Co. v. Swasey*, 23 Wall. (U. S.) 409; *Commissioners v. Lucas*, 93 U. S. 113.

A judgment of reversal, with leave for further proceedings in the court below, cannot be brought up on writ of error. *Brown v. Bank*, 4 How. (U. S.) 466; *Tracy v. Holcombe*, 24 How. (U. S.) 426; *Moore v. Robbins*, 18 Wall. (U. S.) 588; *McComb v. Knox Co.*, 91 U. S. 1; *Baker v. White*, 92 U. S. 176; *Davis v. Cranch*, 94 U. S. 514; *Buck v. Hamilton*, 99 Ill. 507.

An order that a cause stand dismissed at plaintiff's costs, there having been no service of process upon the defendant, is a final disposition of the matter to which a writ of error will lie. *Cook v. Cook*, 18 Fla. 634.

An allowance of temporary alimony by a judge at chambers, is a final order which may be reviewed on error. *King v. King*, 38 Ohio St. 370.

The legal discretion of the orphan's court in the appointment of guardians of the persons and estates of minors, is not subject to review by a court of error. *Gray's Appeal*, 96 Pa. St. 243.

Error will lie on the demeanor of the trial judge, if it be such as to prevent a fair trial, or prejudice the case upon the facts before the jury. *Wheeler v. Wallace*, 53 Mich. 355.

Writs of error are authorized only on review of final judgment or decrees, in actions triable by jury as a matter of right. *Crocker v. State*, 60 Wis. 553.

An order of the circuit court, setting aside an award made by arbitrators upon a submission *in pais* of matters as to which there is no action pending, but which provides that the award shall be made the judgment of the court, is such a final judgment that a writ of error will lie from it to the Supreme Court. *Tennant v. Divine*, 24 W. Va. 387.

Where a judgment below was consented to by a party complaining thereof, his writ of error will be dismissed. *Zorn v. Lamar*, 71 Ga. 80.

Where a feigned issue is awarded as ancillary to a suit or proceeding in the same court or in another, the judgment in the feigned issue cannot be reviewed by writ of error until after final judgment or decree in the principal cause. *Cake v. Cake*, 106 Pa. St. 472.

Under the Florida statutes, the writ of error in civil cases, when the defendant in the circuit court applies therefor, issues on demand as a matter of right. *Weiskoph v. Dibble*, 18 Fla. 22.

A case may be taken to the Supreme Court upon the rendition of a final judgment in the lower court, or upon refusal of a judgment which would have finally disposed of the case had it been rendered as contended for by the excepting party. *Mechanics, etc., Bank v. Harrison*, 68 Ga. 463.

A general statute of Connecticut provides that writs of error may be brought from the judgments of all city courts to the superior courts. A later act repealed this statute, and provided that writs of error from judgments of city courts should be brought as provided in the charters of the several cities. The city of Norwich's charter contained no provisions for writs of error from the judgment of its city courts. *Held*, that no writ would lie to the Superior Court. *Rogers v. Carroll*, 48 Conn. 300.

When the instructions to the jury are clearly erroneous and calculated to mislead, to the injury of a party, to sanction the judgment which follows, it should be clear that such a consequence did not, in fact, ensue from error. *Hudson v. Morris*, 55 Tex. 595.

The omission to rule expressly upon objections to injurious irregularities committed at a trial, will not protect them from review. The judge's silence may be construed as allowing them against objections. *Corning v. Woodin*, 46 Mich. 44.

One writ of error cannot be taken to separate judgments in two actions in different rights, but tried together on the same evidence; and if so taken, the writ will be quashed. *Cauley v. Pittsburgh, etc., R. Co.*, 95 Pa. St. 398; s. c., 40 Am. Rep. 664.

Remarks made by counsel in summing up to a jury are *dehors* the record, and their propriety or impropriety cannot therefore be passed upon an error by the Supreme Court. *Fulmer v. Commonwealth*, 97 Pa. St. 503.

In Colorado, a writ of error must be prosecuted within five years from date of the rendition of the decree in the court

below. Heirs-at-law, prosecuting in that character, have no greater rights than the ancestor whom they represent; and when he, if living, would not be entitled to a writ of error, it follows that his personal representatives, as such, are equally without remedy. *Clayton v. Cheeley*, 5 Colo. 337.

The Supreme Court has no power to review the findings of a jury on a writ of error, since, if there is testimony enough to go to the jury, that body must find the facts for itself. *Tyler v. Smith*, 46 Mich. 292.

The refusal of the court of common pleas to allow a petition in error in a forcible detainer suit, is not reviewable in the district court on a petition in error. *Rothwell v. Winterstein*, 42 Ohio St. 249.

A writ of error directed to the circuit court, having been dismissed for want of prosecution, the plaintiff in error cannot sue out a second writ of error. *Welsh v. Brown*, 42 N. J. L. 323.

When error appears on face of the judgment, it can be reviewed in the Supreme Court without motion for a new trial, or bill of exceptions in the court below. *Union County v. Smith*, 34 Ark. 684.

The act of April 1, 1874, provides that no judgment shall be reversed unless a writ of error be sued out within two years from entry of the judgment. A judgment was entered Jan. 10, 1876. The writ of error was taken out June 10, 1878. *Held*, that the writ was not within the statutory period, and should be quashed. *Penn. Central Ins. Co. v. Gaus*, 91 Pa. St. 103.

Under the Ohio civil code to reverse a judgment, the court must not regard those defects in the pleadings or proceedings which do not affect substantial rights of the adverse party. The refusal of a court, in which a civil action is pending, to sustain a motion to state separately and number several causes of action which may be united in one petition, is not error for which a final judgment will be reversed, unless it appears that by such refusal the adverse party has been deprived of substantial rights. *Bear v. Knowles*, 36 Ohio St. 43.

Where no objection has been made in the trial court to the form of the judgment, and no motion made there to modify or correct it, its sufficiency will not be considered by the Supreme Court. *Teal v. Spangler*, 72 Ind. 380.

Error does not lie on the affirmation by the circuit court of a commissioner's order dissolving an attachment. The order only determines the right to the lien, and a writ of error based upon it would not affect the judgment actually given on the merits. *Gray v. York*, 44 Mich. 415.

The order of a circuit court affirming the

order of a court commissioner discharging a prisoner on *habeas corpus*, is in the nature of a final judgment, and may be reviewed by this court on writ of error. *State v. Smith*, 65 Wis. 93.

An appeal from the allowance of an administrator's account, or from his final accounting, is removable on writ of error and exceptions. All questions in probate proceedings that are reviewable by the Supreme Court are removable thereto on writ of error, there being no provision for appealing such proceedings to that court, as in chancery. On error the Supreme Court reviews the actions of the court below on questions of law only, but examines its conclusions on questions of fact for purposes of determining such questions of law as arise on them. *Mower's Appeal*, 48 Mich. 441.

Where a verdict is rendered under act of 1877, Rev. Stat. sect. 7240, finding a prisoner to be sane, error will not lie to reverse such proceeding for alleged errors therein, even after his conviction. *Inskeep v. State*, 36 Ohio St. 145.

Where a case has been treated by the parties and the lower court, as an equitable action, and as appealable, and the case has been tried by the district court on its merits, without objection, this court will not *sua sponte* consider the question of error in entertaining the appeal. *Kershaw v. Snowden*, 36 Ohio St. 181.

Where a party, for the purpose of having an order of the lower court overruling a motion for a new trial reviewed in the Supreme Court attempts, in good faith, within less than a year after the order, to sue out a writ of error, and afterwards, and within less than sixty days after filing petition, procures a service of summons, held that within the meaning of the civil code, and particularly as amended by sect. 2, ch. 126, 1881, which requires that proceedings in error be commenced within one year after judgment is rendered, or final order made, the proceeding in error in the present case was commenced at the time when the original summons in error was issued, and hence commenced within one year after final judgment. *Thompson v. Manufactur. Co.*, 29 Kans. 476.

An *alias* summons in proceedings in error, issued more than one year from date of the final order sought to be reviewed, is of no effect, being issued after the bar of the statute is complete. *Baker v. Sloss*, 13 Nebr. 230.

Where the record shows on a writ of error from the appellate court the taking and perfecting of an appeal to the Supreme Court, but fails to show that the appeal is still pending in that court, a motion to dismiss the writ of error because of such appeal, which contains no averment that

the appeal is still pending, is properly overruled. *Garrick v. Chamberlain*, 97 Ill. 620.

A citation in error which fails to show the date of filing the petition in error, or to show a *supersedeas* has been granted, fails to conform to the requirements of the statute, and will be held defective on a motion to dismiss the writ of error. *Thomas v. Thomas*, 57 Tex. 516.

The provision in the Code of Civil Procedure as revised in 1878, by which the period within which a proceeding in error may be commenced is reduced from three to two years, does not apply to judgments which had been rendered when the act of 1878 took effect, but by force of act of 1866, the period of three years, prescribed in sect. 523, governs as to those judgments. *Lafferty v. Shinn*, 38 Ohio St. 46.

When an *alias* summons was issued and served after the expiration of a year from the rendition of the judgment, held it gave no jurisdiction to the appellate court. *Republican Valley R. R. Co. v. Sayer*, 13 Nebr. 280.

Where it does not clearly appear to which matters the language of the charge to the jury is applicable, the language will be referred to that matter which would make the charge correct. A general and indefinite exception will not be considered. *State v. Gilreath*, 16 S. Car. 100.

Error does not lie on the allowance, by a referee, of leading questions; but in extreme cases of abuse, their allowance may warrant an appeal to the discretion of the circuit court to avoid the decision. *Campau v. Brown*, 48 Mich. 145.

No affirmance on certificate without reference to the merits can be had, unless the citation in error shows the date of the filing of the petition in error, the names of the parties according to such petition, the description of the judgment as therein given, and that the writ of error and *supersedeas*, if any, have been granted and served. *McGuire v. Newhill*, 54 Tex. 317.

After a case has been tried on writ of error in the Supreme Court, exceptions being taken, both to the refusal of a new trial and the form of the decree, a dismissal of the case affirms the judgment as pronounced, and a bill of review will not lie for errors apparent on the face of the record. *Price v. Lathrop*, 66 Ga. 545.

A motion for a new trial is unnecessary in cases brought to the district court on error from the justice of the peace, where no retrial of the issues of fact is to be had. *Leach v. Sutphen*, 11 Nebr. 527.

Counsel for both parties in the lower court signed the following agreement: "We agree that the within is a correct brief of the oral evidence submitted to the court and jury on the trial of the above

III. Parties.—Writ of error may be brought by the plaintiff in the action, or plaintiff below, or by the defendant in such action, or defendant below. The party complaining of the alleged error is called plaintiff in error; and the opposite party, defendant in error.¹ There may be several plaintiffs or defendants, or only one.²

1. *Who may bring the Writ.*—The party who sues out the writ of error must be a party or privy to the record, and prejudiced by the judgment.³ The party may be a privy in blood,

stated case, and consent that we use the original interrogatories on the hearing of the motion for new trial; also consent that the original indictment and warrant for assault with intent to murder against John H. Pounds, used in evidence on the trial, be used without attaching copies of the same thereto." The judge signed, "Within brief of evidence approved." In the record, and interspersed with the oral evidence, are what appear to be copies of interrogatories and of the indictment and warrant. *Held*, that such interrogatories and indictment and warrant were not authenticated as part of the evidence, and the writ of error will be dismissed. The tenth rule of the Supreme Court does not contemplate the use of the original papers. *Pounds v. Hanson*, 64 Ga. 668.

Where there is a rule against the sheriff for money in his hands, and the same is made absolute by an order to pay the money to the movant, another claimant of the fund, who was made a party to the rule, cannot bring the case to this court without making the sheriff a party to the writ of error, or serving him with the bill of exceptions. A receiver is a mere custodian for the court, but the sheriff is responsible to all the world. *Bird v. Harris*, 63 Ga. 433.

Error cannot be successfully assigned upon a ruling denying a motion to strike out part of a complaint. *Bauer v. Lodge*, 102 Ind. 262.

In proceedings under assignment for the benefit of creditors in Illinois a writ of error will not lie from the Supreme Court to the county court in a case where an appeal from the county court is pending in the circuit court. *Frank v. Moses* (Ill. 1886), 8 N. E. Rep. 192.

The decision of a question of fact by a jury is not reviewable in the New-York Court of Appeals. *Fleckenstein v. Dry Dock Co.*, 105 N. Y. 655.

In Illinois the appellate court settles cases on appeal to the amount of a thousand dollars, exclusive of costs. Where the circuit court by its decree disposes of the whole fund in the hands of a trustee, exceeding the amount a thousand dollars, and an appeal or writ of error is taken to

the appellate court, questioning a part of the fund, which is less than a thousand dollars, and the decree is affirmed, and the case is taken to the Supreme Court by writ of error or appeal, the Supreme Court will take jurisdiction. The whole amount disposed of by the circuit-court decree will determine the jurisdiction of the Supreme Court. *Longwith v. Riggs*, Chi. L. News, 196, Feb. 18, 1888.

It is error for the court to refuse to rule on material points which have been omitted from its findings, and on exceptions such action will be reviewed on appeal. *Wells v. McGloch* (Wis. 1888), 35 N. W. Rep. 769.

1. 3 Bouvier's Inst. No. 3315.

2. 3 Bouvier's Inst. No. 3318.

The action being against two persons jointly, a judgment on demurrer dismissing it as to one of the defendants, is final in its nature, and may be brought to the Supreme Court by the plaintiff whilst the case is still pending below as to the other defendant. The other defendant is not a necessary party to the writ of error, and need not be served with the bill of exceptions. *McGaughy v. Latham*, 63 Ga. 67.

A bill of equity was brought against a partnership of several partners. One was not served except in so far as partnership property was concerned, which could be bound by serving either of the other partners. He need not, therefore, be made a party plaintiff in error, but the case may proceed without him. *Epping v. Aiken*, 71 Ga. 682.

An assignment of error in the Supreme Court is a pleading tendering an issue of law, must contain the names of the parties to the cause in full, and be signed by the party complaining, or his attorney: if not, the cause, on motion, will be dismissed. *Thoma v. State*, 86 Ind. 182.

A writ of error will be dismissed unless it appears that all the defendants in error have been cited. The question will not be considered unless all the parties defendant are thus brought before the court. *Thompson v. Pine*, 55 Tex. 427.

3. *City v. Reese*, 20 Fla. 437; *Townsend v. Davis*, 1 Ga. 495; *Watson v. Willard*, 9 Pa. St. 89.

privity in representation, and privity in estate, when injuriously affected by the judgment.¹ When there are several privies to a judgment, each having a distinct and several interest, each is distinctly entitled to a writ of error, and to maintain it by himself.² The writ must be sued out in the names in which the proceedings below were conducted, and not in any other.³

a. In Case of Infancy. — Until an infant has arrived at maturity, he cannot implead or be impleaded; and when he sues, he must sue by guardian or next friend. A writ of error sued out by him without any such agent is irregular, and will be quashed, unless his guardian or next friend be made a party.⁴ But when the infant sues in his own name, and there is a joinder in error, his disability will be considered waived.⁵

b. In Case of Marriage. — Under the common law, if an erroneous judgment was recovered against a single woman, who afterwards marries, the writ of error was brought by herself and husband.⁶ If the judgment was against the wife as a *feme sole*, the writ must be brought by the husband and wife jointly.⁷

c. In Tax Proceedings. — Where a judgment is rendered against several tracts of land for taxes, any person interested in the land may join in a writ of error for its reversal, and the judgment may

1. *Porter v. Rummery*, 10 Mass. 64.

2. *Shirley v. Lunenburg*, 11 Mass. 379; *Thorp v. Thorp*, 40 Ill. 113.

3. *Ex parte Dorr*, 3 How. (U. S.) 103.

A writ of error cannot be sued out on a judgment founded on a tort, after the death of the tortfeasor. *Barret v. Gaston*, Breese (Ill.), 255.

A writ of error abates by the death of one of the plaintiffs in error before error assigned. *Boas v. Heister*, 6 Serg. & R. (Pa.) 20.

When a personal judgment has been rendered erroneously against two, and one dies, the survivor may bring error without joining the executor of the deceased. In such case the writ ought to aver the death of the party in order to account for the variance. *Brewer v. Turner*, Strange, 233.

The death of plaintiff in error, after service of the note of the receipt of the memorandum of error, shall not cause the proceedings to abate, but they may be continued as regulated by statute. 15 & 16 Vict. c. 76, 161, 162, 163.

4. *Whitaker v. Patten*, 1 Pont. (Ala.) 9.

5. *Williamson v. Johnston*, 4 T. B. Monroe (Ky.), 253; *McCloy v. Norris*, 4 Gil. (Ill.) 370.

In a civil case, proceedings against an infant are liable to be reversed and set aside for irregularity where no guardian acts for him; and process must have been first regularly served upon the infant, though in this latter respect the rules of the several States are not uniform. *Abdil v. Ab-*

dil, 26 Ind. 287; *Frierson v. Travis*, 39 Ala. 150.

Irregularity of procedure is often cured by judgment; and lapse of time and laches on the part of an infant after reaching majority may prevent his setting aside a judgment, as in the case of his voidable bargains. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *McMurray v. McMurray*, 60 Barb. (N. Y.) 117; *Tarleton v. Cox*, 45 Miss. 430.

If an infant reaches his majority pending a suit, he may assert his rights at once, and, if he does not, he cannot then complain of the acts of his guardian. *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Marshall v. Wing*, 50 Me. 62; *Eustis v. Holmes*, 48 Miss. 34.

Any person who will give bond required by law may sue out a writ of error for an infant as his next friend. *Ridgely v. Bennett*, 13 Lea (Tenn.), 206.

6. *Haines v. Corliss*, 4 Mass. 659.

7. *Whitmore v. Delano*, 6 N. H. 543, note. Most of the States have increased the legal capacity of the wife, and in many she can sue and be sued as a *feme sole*, and the local statute must be consulted to know her legal status.

The code of *Tennessee*, sect. 3182, which authorizes married women and infants to prosecute writs of error within two years after the removal of disability, merely extends the time for suing out the writ; and the writ may be sued out at any time within the extended period, whether the disability exists or has been removed. *Ridgely v. Bennett*, 13 Lea (Tenn.), 206.

be reversed as to those lands of the parties who join in the writ of error, respecting which the judgment is erroneous, and affirmed as to the rest. The superior court will inquire into the regularity and validity of so much only of the proceedings as relate to the lands of the parties before the court.¹

2. *Against whom brought.* — a. *Parties to the Suit.* — When the party is to be made defendant in error, who has sued or been sued, he must be made the defendant in error without joining any stranger with him.²

b. *In Case of Death of the Defendant in Error.* — The writ of error must include all parties who were parties to the judgment; or, if they are dead, then their executors or administrators. If the subject of the suit shall concern land, and the party in whose favor the judgment or decree is rendered be dead, then the writ must be brought against those that may be interested in the subject-matter.³

IV. Supersedeas. — When a writ of error is made to operate as a *supersedeas*, inadvertently, without assignment of errors on the record, the court, upon its attention being called to the omission, will require them to be assigned at once, and in default thereof will dismiss the case.⁴

V. Scire Facias. — A neglect on the part of the plaintiff in error

1. *Olcott v. State*, 5 Gilm. (Ill.) 481.

2. *Steel v. Bridenback*, 7 Watts & Serg. (Pa.) 150.

3. *Graham's Pr.* 940; *Barr v. Stevens*, 1 Bibb (Ky.), 292; *Porter v. Rummery*, 10 Mass. 64; 6 Comyn's Dig. Pleader (3 B. 10), 447; *Carr v. Callaghan*, 3 Litt. (Ky.) 365.

When the judgment is in favor of several and one dies, and the judgment is personal, the writ must be sued against the survivor alone. If the action is real or mixed, it must be against the heirs also, when the estate is an inheritance, with *scire facias*, when requisite. *Bartholomew v. Belfield*, 2 Bulstr. 244; *Doe v. Jones*, 2 M. & Selw. 472.

The right to bring writs of error in case of death of the party, against whom the judgment was rendered, will be in the personal representatives, without a revival of the judgment, because the personal representatives stand in the shoes of the deceased. *Phares v. Saunders*, 18 W. Va. 336.

When, on call of a case, the death of one of the parties is suggested, and the case continued, but no order was taken to expedite it, under Rule 26, upon the call of the case on the next term, no parties having been made, it will not again be continued, but the writ of error dismissed. *Brewing Co. v. Hare*, 73 Ga. 17.

4. *Gibbs v. Blackwell*, 40 Ill. 51.

At common law a writ of error, though

duly allowed in a criminal case, is not a *supersedeas* so as to discharge from custody. *R. V. Wilkes*, 4 Burr. 2527.

A probable cause for reversing a judgment is good ground for granting a *supersedeas*; but it will not be granted in any case, unless the transcript of the record is certified to be complete. A *supersedeas* issued upon a transcript not certified as provided by rule of court will be quashed. 2 Hill's Pr. 576.

After the court has allowed a *supersedeas* and bond taken, either during or after the term, jurisdiction as to all matters, especially those of substance, determined by the decree, is transferred to the appellate court. *Draper v. Davis*, 102 U. S. 371; *Hovey v. McDonald*, 109 U. S. 157; *Roemer v. Simon*, 91 U. S. 149; *Goddard v. Ordway*, 101 U. S. 745; *Rubber Co. v. Goodyear*, 6 Wall. (U. S.) 156.

A party perfected an appeal and gave a cost bond merely: he afterwards prosecuted a writ of error under a *supersedeas* writ of error bond, returnable to the same term of the Supreme Court as the appeal. *Held*, both methods may be used, if not so used for delay. Both appeal and writ of error may be prosecuted by a party acting in good faith, and in accordance to the intent of the statute. It is right and proper to allow a *supersedeas* writ of error to be prosecuted by a party who has appealed, provided it does not delay the opposite party. *Eppstein v. Holmes*, 64 Tex. 560.

to have a *scire facias* issued, or a failure to use reasonable diligence to have the same served in proper time, does not entitle the defendant in error to have the cause dismissed; but he may join in error, and have the cause heard at the current term without giving the required notice, as per rule of court. The validity of a writ of error does not depend upon the *scire facias*. If it is informal or insufficient, an *alias* may issue, which, when served, gives the court jurisdiction. Jurisdiction will also be conferred by the appearance of the parties. The plaintiffs in error may always dismiss their suit before a decision on the merits; and the effect of such dismissal is to leave the parties where they were before the appeal was taken, or the writ of error brought.¹

VI. Record in Error.—At common law, error lies only to matters of record.²

The certified transcript of the record below is procured from the clerk, and the alleged errors are thereon specifically assigned or pointed out. The fact of the allowance of the writ is indorsed by the judge or clerk, on the transcript presented. Thereupon the writ is issued, commanding the judge below to certify up the proceedings.³

1. 2 Hill's Pr. 649–50.

If the party can be found, the officer serves him with a copy of the writ, and returns *scire feci*; if not found, the return is *nihil*. Generally, two returns of *nihil* are equivalent to service. *Wolf v. Ponsford*, 4 Ohio, 397; *Dane's Abr.* 462.

The reversal of the original judgment has the same effect on the *scire facias*. *Eldred v. Hazlett*, 38 Pa. St. 16.

The *scire facias* is not a new suit, but the continuation of an old one. *Hopkins v. Howard*, 12 Tex. 7; *Denegre v. Hann*, 13 Iowa, 240.

A *scire facias ad audiendum errores* is "process" within the meaning of the constitution of Florida. The "style" of process the constitution provides shall be "The State of Florida." This is a formal requirement, and if omitted may be amended. *Weiskoph v. Dibble*, 18 Fla. 22.

Pending certain actions of *scire facias* to revive a judgment, the court awarded a feigned issue to try the question whether assignment of said judgment to the use of the plaintiff was absolute, or as collateral security for money advanced by him to enable the defendants to compromise the judgment debt with the original plaintiffs. A verdict and judgment for plaintiffs having been entered in the feigned issue, the defendants therein sued out a writ of error to said judgment, pending the said actions of *scire facias*. *Held*, that said writ of error was prematurely brought, and was therefore quashed. *Cake v. Cake*, 106 Pa. St. 472.

Under the Florida statutes, twenty-five days must intervene between the issuing of a writ of error and the first day of the term of the Supreme Court to which it is returnable. Where such time did not intervene between the date the writ was issued and the first day of the term, and the *scire facias ad audiendum errores* was not served twenty-five days "previous to the first day of the term of the Supreme Court," to which it is returnable, the writ must be dismissed for want of conformity to the statutory requirements. *Driggs v. Higgins*, 19 Fla. 103.

2. *Turner v. Commonwealth*, 6 Met. (Mass.) 224; *Gaffney v. People*, 50 N. Y. 416; *People v. Casey*, 72 N. Y. 393; *Smith v. People*, 1 Colo. 121; *Allen v. State*, 46 Wis. 383.

3. *Graves v. Stone*, 3 Ohio St. 576; *Goode v. Wiggins*, 12 Ohio St. 341; *Schaeffer v. Marienthal*, 17 Ohio St. 183.

The judgment and orders of court and pleadings should be embraced in the record. *Safford v. Vail*, 22 Ill. 327.

A petition for a change of venue is a mere motion, and, like other motions, does not become a part of the record in a suit in chancery, unless embodied in a bill of exceptions, on certificate properly signed by the presiding judge. This is the same rule as in law. The pleadings in a chancery case, and exhibits, and depositions in writing, are a part of the record, and no certificate of evidence is required to make them such. The testimony of witnesses called to testify on the hearing, and motions

made in the case, do not become a part of the record, unless preserved by a bill of exceptions or a certificate of the judge. A petition for a change of venue is not a pleading. *Heacock v. Hosmer*, 109 Ill. 245.

Any thing produced as a record may be shown to be forged or altered. A record is understood to be conclusive evidence; but whether it is or is not a record, is a matter of evidence, and may be proved like other facts. *Brier v. Woodbury*, 1 Pick. (Mass.) 362.

If words have been struck out of a record, so as to render it erroneous, witnesses may be examined to show such words were erased improperly; but not to falsify the record by showing that an alteration whereby the record was made correct, was improperly made. *Dickson v. Fisher*, 4 Burr. 2267; *Adams v. Betz*, 1 Watts (Pa.), 425.

Simple contract creditors, who are no parties to the suit, have no right to file a bill of review, which only lies by parties and privies. *Story's Eq. Pl. sects.* 409, 638.

On bill of review, a master in chancery's report cannot be controverted. *Lube's Eq.* 130.

Where the court below refuses to correct an error, which is assigned for error of law in the superior court, the assignment will fail, unless the original record is brought up. After the affirmance of judgment in the appellate court, errors of fact cannot be corrected in the court below. It is not sufficient to take up, in return to the writ of error, only a bill of exceptions embodying the motions, notice, affidavits, stipulations, and order of court upon the motions, but the record in the original cause should be taken up. Nothing can be assigned for error which contradicts the record. *Wetmore v. Plant*, 5 Conn. 541; *Hill v. West*, 4 Yeates (Pa.), 385.

At common law the record of a judgment was as the judgment roll, and included as well the pleadings, process, and the like, as "signing judgment." *Stephen on Plead.* 24 *et seq.*; *Freeman on Judg.* sect. 75.

When a copy of the record of a judgment is required, for the purpose of bringing the case by appeal or writ of error into the superior court, and it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it. It must be the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part. *Eamiston v. Schwartz*, 13 Serg. & R. (Pa.) 135; *Vance v. Reardon*, 2 Nott & M. (S. C.) 299; *Dismukes v. Musgrove*, 8 Mar. (La. U. S.) 375; *Ingham v. Crary*, 1 Pa. St. 389.

Errors of law, of any kind, which may be supposed to have crept into a judgment at a previous term, cannot be considered a sufficient justification for revising and annulling it at a subsequent term, in a summary way, on motion. The lower court has no power over its decree, so as to set it aside, on motion, after the expiration of the term in which it was rendered. *Assignees v. Dorsey*, 2 Wash. C. C. 433; *The Avery*, 2 Gall. C. C. 386; *Jackson v. Ashton*, 10 Pet. (U. S.) 480; *Wash. Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Jenkins v. Eldridge*, 1 Wood. & Min. C. C. 61; *Catlin v. Robinson*, 2 Watts (Pa.), 373; *Stephens v. Cowan*, 6 Watts (Pa.), 511; 2 *Tidd's Pr.* 975; 2 *Arch. Pr.* 243.

The record of a judgment is under the control of the court during the term at which it is rendered. The judge may set it aside and award a new trial, or allow amendments, so as to make the record conform to the facts, and to correct mistakes. *Edwards v. Irons*, 73 Ill. 583.

Defects in an indictment, as not naming the judges, the jurors, and the county, may be supplied in the court where it was taken by referring to the records there. *Commonwealth v. Hines*, 101 Mass. 33; *State v. Brady*, 14 Vt. 353; *Dawson v. People*, 25 N. Y. 399; *Brown v. Commonwealth*, 78 Pa. St. 122; *Mackey v. State*, 3 Ohio St. 362; *Reeves v. State*, 20 Ala. 33; *Cornelius v. State*, 7 Eng. (Ark.) 782; *State v. Freeman*, 21 Mo. 481.

A caption of an indictment may be amended in the appellate court, on proper showing of the facts, or the *certiorari* may be returned to the court below, and the amendments made there. *Vandyke v. Dore*, 1 Bailey (S. Car.), 65; *State v. Jones*, 4 Hals. (N. J.) 357; *State v. Norton*, 3 Zab. (N. J.) 33.

The sentence imposed by a court of record is within the power of the court during the session in which it was entered, and may be amended at any time within the session. *People v. Thompson*, 4 Cal. 238; *Lee v. State*, 32 Ohio St. 113; *Commonwealth v. Weymouth*, 2 Allen (Mass.), 144; *Mason in re*, 8 Mich. 70.

The entry of the rule to reconsider at the current term, when the sentence was imposed, will not give the court the right, after execution of the sentence has substantially begun, to revise the sentence at a future term. *Commonwealth v. Mayloy*, 57 Pa. St. 291.

Questions of law dependent upon foreign statutes cannot be presented to the Supreme Court upon proof in that court as to what the foreign law is, unless the record shows how it was proved below, so that it may be seen whether the lower court erred on the showing made. *Belleville Bank v. Ricardi*, 56 Mich. 453.

Where the record does not show the ground of the action below, it must be presumed on error to have been legal, if legality was possible. *Schwab v. Coats*, 48 Mich. 116.

Where interrogatories and answers are omitted from the brief of evidence, the writ of error will be dismissed, and this though such omitted testimony may appear in another part of the record. *Turner v. Wilcox*, 65 Ga. 299.

Affidavits relating to a motion, but not regarded by the court in deciding it, are not part of the record, and will not be regarded an error from the order made. *Noble v. Bourke*, 44 Mich. 193.

A paper purporting to be a bill of exceptions, but not signed as required by statute, is no part of the record, notwithstanding the journal entry in the case recites that a bill of exceptions was duly signed, sealed, and allowed and ordered to be made part of the record, and no other bill of exceptions appears in the case. *Shilito v. Thacher*, 43 Ohio St. 63.

Error must be affirmatively shown by the record; presumptions cannot be made for the purpose of founding thereon. *Brown v. Haben*, 48 Mich. 229.

Nothing not made part of the record by bill of exceptions, or by order of the court, can be regarded as such by the appellate court. The clerk can add nothing to the record; and his certificate that a deposition or other paper copied by him was the evidence whereon the judgment was founded, is no part of the record. *Roanoke L. & I. Co. v. Karm*, 80 Va. 589.

Where special pleas are copied by the clerk, and certified as being filed in the papers, and indorsed as filed by the clerk, and no order was entered by the court filing them, they cannot be considered a part of the record. *Phares v. Saunders*, 18 W. Va. 336.

When the record shows the sustaining of demurrers to different answers, an assignment that the court erred in sustaining the demurrer to the answer is too indefinite. *Bolin v. Simmons*, 81 Ind. 92.

It is incumbent on the plaintiff in error to show error to this court; and where from the state of the record it is not made to appear, the judgment will be affirmed. *Scarborough v. Strozier*, 66 Ga. 390.

The record being removed into this court by the first writ, a second writ, directed to the court below, commanding it to certify and return the record, would be a nugatory thing. If the first writ of error was irregular or improvidently dismissed, the remedy of the plaintiff in error is by motion to set aside the order of dismissal. *Welsh v. Brown*, 42 N. J. L. 323.

Where the transcript of an amended

record shows that notice was given to the opposing counsel to correct the record below, and the amendment was made, and the cause still pending in the Supreme Court, leave will be granted in furtherance of justice to file the supplemental record, although the cause had been submitted at the previous term. *Stebbins v. Anthony*, 5 Colo. 342.

Though the brief of evidence used on the motion for new trial be properly filed and approved, and thus made a part of the record, yet under sect. 4253 of the code there must be some reference thereto in the bill of exceptions, or the writ of error will be dismissed. *Myers v. Way*, 63 Ga. 145.

A writ of error requires only so much of the record to be certified as is necessary to secure a correction of the error complained of; and no presumption can be indulged in reference to a point about which the portion of the record so certified is silent. *Spiesberger v. Thomas*, 59 Iowa, 606.

Where the clerk transmits to the Supreme Court the original records of the lower court, instead of sending up a complete transcript or copy of the record, it is such an effort to send up the record that upon it a diminution of the record may be suggested, if made in time, and the plaintiff in error be not in laches. *Davis v. Bennett*, 72 Ga. 762.

When the names of certain parties to the record appear among the names of the appellants, and also of the appellees, but they do not otherwise appear to be appellees, and they brief and submit the case as appellants, they will be deemed appellants in the Supreme Court. *McKee v. Hungate*, 99 Ind. 168.

When the record does not show the point of law reversed, and the facts on which it arises, a judgment, *non obstante veredicto*, cannot be sustained. The point of law reserved, and the facts on which it arises, must be distinctly put on the record. *Fayette City v. Huggins*, 112 Pa. St. 1.

Leave having been granted to file a supplemental record in the Supreme Court, and it appearing that the supposed supplemental record was of matters subsequent to and independent of the decree in the original record, the supplemental record was stricken out upon the court's motion. *Becker v. Henderson*, 5 Colo. 346.

Where the exception is to the refusal of the court to grant a new trial, the brief of evidence may be brought up to this court as part of the record; but it must be referred to in the bill of exceptions, or the writ of error will be dismissed. *Atlanta, etc., R. Co. v. Smith*, 66 Ga. 205.

When, in an appeal of a criminal case, the original indictment is attached to the

1. *Office of Bill of Exceptions.* — Motions entered in a cause, and affidavits and other papers filed in support of the motions, and the decisions of the court thereon, and exceptions taken to decisions, in order to become a part of the record, must be incorporated in a bill of exceptions, otherwise the decisions of the court will not be considered in the appellate court.¹

At common law, exceptions do not lie in criminal cases.²

transcript, with a pencil-note of the verdict, with no certification, it cannot be considered as a part of the record. *Corrall v. State* (Tex. 1887), 6 S. W. Rep. 42.

An appeal will be dismissed when the record fails to show a judgment. *Moses v. Katzenberger* (Ala.), 3 South. Rep. 302.

Where a demurrer to a bill is sustained, neither a motion for a new trial nor a bill of exceptions is necessary to obtain a review on appeal. *Hays v. Mercier* (Nebr.), 35 N. W. Rep. 894.

When, on an appeal from a county to a circuit court, no opinion is filed by the circuit court, and no argument made in the court of appeals, the case will be decided on the record of the county court, and error must be apparent, or appear by exception to be considered. When the case is tried by a jury, the bill of exceptions must state the facts proven, and that they are all the facts. But when a motion for a new trial, on the ground that the verdict is against the evidence, is overruled, the bill of exceptions must state the evidence and not the facts. *McArter v. Grigsley* (Va. 1887), 4 S. E. Rep. 369.

When a transcript was filed, which was complete as could be then made, but the ground for a new trial was lost and was omitted, but was subsequently proven and offered as a supplemental record after the time for filing had passed, and no extension had been granted, it was held that the filing should be allowed. *Bush v. Lisle* (Ky.), 6 S. W. Rep. 330.

The presumption is in favor of the legality of a judgment of a lower court, and he who insists that error has intervened in the proceedings must make such error manifest by the record to procure a reversal. This presumption, in civil cases, always prevails, unless the record shows affirmatively to the contrary. *Montgomery v. Block* (Ill.), *Chi. L. News*, 198, Jan. 18, 1888.

1. *Earl v. People*, 73 Ill. 329; *Walton v. United States*, 9 Wheat. (U. S.) 651; *Brown v. Clarke*, 4 How. (U. S.) 4.

2. *United States v. Gilbert*, 2 Sumn. C. C. 19; *People v. Holbrook*, 13 John. (N. Y.) 90; *Ex parte Barker*, 7 Cow. (N. Y.) 143; *Vane's Case*, 1 Sid. 85.

Nor were exceptions to the proceedings of the sessions allowable in settlement

cases. *Newton v. Gloucester*, 1 Hals. (N. J.) 405.

By statutes, bills of exceptions are allowed in criminal cases. *Hooker v. State*, 4 Ham. (Ohio) 348; *Commonwealth v. Hickerson*, 2 Va. 60.

The interlocutory opinions of the court during the trial below are not regularly recorded. If either party, in a civil cause, thinks the court wrong in rulings as to testimony, or a non-suit, or instruction to jury, or allowing or refusing a new trial, he may have a bill of exceptions pointing out the facts and error. *Erwin v. Shaffner*, 9 Ohio St. 43.

When the record fails to show when a bill of exceptions was signed and sealed, it will be presumed that the exceptions therein noted were taken on the trial, and in the order, and at the time, therein purported. If filed under circumstances not authorized by law, motion should be made in the court below to strike it out of the record; and if this is not done, the appellate court must regard it as rightfully a part of the record. *Hyde Park v. Dunham*, 85 Ill. 569.

Judgments may be reversed in criminal cases on the ground of improper evidence, when, in a civil case, the same would have been sustained. *People v. Williams*, 18 Cal. 187; *Peek v. State*, 2 Humph. (Tenn.) 78.

A bill of exceptions will not lie to an opinion wholly abstract, though it may be erroneous. If the bill is signed in such case, the appellate court will not act upon it. *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674.

It will not lie to instructions on facts. *Brooke v. Young*, 3 Rand. (Va.) 106; *Gilbert v. Woodbury*, 22 Me. 246.

If a judge refuses to permit a witness to be re-examined as to what he had testified, after a cause has been submitted to the jury, no exception will lie, as this is a matter in the discretion of the court. *Clapp v. Balch*, 3 Greenl. (Me.) 219.

Exceptions can be taken on both sides of the case. *Liggett v. Bank*, 7 Serg. & R. (Pa.) 219; *Stewart v. Bank*, 11 S. & R. (Pa.) 267; *Poole v. Fleegeer*, 11 Pet. (U. S.) 185.

The judge who tried the cause must sign the bill. *Law v. Johnson*, 8 Cow. (N. Y.) 746.

The signing of the bill by the judge is

conclusive on the parties. *Bingham v. Cabbot*, 3 Dall. (U. S.) 19.

The bill generally must be signed at the term of the trial. *Agnew v. Campbell*, 3 Harr. (N. J.) 291; *Pomroy v. Selmes*, 8 Miss. 727; *Sikes v. Ransom*, 6 John. (N. Y.) 279.

But this is not the uniform practice. *Nesbit v. Dallan*, 7 Gill & J. (Md.) 494.

The bill must not be so framed as to refer the credit of the witnesses to the appellate court. *Carrington v. Bennett*, 1 Leigh (Va.), 340; *Ewing v. Ewing*, 2 Leigh (Va.), 340.

The error complained of must be material. — *Watson v. Brown*, 14 Ohio, 473, — and set forth distinctly. *Hare v. Harrington*, *Wright* (Ohio), 290.

The bill of exceptions is evidence between the parties as to the facts therein stated, and they cannot be controverted. *Bingham v. Cabbot*, 3 Dall. (U. S.) 19; *Beach v. Packard*, 10 Verm. (Vt.) 96.

The party alleging error must establish it by the record; and if he claims that there is a want of evidence to sustain an instruction to the jury, he must show it, if the bill of exceptions does not purport to give the whole of the evidence, and especially if the trial judge, in charging the jury, stated, without objection, that there was such evidence. *Kline v. Kline*, 49 Mich. 419.

A bill of exceptions set out the defendants in error as A., B., C., and others. *Held*, the writ of error must be dismissed. The words "and others" will not suffice to set out the defendants in error. The bill of exceptions may be amended by the record so as to set out the other defendants below, but it must be done before service is acknowledged. *Cameron v. Sheppard*, 71 Ga. 781.

When no exceptions are taken in the court below to the matters assigned for error, the Supreme Court will not review the judgment. *Yard v. Pancoast*, 108 Pa. St. 384.

Where some of the defendants to a bill in equity except to the overruling of a demurrer to the bill, they need not serve their co-defendants with the bill of exceptions. *Mechanics' Bank v. Harrison*, 68 Ga. 463.

A son by his guardian filed a bill to have the will of his father construed; that the administrator be instructed as to the management of the estate until the final hearing. *Held*, an order requiring the payment of a certain sum for the son's support and education was not a final judgment; and a bill of exceptions predicated thereon will not lie. *Ross v. Byrd*, 65 Ga. 41.

The question as to which party shall make the closing argument to the jury is one of practice, and is not the subject of

a bill of exceptions or of a writ of error. *Eliot v. McCormick*, 141 Mass. 194.

Exceptions to a decree in equity bring before the Supreme Court the record proper to the cause; that is, the pleadings in the case, and the verdict of the jury in answer to questions propounded by the court, when the case is so submitted to the jury; and the writ of error will not be dismissed because the bill of exceptions does not contain or exhibit the testimony in the case. *Churchill v. Bee*, 66 Ga. 621.

In a petition for specific performance of a contract, it was averred "that the plaintiff tendered to the defendant a conveyance of said land, and demanded payment of the purchase-money;" and "that a deed for said lands, above mentioned and described, from the plaintiff to the defendant, is herewith filed, and tendered him." The answer avers that the plaintiff did not, within a reasonable time, tender to the defendant a conveyance of the land, or seek to enforce the contract; "and not until April, 1876, when said property had largely decreased in value." The averments in the petition, of tender of conveyance, and of filing the deed so tendered with the petition, are not denied by the answer. On trial the plaintiff gave the deed in evidence, and incorporated it — with no objections from the defendant — in his bill of exceptions taken at the trial. *Held*, such deed, and its sufficiency, may be considered by this court in reviewing the judgment of the trial court. *City v. Shawhan*, 43 Ohio St. 178, following *Woodward v. Sloan*, 27 Ohio St. 592; *Lovell v. Wentworth*, 39 Ohio St. 614.

When an acknowledgment of the service on a bill of exceptions was without date, and signed by two attorneys, who neither appeared in such acknowledgment nor elsewhere on the face of the record to represent the defendant, the writ of error will be dismissed. *Weatherly v. Mimms*, 63 Ga. 161.

On proceedings in error, only those questions will be considered which were raised and decided in the trial court. *Byington v. Comm'rs* (Kans.), 16 Pac. Rep. 105.

Where, on an appeal, the clerk certifies incorrectly that the transcript contains all the evidence in the furtherance of justice, the cause will be remanded. *Lodge v. Cavanac* (La.), 3 South Rep. 285.

When evidence is excluded, the bill of exceptions must show what the evidence was expected to prove. *Stanley v. Smith* (Oreg. 1887), 16 Pac. Rep. 174.

Where defendant secures time to file a motion for a new trial, stating he does not intend to proceed under his exceptions, and then gets further time *ex parte*, and, after his motion is overruled, petitions, at a sub-

2. *Abatement, Diminution, and Revival.* — On the suggestion of the death of a plaintiff in error, or appellant, and a revival in the name of his representatives, the requisite notice must be given before a rule for joinder in error will be allowed. If the defendant is a non-resident, there must be a publication.¹ A diminution of the record must be suggested on or before the calling of a case on the docket. After the case has been called, and a motion to dismiss made and argued, it is too late to suggest diminution.²

VII. Assignment of Errors. — When the record has been certified, the plaintiff in error should assign the error of which he complains. This must be done within the time prescribed by the rules of the appellate court, or the case can be dismissed. If no assignment of error is made, and no appearance by either party, the case will be stricken from the docket.³

The defendant in error has the privilege of assigning cross-errors, but it is not imperative that he shall do so: he can prosecute a cross-appeal or writ of error, if he does not assign cross-errors. If he does assign cross-errors, he cannot afterwards prosecute a writ of error upon the same record; but when he does not do this, he can retain his common-law right to sue out a writ of error upon the same record.⁴

sequent term, eight months after the trial, for a signature of his bill of exceptions, and for a writ of error, the writ should be refused. *Marine Co. v. Herreshoff Co.* (R. I. 1887), 32 Fed. Rep. 822.

A bill of exceptions filed more than ten days after the adjournment of the court will not be considered on appeal under Texas laws. *Stewart v. State* (Tex. 1887), 6 S. W. Rep. 317.

1. 2 Hill's Pr. 654.

2. *Shealy v. Toole*, 66 Ga. 573.

A suggestion of diminution of the record must describe or set out the missing record to such an extent that the counsel for the opposing party may agree thereto, and demand that the case proceed. A mere statement that there was a motion for a new trial and a brief of evidence, which the clerk had failed to send up, was not sufficient. *Brown v. Lathrop*, 64 Ga. 430.

Where a suggestion of diminution of the record, and a motion to dismiss the case, are made at the same time, the former has precedence. *Davis v. Bennett*, 72 Ga. 762; *Haines v. Clary*, 66 Ga. 519.

³ If no steps are taken to revive a suit at or before the second term after the suggestion of the death of the plaintiff, the court ought to make an order discontinuing the suit, but during that term the court may set aside such order; but after the adjournment of the court, that order can never be set aside. *Gainer v. Gainer* (W. Va.), 4 S. E. Rep. 424.

3. *Smith v. Court*, 4 Ga. 156.

4. *Wickliffe v. Buchman*, 12 B. Mon. (Ky.) 424.

The payment or satisfaction of a judgment against a party can never be allowed as a bar to a writ of error. An erroneous judgment against a party is an injury, *per se*, from which the law will intend he is or will be damaged by its non-reversal. *Barthelemy v. People*, 2 Hill (N. Y.), 248; *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473; *Armes v. Chappel*, 28 Ind. 469.

Nothing of which the party below could have taken advantage of, in the court below, can be assigned for error. *Wetmore v. Plant*, 5 Conn. 541.

A confession made under inducements, which render it incompetent as evidence, can be successfully assigned as error. *People v. Alibez*, 41 Cal. 452; *People v. Barric*, 49 Cal. 342; *Porter v. State*, 58 Ala. 66; *Ward v. State*, 50 Ala. 120.

Counsel has the right to have good instructions given as asked without modification: if denied this, it is error. *Ivey v. Phifer*, 11 Ala. 535; *People v. Taylor*, 36 Cal. 255; *Cotton v. State*, 31 Miss. 504; *Exchange Bank v. Cooper*, 40 Mo. 169.

When a case is brought to the Supreme Court from the appellate court, the plaintiff in error is required to assign errors upon the record from the appellate court; and such assignment must be made upon the record itself, or attached to it. When the attention of the court is called to the omission to assign errors on the record, before the cause is submitted, it may re-

quire such assignment to be made instanter, and, on failure to do so, dismiss the appeal or writ of error. But after submission, it is too late to make such rule; and there being no proper assignment, the suit will be dismissed. *Benneson v. Savage*, 119 Ill. 135.

None except parties to the record in the appellate court have a right to be heard. If interests intervene in the cause, they should have been adjudicated in the court of original jurisdiction. The court has power to order any proper amendment of its judgment rendered, as a court when in session. And when a statute gives power to the court to do certain things in vacation, it has no power to make orders independent of the statute conferring the power. The statute applies only to those judgments erroneously "entered up" by the clerk, which can be corrected by the court in vacation. To make an order independent of such statute in vacation is erroneous. *Trustees v. Bailey*, 10 Fla. 238; *Real Estate Bank v. Rawdon*, 5 Ark. 558; *Rawdon v. Rapley*, 14 Ark. 205; *Emerson v. Tomlinson*, 4 Greene (Iowa), 398; *Hungerford v. Cushing*, 8 Wis. 320; *State v. Bank*, 20 Wis. 640; *Scheer v. Keown*, 34 Wis. 349; *Sagory v. Bayless*, 13 Smed. & M. (Miss.) 153; *Hill v. St. Louis*, 20 Mo. 586; *Inhabitants of Limerick*, 18 Me. 186; *Conn v. Doyle*, 2 Bibb (Ky.), 248.

The plaintiff in error can assign as error special defects in the record which make the judgment erroneous. But he cannot assign any thing that will controvert the record, or that is in his own favor, or that which was not excepted to in due time. *Cook v. Conway*, 3 Dana (Ky.), 454; *Shirley v. Lunenburg*, 11 Mass. 379; *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114; *Clemson v. Bank*, 1 Scam. (Ill.) 45.

An assignment of error is sufficient, where the evidence objected to was in its nature inadmissible, and where it was apparent that the ground of the objections could not have been mistaken. *Tozer v. R. R. Co.*, 105 N. Y. 617.

When the instructions are not brought into the record by a bill of exceptions, it must affirmatively appear that they were filed. *Fort Wayne, etc., R. Co. v. Beyerle*, 110 Ind. 100.

Where all the appellants join in the same assignment of errors, it is necessary that each specification of error in such joint assignment should be founded upon a ruling against all the applicants, and of which all of them had the right to complain, or it will not be good as to any of them. *Orton v. Tilden*, 110 Ind. 131.

An assignment of errors is in the nature of a declaration, and at common law was either of errors in fact, *coram nobis*, or errors at law. At common law, an error

of fact and an error of law could not be joined in one assignment. If they were so joined, it could be taken advantage of by demurrer. 2 Tidd's Pr. 1168; *Freeman v. Denman*, 2 Hals. (N. J.) 190; *Moody v. Vreeland*, 7 Wend. (N. Y.) 55; *Clarke v. Bell*, 2 Litt. (Ky.) 162; *Fitch v. Lothrop*, 2 Root (Conn.), 524.

Where, in a superior court in general term, errors are jointly assigned, the Supreme Court, on appeal, will not consider alleged errors against the parties severally. *Hadley v. Milligan*, 100 Ind. 49.

A discrepancy between the amount sworn to in the affidavit, and the amount of plaintiff's claim named in the order of attachment which is favorable to the defendant, cannot be assigned for error by him. *Tessier v. Crowley*, 16 Nebr. 369.

The sufficiency of a complaint may be questioned for the first time in the Supreme Court; but an assignment of error that "the complaint does not state facts sufficient to constitute a cause of action," only calls in question the sufficiency of the complaint as an entirety, and, if one paragraph be sufficient, the error is not well assigned. *Buchanan v. Lee*, 69 Ind. 117.

Error in fact cannot be assigned in a writ of error where the matter of fact might be put in issue, and tried in the original action. *Raymond v. Butterworth*, 139 Mass. 471.

An assignment of error, to be good, must be such, if true, as to require the reversal of the judgment; but if any paragraph of a complaint is good, the sufficiency of other paragraphs cannot be questioned, either by a motion in arrest, or by an assignment of error, that it does not state facts sufficient. *Trammel v. Chipman*, 74 Ind. 474.

At the beginning of a trial, the judge informed a party how he should rule as to the measure of damages; the party made no objections, and offered no suggestions in his request for instructions; *held*, he could not properly assign error on a charge embodying the same views. *Cook v. Perry*, 43 Mich. 623.

An assignment of error, that "the court erred in overruling appellant's several demurrers to the complaint," is sufficient. *Stevens v. Tucker*, 73 Ind. 73.

A defendant in error cannot assign errors against his co-defendants, unless he has himself sued out a writ of error, and given the statutory bond. *Patterson v. Rogers*, 53 Tex. 484.

To entitle a defendant in error to a review in the Supreme Court of errors in the admission of evidence against his objections, he should have moved for a new trial on that ground, and, if still unsuccessful, have prosecuted a writ of error. *Johnson v. Ghost*, 11 Nebr. 414.

An assignment of errors, "that in the

record and proceedings, as also in the condition of the said judgment, manifest errors have happened, to the damage of the State, to wit, in overruling the demurrer of the State to the defendant's plea to the indictment," is not sufficient under Rule 1 of the court of appeals. *State v. Scarborough*, 55 Md. 345.

The rules of this court require plaintiffs in error and appellants to assign errors at the time of filing the transcript of the record. *Haas v. Commissioners*, 5 Colo. 125.

A statement, "The court erred in rendering the judgment in said cause," is too general to present any question for consideration. *Hatton v. Jones*, 78 Ind. 466.

An assignment was made in these words: "To this decision and judgment of the court, the plaintiff, by his attorney, then and there duly excepted and assign the decision and judgment of non-suit as error." *Held* sufficient. *Brown v. Warren*, 16 Nev. 228.

Submission to the jury of a needless issue, and proof of an admitted fact, which are not seen to be prejudicial to the party excepting, are not assignable for error. *Perry v. Jackson*, 88 N. Car. 103.

When an assignment of error merely states the names of witnesses, whose testimony was received or rejected without specifying the particular evidence as required by the rules of this court, it will be disregarded by the Supreme Court. *Royse v. May*, 93 Pa. St. 454.

When, after a submission of a case, it is withdrawn from the jury, and decided by the court, the charge which had been given cannot be regarded as showing the legal grounds on which the case was decided. *Barnard v. Tarleton*, 57 Tex. 402.

An assignment of error in these words, "The court erred in overruling the defendant's exceptions to the report of the referee, and entering judgment against the defendant," is not sufficiently specific under code, sect. 3207. *Hoefer v. Burlington*, 59 Iowa, 281.

An assignment of errors having been filed in the prosecution of an appeal, afterwards abandoned, and being incorporated in the transcript brought up by writ of error, will answer the requirements of the statute. *Thomas v. Thomas*, 57 Tex. 516.

When a motion is based upon a single ground, and an assignment of error is, that the motion is erroneously sustained, the assignment is sufficiently specific. *Nichols v. Wood*, 66 Iowa, 225.

The record showing, on defendant's appeal, that the plaintiff demurred to a special plea, assigning *nine* grounds, and that the court sustained the *tenth* ground, an assignment of error, that the primary court erred in sustaining the demurrer,

cannot be considered, the court being unable to know what is covered by the assignment. *Smith v. Freeman*, 75 Ala. 285.

Assignment of errors must be specific. "The court erred in allowing the evidence objected to by plaintiff to be introduced," and "the court erred in finding for defendant," are too general. *Garrett v. Wells*, 63 Iowa, 256.

Where two or more appellants assign error jointly, any error assigned which is good only as to one of the appellants will not be available. *Lake v. Lake*, 99 Ind. 339.

There must be some distinct assignment of error in a bill of exceptions before it can be considered by the Supreme Court. If the language be so obscure or confused that no distinct assignment of error appears, the writ will be dismissed. *Clark v. State*, 68 Ga. 784.

An assignment of error, averring that "the court below erred in the final decree rendered" on a stated day, although very general in terms, will be accepted when the decree of the chancery court is assailed as erroneous in the whole. *Robinson v. Murphy*, 69 Ala. 543. This case is distinguished from *Alexander v. Rea*, 50 Ala. 452.

A joint assignment of error, in the Supreme Court, by two or more appellants, cannot be sustained, unless it is well assigned by all. *Hinkle v. Shelley*, 100 Ind. 88.

Where a motion is based upon grounds, it is insufficient to assign as error simply that the court overruled the motion. *Foley v. Kirkland*, 66 Iowa, 227.

Assignments of error for the refusal of request to charge, cannot be considered where the record does not give the request. An assignment in error is not in compliance with the Supreme Court, Rule 12, if the error relied on is not singled out by the assignment, or by the exception on which it rests. *Baylis v. Stout*, 49 Mich. 215.

A mere clerical mistake in an assignment of error, such as the use of one word for another, will not preclude the Supreme Court from considering and deciding the precise question which was manifestly intended to be presented thereby. *Landon v. White*, 101 Ind. 249.

A joint assignment of errors must be well taken by all of the appellants who join in the assignment, or else it is not well taken by any, and cannot be sustained. *McKee v. Hungate*, 99 Ind. 168.

The objection, that a complaint does not state facts sufficient to constitute a cause of action, is not good when raised for the first time by an assignment of error. *Boyd v. Anderson*, 102 Ind. 217.

The refusal of the circuit court to allow a peremptory *mandamus*, after hearing up-

VIII. Pleas in Error. — 1. *Joinder in Error.* — To an assignment of errors the defendant in error may plead the common plea, or joinder as it is sometimes called, which is *in nullo est erratum*; that is, there is no error in the record or proceedings. This is in the nature of a demurrer, and at once refers the matter of law arising thereon to the judgment of the court. By joining in error, the defendant, or appellee, admits the record to be perfect. After joining thus, neither party can allege diminution, or pray a *certiorari*, without leave to withdraw the joinder for that purpose.¹ The common plea is *in nullo est erratum*, and generally confesses all the facts pleaded; and when it was assigned for error that the defendant below, an infant, appeared by attorney, this plea was considered as confessing this fact.² A defendant in error may plead specially matters in confession and avoidance, as a release of errors, or the statute of limitation and the like, to which the plaintiff in error may reply or demur, and proceed to trial on argument. This special plea waives the right to join in error. By pleading a release of error, and failing to sustain it, prevents his joining in error afterwards. If the special plea is sustained by proof, the judgment of the court below will be affirmed.³

2. *Release of Errors.* — A plea of release of errors should aver that it was by deed, by parol, or by acts *in pais*. It must state the

on issue joined, is a final judgment reviewable on error. *State v. Ottinger*, 43 Ohio St. 457.

A party cannot assign, for error, a ruling made at his own instance, or a ruling made at opponent's instance, which is the same as one made at his own instance. *Calumet v. Martin*, 115 Ill. 358.

The question of a defect of parties cannot be presented for the first time in the assignment of errors, but must be presented by demurrer in the trial court. *Eichelberger v. Nat. Bank*, 103 Ind. 401.

Errors of law and errors of fact, or several errors in fact, may be assigned together in one assignment of errors under the practice in Massachusetts. *Eliot v. McCormick*, 141 Mass. 194.

A ruling upon a matter affecting the evidence adduced at a trial, being ground for a new trial, cannot be assigned in the Supreme Court as an independent error. *Bank v. Dunn*, 106 Ind. 110.

One who claims an error to have been without prejudice, must show it to be so, the presumption being to the contrary. *McCormick v. Jacobson* (Iowa, 1887), 35 N. W. Rep. 627.

1. 2 Tidd's Pr. 1174.

2. *Moore v. McEwen*, 5 Serg. & R. (Pa.) 373; *Goodwin v. Sanders*, 9 Yerg. (Tenn.) 91; *Harvey v. Rickett*, 15 Johns. (N. Y.) 87.

3. *Puterbaugh's Ch. Pl. & Pr.* (1880) 674.

In a trial of a case the defendant pleaded specially a former recovery, and the plaintiff, in his replication, prayed that the same might "be inquired of by record." The court entered judgment for the defendant, but there was no trial on the general issue, which was also pleaded. On reviewing this case on writ of error, the Supreme Court, presuming that the issues of fact had been disposed of, reversed the judgment, and entered judgment for the plaintiff without a *venire* or *procedendo*. The court below then granted leave to the plaintiff to issue execution. *Held*, that this was error; that the effect of the judgment of the Supreme Court on the special plea must be held as only an adjudication; that the former action is no bar to the present action. *Schrivver v. Eckenrode*, 94 Pa. St. 456.

A writ of error to bring up a judgment against joint parties should be taken out in the name of all; and if any do not wish to prosecute it, a severance may be had under Rule 35. But a writ taken out in the name of only one is amendable, if it identifies the judgment; and if the party who was not joined afterwards files his election not to proceed, the writ will not be dismissed for non-joinder, but the other may be allowed to proceed separately. *Spencer v. Fish*, 43 Mich. 226.

A joint motion, or a joint assignment of errors, must be good as to all who unite in it. *Carr v. Boone*, 108 Ind. 241.

facts relied upon as a release of errors.¹ When a party recovering a judgment or decree accepts the benefits thereof voluntarily, knowing the facts, he is estopped afterwards to reverse the decree or judgment on error. The acceptance operates, and may be pleaded, as a release of errors. A release of error by one partner will bind his copartner.²

IX. Dismissal.—After the writ of error has been sued out from the superior court, and the record and bill of exceptions brought up, then the defendant in error, before joinder, may have the writ dismissed for irregularities and defects, as where a writ of error returnable to a day, to which such writs are not returnable by law, will be dismissed, provided it cannot be amended by inserting a day to which it should have been returnable, such day being passed, and a service to it being impossible. In such case where there is no voluntary appearance, the writ must be dismissed.³ But a petition in error may sometimes be amended by leave of court, where the amendment will be in furtherance of justice upon such terms as to costs as may be proper.⁴

1. Puterbaugh's Ch. Pl. & Pr. 674.

2. 2 Hill's Pr. 666.

If matters are relied on in the appellate court as a release of errors, they must be pleaded, or they will not be regarded. *Trustees v. Hihler*, 85 Ill. 409.

An assignment of errors not argued will be regarded as waived. A party not appealing can urge no objection in the Supreme Court to the decree of the lower court. *Cassady v. Spofford*, 57 Iowa, 237.

3. *Driggs v. Higgins*, 19 Fla. 103.

4. *Spencer v. Thistle*, 13 Nebr. 201.

Where, on making a motion for a new trial, the brief of evidence was not perfected, but was agreed to between the counsel that certain original interrogatories should be used on the hearing, and sent up to the Supreme Court as a part of the evidence in the case, and the court approved the brief, with an order that the clerk copy the interrogatories as a part of the evidence, and where what purports to be a copy of such interrogatories appears in the record, disconnected from the approved brief, and without further authentication by the presiding judge, the writ of error will be dismissed. *Erie City Iron Works v. Angier*, 66 Ga. 634.

Where all the evidence in a case, submitted to the court without a jury, is not printed, the Supreme Court will not decide whether or not there was error in the findings of fact or in those conclusions which were or might be based upon facts; but the statements of facts made by the court below will be taken as true. *Hyndman v. Hogsett*, 111 Pa. St. 643.

Where the judge does not approve the brief of evidence, and no reference thereto

in the bill of exceptions, the writ of error must be dismissed, no error being assigned which can be determined without such evidence. *Smith v. Bryan*, 64 Ga. 366.

A citation in error which undertakes to describe the judgment by mentioning nine hundred acres of land as the subject of it, and which refers to a copy of petition accompanying it for specific description, is not sufficient. *McGuire v. Newbill*, 54 Tex. 317.

Where it appears from the record in a claim case, that the plaintiff *in fi. fa.* was dead before the levy, and no parties had been made, the writ of error will be dismissed. *Rogers v. Smith*, 63 Ga. 172.

The wife and husband sued jointly. The husband died, and the suit was discontinued as to him, and recovery had against the wife. The wife sued out a writ of error entitling the case as if her husband was still a party. *Held*, an irregularity which might be disregarded. *Campau v. Brown*, 48 Mich. 145.

Where neither the judge who presided at the trial, nor the one who passed on the motion for a new trial, revised and approved the brief of evidence, and no legal reason is given for such failure, the Supreme Court cannot hear the case, except as to such assignment of errors as do not depend upon the evidence for their decision. *Harrison v. Safe Co.*, 64 Ga. 558.

A motion to dismiss a writ of error will not be sustained on the ground that the motion for a new trial was not made within the time prescribed by statute; nor will it for the reason that the bill of exceptions was not settled within the statutory time. *Hollenbeck v. Tarkington*, 14 Nebr. 430.

Where the abstract fails to show that it contains all of the evidence, the Supreme Court cannot enter upon an examination of the merits of the case. *Cassady v. Spoford*, 57 Iowa, 237.

Where plaintiff failed to assign error during vacation under an order of court, and defendant filed a motion to dismiss for non-compliance with the order, no delay in the submission of the cause having occurred, the motion to dismiss was denied. *Home v. Duff*, 5 Colo. 344.

Where the plaintiff in error has done acts which in law will deprive him of the benefits of a writ of error, and the appellate court being able to act upon it, his writ of error will be dismissed. But if the motion is based upon alleged forfeiture of defendant's title after judgment in an ejectment case, the motion will be overruled. *Bradley v. Ewart*, 18 W. Va. 598.

The title to land having been obtained by the plaintiff in error through a conveyance from the defendant, in whom it was found to be by the judgment sought to be reversed, to the end that the litigation may cease, and each party left secure in his rights, it is ordered that the petition in error be dismissed at the cost of the plaintiff in error. *Panko v. Irwin*, 14 Nebr. 419.

In order to get a decision on a motion to dismiss, made before printing, the motion papers must present the case in a way which will enable the court to act understandingly, without reference to the transcript on file. *Waterville v. Van Slyke*, 115 U. S. 290.

On a motion for a rehearing in a case, the attention of the court for the first time being called to the fact that no final judgment is found in the record, such point not having been made in the briefs upon which the cause was submitted, the writ of error must be dismissed. *Savage v. State*, 19 Fla. 561.

Where a petition of error is filed within the period of limitation, and both parties prepare for a final hearing, the defendant in error is estopped after submitting the case to question the jurisdiction of the court, upon the ground that no summons in error was issued or served. *King v. Penn*, 43 Ohio St. 57.

Under a rule of the appellate court, the plaintiff in error is required to file abstracts and briefs on or before the second day of the term unless the time is extended. Failing to comply with this rule, the judgment below will be affirmed. On a writ of error to the circuit court, where no return to the writ had been returned by the clerk by sending up the record at the second term of the appellate court, though service had been made on the defendant in error before the first term, an order of continuance at the second term of the appellate court

was set aside, and the decree below affirmed, without any rule having first been taken to bring up the record. *Held*, no error in affirming the decree complained of. *Challenor v. Mulligan*, 110 Ill. 666.

In *Georgia*, in an injunction, the bill of exceptions must be signed by the presiding judge within twenty days after the decision complained of, or the writ of error will be dismissed. *Moring v. Ross*, 63 Ga. 308.

Deficiencies in the record cannot be supplied in the Supreme Court by *ex parte* affidavits. Where an amendment is desired to a sheriff's return, application must be made in the court below. *Barndollar v. Patton*, 5 Colo. 29. The Supreme Court cannot, in a case at law, proceed to ascertain and assess the damages involved, no matter how well established may be their measure. *Wiley v. Lovely*, 46 Mich. 83.

A justice gave judgment for the plaintiff. The defendant takes an appeal to the district court on error, May 31, 1880; transcript filed, Nov. 12, 1880. May 3, 1881, motion by plaintiff, or defendant in error, to strike transcript from the files for causes stated at length in the opinion. Motion denied. *Held*, no error. *Campbell v. Sutton*, 12 Nebr. 522.

When exception is taken to the granting, or refusal to grant, an injunction, the time prescribed in sect. 3213 of the code for tendering, serving, and forwarding the bill of exceptions, is imperative; and if such document be not transmitted to this court by the clerk, together with a transcript of the record, within fifteen days from the date of the service, the writ of error will be dismissed. *Smith v. Wheatley*, 65 Ga. 299.

A plaintiff in error may dismiss his writ. *Becker v. Henderson*, 5 Colo. 346.

There being nothing to indicate when the presiding judge signed, nor that the service was in proper form thereafter, the writ of error must be dismissed. *Jones v. Daniel*, 66 Ga. 246. So also when the certificate of the presiding judge to the bill of exceptions shows on its face that the recitals therein are not true, the writ of error will be dismissed. *McBride v. Beckwith*, 67 Ga. 764. So also where the date of the clerk's certificate to the bill of exceptions is prior to the date of the judge's signature, it will be dismissed. *Atlantic, etc., R. Co. v. Smith*, 66 Ga. 205.

If a judgment be rendered against a party, no creditor of the party, whether he has a lien on his land or not, has a right to obtain a writ of error in the name of the defendant; and, if a writ of error is obtained in the name of such defendant, he may at any time dismiss such writ of error with assent of the defendant in error, and no such creditor of the plaintiff in error has a right to object. No court on the appli-

X. Certiorari.—When a plaintiff in error has obtained a writ of *certiorari*, on suggestion of the diminution of the record, he cannot require the defendant to join in error until the return of the writ.¹ A *certiorari* may be returned to the court below, to have an amendment made.² A writ of *certiorari* may accompany a writ of error, and is issued for the purpose of compelling the production of the whole record, when a diminution has been suggested and shown.³

plication of such creditor, and on his showing that he would be benefited by the reversal of such judgment, can properly enjoin the plaintiff in error from dismissing such writ of error. The fact that the plaintiff in error is a corporation, and is insolvent, and that on its application the court had directed costs of such writ of error to be paid by its receiver, out of funds in his hands arising from the renting of the land of such corporation, will not prevent the appellate court, before whom such writ of error is pending, from disregarding such injunction, and dismissing the writ of error, if the plaintiff in error and the defendant in error have agreed that it should be dismissed, and the court is asked so to do. *Colman v. West Virginia Oil & O. L. Co.*, 25 W. Va. 148.

The United States Supreme Court will review, on writ of error, the judgment of the Supreme Court of a State, in a suit between citizens of that State for the foreclosure of a mortgage, in which the only controversy related to the effect to be given a sale of property under an oath of the bankruptcy court, directing the mortgaged property of the bankrupt to be sold free of incumbrances. *Factor's, etc., Ins. Co. v. Murphy*, 111 U. S. 738.

The court will not review, upon appeal, a judgment rendered by the trial court, on the sole ground that the damages awarded are excessive, if it appears that the question is one purely of fact. *City v. Weston* (Ill. 1888), 14 N. E. Rep. 665.

1. *Schirmer v. People*, 40 Ill. 66.

2. *State v. Williams*, 2 McCord (S. Car.), 301; *State v. Jones*, 4 Hals. (N. J.) 357.

3. 3 Bouvier's Inst. No. 3359.

If there is any portion of the record, in the court below, which has been omitted from the transcript of the record, it can only be supplied upon suggestion of a diminution of the record, supported by affidavit of that fact, when the court will award a writ of *certiorari* to the court from which the cause is brought for a complete record. *Finch v. McDowall*, 7 Cow. (N. Y.) 538.

Should matter be copied into the transcript as a part of the bill of exceptions, which is not contained in the original bill of exceptions, the proper course is, upon

proper suggestion, supported by affidavit, to ask a writ of *certiorari*, so that the correct record may be produced in the appellate court. In order to avail himself of this writ, the defendant in error must ask for it before joinder in error; or, in case he has joined in error, he should ask leave to withdraw his joinder for that purpose. This writ will not be allowed after the term at which the cause was submitted to the court for decision, nor will it be allowed on an application for a rehearing. *Puterbaugh's Ch. Pl. & Pr.* 679.

The refusal of a trial court to order a further return to a writ of *certiorari* issued to a justice, is not open to review in the Supreme Court. *Mann v. Tyler*, 56 Mich. 564.

A writ of error does not lie from a judgment of the mayor of a town, imposing a fine for the violation of a town ordinance. An appeal is generally the proper mode of reviewing such judgment; but, under some peculiar circumstances, such a judgment might be reviewed by a writ of *certiorari*; but under no circumstances will a writ of error lie to such a judgment. *Ridgway v. Hinton*, 25 W. Va. 554.

On error bringing up a judgment on *certiorari*, only such grounds can be considered as are alleged in the affidavit for *certiorari*. *Grand Trunk R. Co. v. Russ*, 47 Mich. 500.

Under the provisions of the act of March 20, 1810, sect. 20, the judgment of the court of common pleas upon a *certiorari* to remove the proceedings before a justice of the peace, is final, not only as regards affirmance or reversal of the justice's judgment, but also as regards the subsequent allowance of a writ of execution for costs accrued on the *certiorari*. *Palmer v. Lacock*, 107 Pa. St. 346.

Where a *certiorari* is sought, in a criminal case tried before a county court, the petition should set out errors complained of. *Fleming v. State*, 67 Ga. 767.

Dismissal of an appeal from a probate of a will is a final judgment, and cannot be set aside unless complained of within two years, allowed for removing proceedings to the Supreme Court on error or *certiorari*. *Ellair v. Judge* 46 Mich. 496.

On error bringing up a judgment

XI. Judgment. — Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned; and it may, if necessary or proper, order a new trial, as to any or all the parties. When a judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.¹

In all cases of appeal and writ of error, the Supreme Court or appellate court may give final judgment, and issue execution, or remand the case to the inferior court, in order that an execution may issue, and that other proceedings may be had thereon. The Supreme Court or appellate court, in any case of a partial reversal, shall give such judgment or decree as the inferior court ought to have given, and for this purpose may allow the entering of a *remititur*, either in term-time or vacation, or remand the cause to the inferior court for further proceedings, as the case may require.²

affirmed on *certiorari*, the Supreme Court will decide as the right of the matter may appear. *Wattles v. Moss*, 46 Mich. 52.

On error bringing up a case affirmed on *certiorari* to a justice, the case is to be heard on the justice's return alone. *Dooley v. Eilbert*, 47 Mich. 615.

A petition in *certiorari* does not become a part of the record of the superior court until granted. *Elsas v. Clay*, 67 Ga. 327.

Under the New York practice, a judgment quashing a writ of *certiorari* is appealable, when it is not confined to simple quashing of the writ, but adjudicates upon the proceedings brought up, and is rendered on the ground that the allegations of error are not sustained. *People v. Commissioners*, 103 N. Y. 370.

In *certiorari* proceeding on appeal, to review the assessment of railroad property by the tax assessor, the court of appeals will not review the conclusion of facts upon the question of value, but of law. *People v. Hicks*, 105 N. Y. 198.

1. Wait's Code (N. Y.), 649, sect. 330.

2. Storr & C. St. (Ill.) 1838, sects. 81-2.

The common judgment for the defendant in error is that the former judgment be affirmed. If a judgment is good in part, and erroneous in part, it may be affirmed as to part, and reversed as to the other part. *Barnett v. Barnett*, 16 Serg. & R. (Pa.) 51; *Cummings v. Pruden*, 11 Mass. 206. But if the judgment is not divisible, although good in part, and bad in part, it must be affirmed or reversed as a whole. *Boaz v. Heister*, 6 Serg. & R. (Pa.) 18; *Davis v. Campbell*, 1 Ired. (N. Car.) 482; *Gaylord v. Payne*, 4 Conn. 190.

If there are several dependent judgments, and the principal one is reversed, the dependent ones cannot be sustained. *Hutchinson v. Commonwealth*, 4 Met. (Mass.) 359.

When a written contract for the sale of real estate is entered into, and upon the trial in an action for specific performance the trial court upon conflicting testimony find that such written contract truly expressed the agreement between the parties, such finding on error to this court is conclusive. *Mills v. Ruchlin*, 29 Kans. 87.

The plaintiff in error having asked leave to withdraw the writ of error, in a case after argument thereon, but before any written decision had been agreed upon by the court, it will be ordered that leave be granted and the judgment be affirmed. *Bank v. Bank*, 66 Ga. 752.

When a cause is submitted to the Supreme Court on record so imperfect as to render it impossible to tell therefrom whether the facts assigned for error exist or not, the judgment of the court below will be affirmed. *Cunningham v. Tonnemaker*, 13 Nebr. 462.

Argument on the merits cannot be made on a motion for a rehearing, but only on the rehearing itself, if granted. *Kraft v. Raths*, 45 Mich. 20.

The time prescribed for the tender and signing of bills of exceptions in cases of *quo warranto* is imperative. There is no provision in such cases for the presiding judge to sign after the expiration thereof, and certify the cause of the delay. *Hardin v. Swann*, 66 Ga. 244.

Under Nebraska law a leave to file a motion for a rehearing more than thirty days from time of filing opinion will be denied. *Bank v. Yocum*, 12 Nebr. 208.

A plaintiff in error is sole counsel in his own case, and, while on his way to court, was hurt by accident, and could not arrive at court in time, and his case was dismissed for want of prosecution. Motion being made at the same time for re-instating the

1. *Reversal.* — The Supreme Court, on reversing a judgment on error, may render such a judgment as should have been rendered by the inferior court; for the writ of error is to revive the first cause of action, and to recover what ought to have been recovered in the lower court.¹

cause, and a proper showing of the facts, it was re-instated and continued. *Ex parte Bradley*, 63 Ga. 566.

The general rule is, that error must be assigned with exactness; but where an error is not assigned, the court may yet in its discretion consider it, — the court having the right to reverse a judgment for errors not assigned. *Sturdevant v. Stanton*, 47 Conn. 579.

The Supreme Court can render the proper judgment in a case brought to the circuit court on *certiorari*, and taken upon an error; but if the plaintiff in error has received too favorable a judgment below, and the other party does not complain, it can only affirm the judgment, though it may give costs to the defendant in error. *McClatchie v. Durham*, 44 Mich. 435.

Where, by consent of parties, a cause involving both law and fact is tried by the judge without a jury, and the judgment is excepted to generally, with no specifications as to whether the error intended to be alleged was a mistaken finding on the facts, or an erroneous ruling upon some point of law, a copy of the documentary evidence, as well as a brief of the oral evidence, must be brought up. It is not sufficient that the bill of exceptions represent that certain writings, such as exemplifications from other courts, should so and so, not reciting the contents, but only the supposed legal effect. *Lee v. Porter*, 63 Ga. 345.

The Supreme Court cannot direct the lower court to render judgment for a certain sum upon the evidence alone, without any findings given of any court, or jury, or referee authorizing the same, and, in fact, against the verdict of the jury and the decision of the court below. *Holton v. McPike*, 27 Kans. 286.

While a judgment is in full force and unreversed, the Supreme Court will not, in the exercise of original jurisdiction, again hear and determine the case upon its merits. *State v. Ottinger*, 43 Ohio St. 457.

Where an action has abated as against one of two defendants, and the verdict is returned against both jointly, it is error to render judgment thereon over a motion to arrest. *Boor v. Lowrey*, 103 Ind. 468.

In actions sounding in damages where the judgment of the lower court is for less than the statutory limit, exclusive of costs, the judgment of the appellate court is

final. Where this court directs a verdict for the defendant, and gives judgment thereon for the defendant, a judgment of affirmance in the appellate court is final. *Baxtrom v. R. R. Co.*, 117 Ill. 150.

1. *Garr v. Stokes*, 1 Harr. (N. J.) 403.

The right of third parties under an erroneous judgment are not divested by the reversal of such judgment. *McJelton v. Love*, 13 Ill. 486. The rights of third persons are not affected. Their title to property acquired under an erroneous judgment is not divested on a reversal.

The defendant, in such case, must look to the plaintiff for redress. *Bank of U. S. v. Bank of Wash.*, 6 Pet. (U. S.) 8; *Clark v. Pinney*, 6 Cow. (N. Y.) 298; *Green v. Stone*, 1 Harr. & J. (Md.) 405; *Hubbel v. Broadwell*, 8 Ohio, 120; *Allman v. Taylor*, 101 Ill. 185.

A new trial is not granted on reversal when the court of the declaration on which the verdict rests presents no cause of action, even though the plaintiff might have recovered on some other count. *Dayton v. Fargo*, 45 Mich. 153.

A judgment of reversal is effective, notwithstanding the death of the plaintiff in error, during the pendency of the suit. Such judgment takes effect by relation, as of the date of the commencement of the proceedings in error; and it is competent for the court, to which the cause is remanded for a new trial, to order a revivor of the action in the name of the proper representative of the deceased party. *Williams v. Englebrecht*, 38 Ohio St. 96.

The Supreme Court will reverse a cause for material error apparent on the face of the record, although no motion in arrest or for review is made in the circuit court. *McIntire v. McIntire*, 80 Mo. 470.

Where a declaration contains the common counts and also special counts, and the court sustains a demurrer erroneously to the special counts, but the facts stated in the special counts could be proven by the plaintiff on the trial of the issue on the common counts, and as the plaintiff has received no injury from the demurrer, the judgment below will not be reversed for such error. *Moore v. Supervisors*, 18 W. Va. 630.

Where the judgment, for the reversal of which error is prosecuted in the Superior Court, is pleaded as an estoppel in another suit between the same parties, it is competent for the Superior Court to enjoin the

prosecution of such suit until the case in error is determined. *Yeoman v. Lasley*, 36 Ohio St. 416.

Want of jurisdiction in a judge will not work a dismissal of the writ of error, but a reversal of the judgment. *Castleberry v. State*, 68 Ga. 49.

A proceeding in error, to reverse, vacate, or modify a judgment or final order, is not commenced within the meaning of section 523 of the civil code, unless the petition in error is filed, and the appearance of the defendants in error effected by service of summons or otherwise. *Bowen v. Bowen*, 36 Ohio St. 312.

A decree *et chambers* dismissing a bill on demurrer, cannot be reversed by a "fast" writ of error. *Jordan v. Kelly*, 63 Ga. 437.

On writ of error the Supreme Court does not review the judgment of the court below on its merits, as on an appeal, but is limited to an examination of the decision on points of law and evidence which were excepted to. *Warsaw v. Knox*, 107 Pa. St. 301.

On an attachment suit against an insurance company, plaintiffs introduced evidence, and closed their case. No appearance by the defendants, or motion for non-suit. Certain attorneys calling themselves *amici curiæ*, suggested to the court that a non-suit was proper, which was disregarded. The jury found a verdict for the plaintiffs. Defendants filed a bill of exceptions, assigning as error that the court did not non-suit the plaintiffs. *Held*, that the court did not decide any question to which exception is taken; and there being no exception to any ruling, decision, or judgment, the judgment of the court below must be affirmed. *Republic Fire Ins. Co. v. Beaty*, 71 Ga. 160.

The plaintiffs, by their original action, sought to enjoin proceedings by the village council to complete the extension of the corporate limits of the village. On final hearing in the district court, the petition was dismissed at plaintiffs' costs. To reverse this judgment, a petition in error is now pending in this court, and the plaintiffs now move for an order staying the execution of the judgment of the lower court during the pendency of the proceeding in error. *Held*, where the relief desired, during pendency of a proceeding in error, is an order to stay further action in the proceedings, which it is the object of the original action to enjoin, such relief should be sought under section 5573 of the Rev. Stat. *Croll v. Village*, 36 Ohio St. 316.

Where the evidence fairly supports the verdict, the Supreme Court will not reverse the judgment, although the preponderance of evidence, as shown by the rec-

ord, may be against the verdict. *Day v. Henry*, 104 Ind. 324.

The general term of the Supreme Court has no power to reverse the judgment of an inferior court on the ground of excessive damages, but can only review questions of law decided by those courts. *Reilley v. Canal Co.*, 102 N. Y. 383.

The Ohio Supreme Court has had no power since the amendment of section 6710 of the Rev. Stat. to reverse a judgment of the district court reversing a judgment of the common pleas, and remanding the cause for a new trial on the merits. *Halderman v. Larrick*, 44 Ohio St. 438.

A judgment will not be reversed for an error which causes no injury to the party complaining thereof. *Lee v. Town*, 118 Ill. 304; *Buscher v. Scully*, 107 Ind. 246.

A verdict will not be disturbed because a question of law was submitted to the jury, if it was correctly decided. *Hinds v. Cottle*, 143 Mass. 310.

Neither will a judgment be reversed on account of an instruction abstractly erroneous, where the jury reach the right conclusion. *Andis v. Personett*, 108 Ind. 202.

Giving an instruction erroneous as a matter of law will not be cause for reversal where the evidence is not in the record, and the complaining party is uninjured. *Cline v. Lindsey*, 110 Ind. 337.

A case will not be reversed when the evidence is nearly balanced, nor for an harmless error. *Forbes v. Thomas* (Nebr. 1887), 35 N. W. Rep. 411.

When the evidence tends to support the views of either party, the verdict should not be disturbed. *Pim v. Wait* (U. S. C. C. N. Y.), 32 Fed. Rep. 741.

The question of fact, when it occurs, must be tried by the jury; but it is for the court to say whether the evidence offered is pertinent to the issue, and, also, whether there is sufficient evidence before the jury to present an issue of the fact, under the pleadings; and, if there shall not be, to direct what verdict shall be returned. *Bartelott v. Bank*, 119 Ill. 259; *Lake Shore, etc., R. Co. v. O'Connor*, 115 Ill. 254; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478; *Herbert v. Butler*, 97 U. S. 319.

Where an equity case is one purely of fact, the decision of the chancellor will not be reversed, unless palpably against the weight of evidence. *Campbell v. R. R. Co.* (Ky. 1888), 6 S. W. Rep. 337.

A judgment for the collection of taxes, when the service was by publication addressed to Henry Wheeler, when the correct name was Henry Wheelen, is void. *Wheelen v. Weever* (Mo. 1887), 6 S. W. Rep. 220.

2. *Restitution*. — A writ of restitution is sometimes issued by the appellate court when property has been taken in execution, and the judgment has been reversed. This action compels the plaintiff below, who has received satisfaction of his erroneous judgment, to restore to the opposite party the property taken in execution, or, if sold, then to recompense him for the value of the property sold.¹

3. *Remittitur*. — After the appellate court has passed upon the appeal by writ of error, it still has the record. It is now required that it should be sent back to the inferior court, if affirmed, to be executed; if reversed, and a *venire facias de novo* has been awarded, that a new trial may be had in the court below. In order to send the record below, a *remittitur* is made, which is an entry on the records of the appellate court, that the record of the case has been returned to the court when it was removed. A certificate made by the clerk of the appellate court to that effect is also called a *remittitur*. On the return of the record to the court from whence it was removed by writ of error, the case will then be redocketed, and be proceeded in by a *venire facias de novo*, by execution, or by *scire facias* against a bail in error, as the case may be, conformably to the judgment of the appellate court.²

XII. Statutory Regulation of Writ of Errors. — Many of the States have abolished writs of error, and substituted appeals; but so far as the law of appeals relates to the common-law action of writ of error, it has the same application, and is identical, though known by a different name.³

1. Boal's Appeal, 2 Rawle (Pa.), 37; Bruere v. Britton, 1 Spencer (N. J.), 268.

The successful party on reversal is entitled to a restitution of every thing of his adversary, in specie, not the value, but the thing, acquired by virtue of the erroneous judgment. Bickett v. Garner, 31 Ohio St. 28; Gott v. Powell, 41 Mo. 416.

If the plaintiff in the erroneous judgment has collected money under the execution, an action will lie to recover it. Rann v. Reynolds, 18 Cal. 275.

The statute of limitations begins to run from the time of the reversal. Crocker v. Clements, 23 Ala. 296.

The general rule is, that persons purchasing property under the authority of an erroneous judgment acquire rights which cannot be divested by any subsequent reversal of the judgment or decree. Marks v. Cowles, 61 Ala. 299; Reynolds v. Harris, 14 Cal. 667; Dorsey v. Thompson, 37 Md. 25; Stroud v. Casey, 25 Texas, 740; Stinson v. Ross, 51 Me. 556; Hanschil v. Stafford, 27 Iowa, 301; Taylor v. Laner, 26 La. Ann. 307; Lovett v. German, etc., Church, 12 Barb. (N. Y.) 67; Jesup v. Bank, 15 Wis. 604; Porter v. Robinson, 3 A. K. Marsh (Ky.) 253; Coster v. Peters, 7 Rob.

(N. Y.) 386; Feaster v. Fleming, 56 Ill. 457; Laws of Ala. p. 69. Compare Wambaugh v. Gates, 8 N. Y. 138.

2. 3 Bouvier's Inst. No. 3358.

Formerly when a writ of error, in the Exchequer Chamber, abated, or was discontinued, the transcript must have been remitted, and a *remittitur* entered, before a defendant could sue out execution; but now it is no longer necessary, for the record remains in the court below, and execution is, therefore, in all cases, now issued by and out of that court. H. T. Wm. IV. r. 16. This matter is now wholly regulated by statutes of the different States.

On motion to amend *remittitur*, it is held that the "franchises, privileges, rights, and liberties," directed to be excluded from the sale of defendant's property by court of appeals (Lord v. Y. F. Gas Co., 99 N. Y. 547), on those referred to in ch. 163, Laws 1878, and do not include patent rights, licenses, easements, or privileges acquired by the company since incorporation. Lord v. Y. F. Gas Co., 101 N. Y. 614.

3. Hillard's New Trials, t. Appeals.

Notwithstanding the provisions of the statutes, simplifying the forms of pleading and practice, the forms of the actions have

XIII. In Criminal Cases.—A writ of error does not lie in behalf of the people to reverse a decision of an inferior court in a criminal case; and a joinder in error cannot give jurisdiction to the appellate court.¹ At common law, errors lie only to matters of record.²

1. *When it will lie.*—At common law in criminal cases, no writ of error issues for the defendant as a matter of right in most of the States.³

Error must be affirmatively made out in criminal as well as in civil cases. It cannot be based upon a misapplication of the judge's remarks that would exclude evidence that the remarks were not intended to affect particularly, if the ambiguity is the fault of counsel in not making their offer of proof explicit.⁴

been preserved and kept distinct. *Smith v. State*, 66 Md. 215.

1. *People v. Reynolds*, 4 Hayw. (Tenn.) 110.

2. *McCue v. Commonwealth*, 78 Pa. St. 185; *Davis v. State*, 39 Md. 355.

Under the statutes of the different States, the proceedings on an appeal from a conviction are varied. In Illinois and Michigan the proceeding is called writ of error; in Ohio, petition in error; in Kentucky and Indiana, an appeal; in Iowa the proceedings are substantially as in Indiana. *Harris's Cr. L.* (3d Am. ed.) 411, note.

Bills of exceptions do not lie at common law in criminal cases. *Whar. Cr. Pl. & Pr.* sect. 772.

At common law a writ of error would not lie to the prosecution to review an adverse judgment on demurrer or other procedure before the trial court. *State v. West*, 71 N. Car. 263; *State v. Solomon*, 6 Yerg. (Tenn.) 360; *State v. Jones*, 7 Ga. 422; *State v. Copeland*, 65 Mo. 497; *State v. Kemp*, 17 Wis. 669; *Commonwealth v. Cain*, 14 Bush (Ky.), 525; *Commonwealth v. Cummings*, 3 Cush. (Mass.) 212; *State v. Dougherty*, 5 Tex. 1; *U. S. v. Moore*, 3 Cranch (U. S.), 159.

3. *Loftin v. State*, 11 Smed. & M. (Miss.) 358; *Commonwealth v. Profit*, 4 Binn. (Pa.) 428.

4. *Maillet v. People*, 42 Mich. 262. A party indicted for a misdemeanor punishable by fine only, who has been tried and acquitted, and on writ of error to the Supreme Court, the judgment being reversed and the cause remanded, may be tried again under the Arkansas law, without any violation of the constitutional provisions. *Jones v. State*, 15 Ark. 261; *Taylor v. State*, 36 Ark. 84. Before the States enacted statutes giving them the right to appeal, the weight of authority was against the right of the government to bring error in criminal cases. *People v. Corning*, 2 N. Y. 1; *Commonwealth v. Cummings*, 3

Cush. (Mass.) 212; *State v. Lane*, 78 N. Car. 547; *Reg. v. Duncan*, 14 Cox, C. C. 571.

Although the court, on the trial, may err in the exclusion of evidence, or in refusing to allow certain questions to be put on cross-examination, yet if the court is fully satisfied, under the facts of the case, that the error could not have affected the result, the error will afford no ground of reversal. *Ritzman v. People*, 110 Ill. 362.

A judgment will not be reversed because of the refusal of the court to repeat a ruling once distinctly made during the trial. *State v. Buzzell*, 59 N. H. 65.

A party taking a bill of exceptions, must affirmatively show error to his prejudice, or the proceedings will not be disturbed. *Eskridge v. State*, 25 Ala. 30; *Burns v. State*, 49 Ala. 370.

Where the jury finds the defendant guilty of murder in the first degree, under instructions properly defining murder in the first degree, it seems that the defendant would not be prejudiced by erroneous instruction as to murder in the second degree. *State v. Underwood*, 57 Mo. 40.

An error in a case in the summoning of the jury, held cured by the statute of amendment. *Lynch v. Commonwealth*, 77 Pa. St. 205.

An improper remark by the court, adverse to the prisoner in presence of the jury, will be considered on writ of error as though it were a part of the charge. The court has no right to say, in the presence of the jury, that it was the duty of the prisoner to bring forward his defence in the preliminary examination. *Sullivan v. People*, 31 Mich. 1.

If there be any error in a request to charge, or if a request to charge in the disjunctive is asked, either branch of which is erroneous, the whole charge is properly refused. *State v. Cassidy*, 12 Kans. 551.

It is error, for which a conviction will be reversed, to keep the prisoner shackled

XIV. In the United States Courts. — I. United States District Court. — A final judgment of the United States District Court, in civil actions where the matter in dispute exceeds fifty dollars, exclusive of costs, may be reviewed by the United States Circuit Court of the same district on writ of error. This writ must be issued within one year from final judgment. If the party is disabled, being an infant, *non compos mentis*, or imprisoned, the writ can be brought within one year after the expiration of such disability.¹

in court during trial. *State v. Kring*, 64 Mo. 591; *People v. Harrington*, 42 Cal. 165.

A conviction will be reversed on account of the use of improper language by the prosecuting counsel in his address to the jury, which the trial court on motion refused to restrain. *Ferguson v. State*, 49 Ind. 33; *State v. Smith*, 75 N. Car. 306.

Under the Missouri statute, the State cannot sue out a writ of error in a criminal case. *State v. Cox*, 67 Mo. 46.

The State possesses no such right under a statute unless expressly conferred. *State v. Johnson*, 2 Iowa, 549; *Commonwealth v. Harrison*, 2 Va. 202.

If exceptions to errors are not taken on the trial, points cannot be raised on them on criminal appeals. *Brotherton v. People*, 75 N. Y. 159.

Under section 4720, ch. 190, Rev. Stat. of Wisconsin (1878), which provides for the reduction to "writing in summary mode" of exceptions in criminal trials, held improper to settle bill of exceptions so that the rulings to be reviewed were scattered throughout a long record. *State v. Snell*, 46 Wis. 524.

Error can only be taken after final judgment. *Staup v. Commonwealth*, 74 Pa. St. 458; *United States v. Norton*, 91 U. S. 566; *People v. Nestle*, 19 N. Y. 583.

Failure to demur, or move in arrest of judgment, cannot be held to waive the right to make objections to the indictment in the appellate court; the right being constitutional, and not personal. *Lemons v. State*, 4 W. Va. 755.

A prisoner, after waiving trial by jury, can sue out a writ of error to the appellate court, as he has no power to waive such a right, and be tried by the court. It is a fundamental principle of the common law, declared by *Magna Charta*, that no person shall be convicted of any crime but by the unanimous verdict of good and lawful men in open court. *Hill v. People*, 16 Mich. 351; *State v. Maine*, 27 Conn. 281; *Bond v. State*, 17 Ark. 290; *League v. State*, 36 Md. 259; *Williams v. State*, 12 Ohio St. 622; *United States v. Taylor* (Kans. 1882), 11 Fed. Rep. 470.

The only exception to this is when the legislature may provide other means of trial for petty misdemeanors with the right of appeal. The court has no right to

serve in the double capacity of judge and jury, not even with the consent of the prisoner. 1 Bishop, Cr. L. sect. 759. Such action on the part of the court is in violation of the constitution, and in subversion of the fundamental principles of the common law. *State v. Moss*, 2 Jones (N. C.), L. 66.

Waiving jury in criminal trials by the consent of the prisoner, is against public policy, and is not to be adopted by the courts, except, perhaps, in case where the States have made some express constitutional or statutory provision authorizing the prisoner to waive jury trial. In view of this interpretation, most of the States have incorporated such a provision in the constitution, or embodied it in a statute. Arkansas Const. (1874) art. 2, sect. 7; California Const. (1849) art. 1, sect. 3; Connecticut, Act (1874), sect. 537; Florida Const. (1868) art. 1, sect. 4; Indiana, 2 Rev. St. (1878) 394; Iowa Stat. (1880) sect. 2814. Compare *State v. Kaufman*, 51 Iowa, 578; Kansas, Com. L. (1881) 755, sect. 197; Louisiana, Voorhees' Stat. (1876) sect. 1076; Maryland Const. (1867) art. 4, sect. 8; Massachusetts, Pub. Stat. (1882) 973; Michigan Const. (1850) art. 6, sect. 7; Howell's Am. Stat. (1882) sect. 6485; Minnesota Const. (1857) art. 1, sect. 4; Missouri Const. (1865) art. 1, sect. 17; Nebraska, Com. Stat. (1881) 569, sect. 290; New Jersey, 2 Rev. St. (1877) 875; New York Const. (1846) art. 1, sect. 2; North Carolina Const. (1868) art. 1, sect. 13; Ohio, 2 Rev. St. (1880) sect. 5204; Pennsylvania Const. (1873) art. 5, sect. 27; Rhode Island, Pub. St. (1882) sect. 9; South Carolina, Gen. Stat. (1882) sect. 288; Tennessee Const. Act (1875) 6; Texas Const. (1876) art. 5, sect. 10; Vermont, Gen. Stat. (1862) ch. 30, sect. 36; Virginia Code (1873) 2065; West Virginia, 2 Kelley's Rev. St. (1879) 900, sect. 688; Wisconsin Const. (1848) art. 1, sect. 5; United States Rev. St. (1874) sect. 649.

1. U. S. Rev. St. sects. 633, 635.

Final judgments of the circuit court affirming or modifying the judgment of the district court may be taken to the United States Supreme Court, provided the matter in dispute exceeds five thousand dollars, exclusive of costs. U. S. Rev. St. sect. 691.

But if the circuit court reverses the judgment of the district court, and orders a new

2. *United States Circuit Court.* — A writ of error will lie from the Supreme Court to the Circuit when the matter in dispute exceeds five thousand dollars exclusive of costs.¹

In civil suits held by two judges, and a difference of opinion exists as to matters to be decided, ruled, or ordered by the court, the opinion of the presiding judge prevails for the time being; but when final judgment is rendered, this point must be stated during the same term, under the directions of the judges, and certified and entered. Such judgment may be reviewed by the Supreme Court on a writ of error, irrespective of the amount involved.² A final judgment of the circuit court to be reviewed on writ of error by the Supreme Court must be brought within two years after its rendition. If the party is disqualified, then within two years after his disability is removed.³

trial, no writ of error can be brought to have the Supreme Court examine this judgment of the circuit court. *Bostwick v. Brinkerhoff*, 106 U. S. 3.

The circuit court may review, by writ of error, decisions of district courts in criminal cases where sentence involves imprisonment, or a fine of over three hundred dollars. 20 Stat. at Large, 354.

1. U. S. Rev. Stat. sect. 391.

2. U. S. Rev. Stat. sects. 650, 652, 693; *Dow v. Johnson*, 100 U. S. 158.

3. U. S. Rev. Stat. sect. 1008.

It is not the amount in dispute below that rules, but the amount in the appellate court which determines the question of jurisdiction. *Hilton v. Dickinson*, 108 U. S. 165.

A final judgment of a circuit court, relating to patents or copyrights, or taken against an officer of the revenue service, or in any cause brought on account of depriving any person of rights, privileges, or immunities secured by the United States Constitution, may be reviewed in the Supreme Court on a writ of error, irrespective of the amount in controversy. U. S. Rev. Stat. sect. 699.

The appellate court may affirm, modify, or reverse the judgment, or make the orders necessary to give justice. U. S. Rev. Stat. sects. 636, 701.

It is doubtful whether the findings of a referee, by agreement of parties, can be taken to the Supreme Court on writ of error. *Boogher v. Ins. Co.*, 103 U. S. 90.

No judgment will be reverse, on a writ of error, for ruling on a plea in abatement other than a plea of jurisdiction of the court, or for any error in fact. U. S. Rev. Stat. sect. 1011.

The Supreme Court will not issue an execution on a case before it on a writ of error, but order the inferior court to do it. U. S. Rev. Stat. sect. 701.

A certificate of division was made on

a motion to quash an indictment. The court held that a motion to quash is always addressed to the discretion of the court; and a decision upon it is not error, and cannot be reviewed on a writ of error. *United States v. Rosenburgh*, 7 Wall. (U. S.) 580, *U. S. v. Avery*, 13 Wall. (U. S.) 251; *U. S. v. Hamilton*, 109 U. S. 63.

Section 3 of the act of June 23, 1874, allows a writ of error from the United States Supreme Court to the Supreme Court of the Territory of Utah, in criminal cases, when the accused has been convicted of bigamy or polygamy, or has been sentenced to death for any crime. *Wiggins v. People*, 93 U. S. 465.

The certificate of division brings nothing before the court but points certified. *Ward v. Chamberlain*, 2 Black (U. S.), 430.

These points must be as to the law. *Silliman v. Hudson*, 1 Black (U. S.), 582; *Dennistoun v. Stewart*, 18 How. (U. S.) 565; *Weeth v. Mont. Co.*, 106 U. S. 605.

Several questions may be decided and passed upon at the same time. *U. S. v. Chicago*, 7 How. (U. S.) 185.

If the points presented rest upon a hypothesis, or certified *pro forma*, the Supreme Court will not pass upon them. *Webster v. Cooper*, 10 How. (U. S.) 54; *Pelham v. Rose*, 9 Wall. (U. S.) 103; *Nesmith v. Sheldon*, 6 How. (U. S.) 41.

The request to certify need not be expressly stated, if it can be fairly inferred from the record. *U. S. v. Harris*, 106 U. S. 629.

A division on motion addressed to the discretion of the court does not present a point which can be certified, although relating to the jurisdiction. *U. S. v. Avery*, 13 Wall. (U. S.) 251; *U. S. v. Rosenburgh*, 7 Wall. (U. S.) 580.

The points of division should be distinctly stated. *Sadler v. Hooer*, 7 How. (U. S.) 646.

An order granting a peremptory writ of *mandamus*, which directs the collection of taxes, is a final judgment subject to review when the other requisites exist. The power to review such a judgment of a tax to pay all judgment creditors of a specified class, depends upon the amount of the whole tax ordered to be collected, and not upon the amount of the judgment debts due to each or any individual petitioner. *Davies v. Corbin*, 112 U. S. 36.

The docketing by the defendant in error of a cause in advance of the return day of the writ of error, does not prevent the plaintiff in error from doing what is necessary while the writ is in life, to give it full effect. *Davies v. Corbin*, 113 U. S. 687.

Where a case is tried by the court below, and the record does not affirmatively show a written stipulation waiving a jury, the question decided at the lower court cannot be re-examined here on a writ of error. *County v. Warren*, 106 U. S. 622.

A writ of error was sued out returnable to the October term, 1877. The return was duly made, and transcript filed with the clerk in September court of same year, and citation duly served. No fee-bond was given, and the cause was not docketed. In September, 1878, the bond was filed, and the cause docketed; no motion to docket and dismiss having, in the mean time, been made. *Held*, that a motion made at the present term to dismiss the writ must be denied. *Edwards v. U. S.*, 102 U. S. 575.

A writ of error will not be dismissed for want of jurisdiction by reason of failure to return with it an assignment of errors. *Ackley v. Hall*, 106 U. S. 428.

When a writ of error gives the names of all the parties as they are found in the record of the lower court, and nothing in the record shows that there were other parties, the writ is sufficient, though the defendants in error are there described by firm-names, as A., B., & Co. *Gumbel v. Pitkin*, 113 U. S. 545.

This case distinguished from *Protector*, 11 Wall. (U. S.) 82.

A question of fact cannot be examined in this court on a writ of error, unless the evidence is brought into the record by a bill of exceptions, or by some method known to the practice of courts of error which for that purpose is adopted, such as an agreed statement of facts, or a special finding in the nature of a special verdict. Papers on file in the lower court are no part of the record in the case when brought here by writ of error, unless they are incorporated into the record by some action of the lower court, as by a bill of exceptions, or some equivalent act. *England v. Gebhardt*, 112 U. S. 502.

The Supreme Court cannot acquire jurisdiction under a writ of error where the

return to it is made by filing the transcript of the record here after the expiration of the term of this court next succeeding the filing of the writ in the circuit court. *Cailot v. Deetken*, 113 U. S. 215.

When a jury is waived by agreement, a general finding of the issues by the lower court is not open to review by the Supreme Court. *Santa Anna v. Frank*, 113 U. S. 339.

In an action at law, submitted to the circuit court by the parties waiving a trial by jury, in which the record does not show the filing of the agreement in writing required by section 649 of the revised statutes, this court, upon bill of exceptions and writ of error, cannot review the rulings upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence. But this court may determine whether the declaration is sufficient to support the judgment. *Bond v. Dustin*, 112 U. S. 604.

An information against a distillery for an alleged violation of the revenue law was filed. The district court gave judgment in favor of the claimant, and then denied the motion of the United States that a certificate of reasonable cause of seizure be entered of record. *Held*, that the action on the motion cannot be reviewed by the circuit or the Supreme Court. *U. S. v. Place*, 106 U. S. 160.

Before the act of March 3, 1875, no appeal would lie from an order of the circuit court remanding a suit which had been removed, because such an order was not a final judgment or decree in the sense which authorizes an appeal or writ of error. *Chicago, etc., R. Co. v. Wiswall*, 23 Wall. (U. S.) 507. But this act provided in express terms that the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be. 18 Stat. c. 137, sect. 5. But by section 6 of the act of 1887, c. 373, sect. 5 of that of 1875, c. 137, was expressly repealed; and in the last paragraph of section 2 of the act of 1887, it was enacted, "Whenever any cause shall be removed from any State court into the circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such case shall be allowed."

It is well settled by a series of decisions that the United States Supreme Court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under a sentence of a circuit court or district

XV. From the United States Supreme Court to the State Supreme Courts.—A final judgment or decree, in any suit in the highest court of law or equity of a State, may be taken to the United States Supreme Court on writ of error in point of law under the following conditions:—

(1) When the validity of a treaty, or statute of, or authority exercised under the United States, is drawn in question in the State court, and the decision is against that validity.

(2) When the validity of any State authority is drawn in question, on the ground of being repugnant to the constitution, treaties,

court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under sentence. *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Carll*, 106 U. S. 521; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Crouch*, 112 U. S. 178; *Ex parte Bigelow*, 113 U. S. 328.

In the record of a general conviction and sentence upon two counts, one of which is good, a misrecital of the verdict as upon the other count only, in stating the inquiry whether the convict had aught to say why sentence should not be pronounced against him, is no more than an irregularity or error, and is no ground of discharging him on *habeas corpus*. *Snyder v. U. S.*, 112 U. S. 216.

The circuit court sitting in admiralty shall make separate findings on the law and the facts, and the right of trial by jury upon the facts given. 18 Stat. at L. 315; Act of Feb. 16, 1875. Since the enactment of this law, the Supreme Court has treated the findings of facts in the lower court as conclusive. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214.

The Supreme Court re-examines the proceedings of inferior United States courts on *habeas corpus* to the extent only of determining whether such courts have jurisdiction. *Ex parte Carll*, 106 U. S. 521; *Ex parte Mason*, 105 U. S. 696; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Ex parte Parks*, 93 U. S. 18; *In re Stupp*, 12 Blatchf. C. C. 501.

A writ of prohibition or *certiorari* will not lie from the Supreme Court to the circuit court in a criminal case. The mode is to bring it before the Supreme Court by a certificate of the judges of the circuit court that they are divided in opinion. *Ex parte Gordon*, 1 Black (U. S.), 503; *Forsythe v. U. S.*, 9 How. (U. S.) 571; *U. S. v. Circuit Judges*, 3 Wall. (U. S.) 673.

The office of a certificate of opinion between two judges in the circuit court being to submit to the Supreme Court one

or more points of law, and not the whole case; and when the question cannot be answered, the whole case being submitted, — the writ of error will be dismissed. When the question of division is too general, embracing the merits of the whole case, and does not present any single point or question, it cannot be entertained by the Supreme Court. It has been repeatedly ruled in the Supreme Court that the whole case cannot be brought here, under the act of 1802, upon a general question embracing the merits of the whole case. *Harris v. Elliott*, 10 Pet. (U. S.) 25. The subsequent decisions under the successive acts of Congress upon this point are uniformly to the same effect. *U. S. v. Briggs*, 5 How. (U. S.) 208; *Nesmith v. Sheldon*, 6 How. (U. S.) 41; *Waterville v. Van Slyke*, 116 U. S. 699; *Williamsport Bank v. Knapp*, 119 U. S. 357.

On a writ of error to a United States circuit court, to review a judgment dismissing an appeal from one State court to another in condemnation proceedings, where the error assigned is that "the court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment, deciding that the time commenced to run from the day when the commissioners met and viewed the land, and not from the date of the return of their assessment," held such assignment of errors is sufficient. The sustaining of the motion to dismiss the appeal is a final judgment, and may be reviewed on writ of error from the United States Supreme Court, although no bill of exceptions is prepared, as the record, of which such order of dismissal is part, sufficiently presents the question of law involved. *Clinton v. Mo. Pac. Ry. Co. (Nebr.)*, 7 S. Ct. Rep. 1268.

The United States Circuit Court will grant a citation for a writ of error from the United States Supreme Court, and will leave the question of the jurisdictional amount to be passed on by the latter court on the affidavits filed. *Davie v. Heywood (S. Car.)*, 33 Fed. Rep. 93.

or laws of the United States, and the decision is in favor of its validity.

(3) When the construction of any clause of the Federal Constitution, or treaty, or statute of, or commission held under the United States, is drawn in question, and the decision is against the title, right, privilege, or exemption specially claimed under authority of the Union.¹

(4) When any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the State court decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution.²

1. Act of Congress, Sept. 24, 1789, sect. 25.

2. Act of 1867, Feb. 5; 14 U. S. Stat. at L. 386, c. 28, sect. 2.

The United States Supreme Court will not review the judgment of a State court, if its decision is in favor of the United States authority, treaty, or statute. *Strader v. Baldwin*, 9 How. (U. S.) 261; *Ryan v. Thomas*, 4 Wall. (U. S.) 603; *Williams v. Norris*, 12 Wheat. (U. S.) 117.

If it does not clearly appear that the question must have been decided in order to induce the judgment, the Supreme Court will not take jurisdiction. *Gill v. Oliver*, 11 How. (U. S.) 529; *Millingar v. Hartup*, 6 Wall. (U. S.) 258.

A writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors, pursuant to the requirements of sect. 997, Rev. Stat. *School v. Hall*, 106 U. S. 428.

The judgment of a State court cannot be re-examined in the United States Supreme Court, unless within two years after its rendition a writ of error be brought. *Cummings v. Jones*, 104 U. S. 419.

Whatever is determined in the Supreme Court on a writ of error cannot be re-examined upon a subsequent writ brought in the same suit. *Clark v. Keith*, 106 U. S. 464.

The Supreme Court hears a motion by counsel for plaintiff in error, specially appointed for that purpose, to dismiss the writ of error, which motion is opposed by counsel of record for plaintiff in error. Writ dismissed on the ground that there is no longer an existing cause of action. *San Mateo County v. Southern, etc., R. Co.*, 116 U. S. 138.

In error to a State court, the writ of error may be directed to an inferior court, if the Supreme Court of the State, without retaining a copy, remits the whole record to that court, with direction to enter a final judgment in the case. The statute of limitation for writs of error, by sect. 1008 Rev. Stat., begins to run from the date of the entry and filing of the final judgment

in the court's proceedings, which constitute the evidence of the judgment. *Baylis v. Im. Co.*, 113 U. S. 316.

The time within which a writ of error must be served, in order that it may operate as a *supersedeas*, must be computed from the date of the judgment which is the subject of review. *Wurts v. Hoagland*, 105 U. S. 701.

A writ of error operates as a *supersedeas* only from the time of the lodging of the writ in the clerk's office where the record to be examined remains. When a State officer is removed by the judgment of a State court, and thereby vacates the office, and a writ of error is allowed from the United States Supreme Court for the reversal of that judgment, one appointed to the vacancy with knowledge of the issuing of the writ of error on the part of the judge of the State Supreme Court making the appointment, but before the filing of the writ in the clerk's office, where the record remains, is not guilty of contempt of the United States Supreme Court in assuming to perform the duties of the office. *Foster v. Kansas*, 112 U. S. 201.

The error must appear on the face of the record. *Furman v. Nichol*, 8 Wall. (U. S.) 44; *Worthy v. Commissioners*, 9 Wall. (U. S.) 611; *Klinger v. Missouri*, 13 Wall. (U. S.) 257.

Writs of errors to State courts are not allowed as of right. The practice is to submit the record to a judge of the United States Supreme Court, who examines whether the case upon the face of the record will justify the allowance of the writ. *Twitcheil v. Commonwealth*, 7 Wall. (U. S.) 321; *Gleason v. Florida*, 9 Wall. (U. S.) 779.

When, under sect. 5 of the United States Supreme Court, Rule 6, a motion to affirm a judgment of a State court is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when the question on which jurisdiction depends was manifestly decided right, because the case ought not to be held for further argument. *Arrowsmith*

v. Harmoning, 118 U. S. 194; *Church v. Kelsey*, 121 U. S. 282.

When the application is made for a writ of error, the United States Supreme Court will not send out a writ to bring up the judgment for review of the highest court of the State, when it is apparent on the face of the record that it would be the duty of the court to grant a motion to affirm as soon as it was made in proper form. *Ex parte Spies* (Anarchist Case), *Chi. L. News*, 69, Nov. 5, 1887; s. c., 8 S. Ct. Rep. 22.

If the error alleged is not a federal question, it will not be considered. The first ten amendments of the Federal Constitution were not intended to limit the powers of the State governments in respect to their own citizens, but to operate on the national government alone; and no writ of error will be issued to bring up for review of a State judgment as to its citizens for alleged violation of rights under these amendments. *Ex parte Spies* (Anarchist Case), *Chi. L. News*, 69, Nov. 5, 1887; s. c., 8 S. Ct. Rep. 22; *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Livingston v. Moore*, 7 Pet. (U. S.) 469; *Fox v. Ohio*, 5 How. (U. S.) 410; *Smith v. Maryland*, 18 How. (U. S.) 71; *Withers v. Buckley*, 20 How. (U. S.) 84; *Pervear v. Commonwealth*, 5 Wall. (U. S.) 475; *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *Justices v. Murray*, 9 Wall. (U. S.) 274; *Edwards v. Elliot*, 21 Wall. (U. S.) 532; *Walker v. Sauvinet*, 92 U. S. 90; *United States v. Cruikshank*, 92 U. S. 542; *Pearson v. Yewdall*, 95 U. S. 294; *Davidson v. New Orleans*, 96 U. S. 97; *Kelley v. Pittsburgh*, 104 U. S. 79; *Presser v. Illinois*, 116 U. S. 252.

The jurisdiction of the United States Supreme Court is limited to the question whether the plaintiff in error is denied a right in violation of the Constitution, laws, or treaties of the United States. *Presser v. Illinois*, 116 U. S. 252.

The record must show that the error was objected to in the lower court. It is too late to raise the question for the first time in the United States Supreme Court. *S. B. Co.*, 110 U. S. 57.

The United States Supreme Court may consider the application for the writ of error in open court, and allow it. *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *Ex parte Spies* (Anarchist Case), *Chi. L. News*, 69, Nov. 5, 1887; s. c., 8 S. Ct. Rep. 22.

A right must be claimed or set up in the proper court below. As the Supreme Court of the State can review the decision of the trial court, it must be made to appear that the claim was made in the trial court, because the State Supreme Court is only authorized to review the judgment of that court for errors committed there: the United States Supreme Court can do no more. *Ex parte Spies*, *Chi. L. News*, 69, Nov. 5, 1887; s. c., 8 S. Ct. Rep. 22.

Where there is no assignment of error in the transcript on a writ of error, and complainant's brief contains no specifications of errors, no statement presenting the question involved with reference to the pages of the record supporting it, and does not quote the evidence, whose rejection or reception was objected to, the appeal will be dismissed on motion. *Benites v. Hampton*, 8 S. Ct. Rep. 254.

A statement of facts, which the record entry shows was the bill of exceptions allowed by the court, may be considered by the court as showing an insufficiency in the jurisdictional amount on appeal. *United States v. Hill*, 8 S. Ct. Rep. 308.

Where a defendant, accused of crime, is examined as a witness in his own behalf, the question as to whether the cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is one of State law as administered in the courts of the State, and not of federal law, and cannot be the ground for an application to the United States Supreme Court for writ of error to the State Supreme Court. *Ex parte Spies*, 8 S. Ct. Rep. 22.

Due process of law under the Fourteenth Amendment to the Federal Constitution does not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The substitution by a State for a presentment or indictment by a grand jury, of a proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is due process of law; and such law of a State is not void as being repugnant to that clause of the Fourteenth Amendment of the Federal Constitution which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law," so decided in a writ of error to the Supreme Court of California. *Hurtado v. People*, 110 U. S. 516.

No appeal or writ of error will lie from an order of a United States circuit court remanding a suit which was begun and had been improperly removed from a State court after the act of Congress of March 3, 1887, ch. 373, 24 Stat. 552, went into effect, as sect. 6 of that act expressly repeals sect. 5 of the act of 1875, by which such appeals or writs of error were allowed, and the last paragraph of sect. 2 declares that no appeal or writ of error from such an order shall be allowed. The section prohibiting an appeal or writ of error in such cases applies, not only to removals on account of prejudices or local influence, but to cases removed on other grounds.

A certificate of division of the circuit judges for removal of cause cannot be

1. *United States Court of Claims.* — A claimant in the United States Court of Claims may have his cause reviewed in the United States Supreme Court after final judgment or decree, provided the sum in controversy exceeds three thousand dollars.¹

2. *Territorial Courts.* — Writs of error lie to Territorial courts where there was a trial by jury, and by appeal where there was no jury.²

3. *Supreme Court of the District of Columbia.* — The United States Supreme Court can review the final decree or judgment of the Supreme Court of the District of Columbia when the sum in controversy exceeds twenty-five hundred dollars.³

a. *What is a Final Decree or Judgment.* — It is held that a final decree or judgment is, "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as final to that extent, and authorizes an appeal to this court (United States Supreme), although so much of the bill is retained by the circuit court as is necessary for the purpose of adjusting, by a further decree, the accounts between the parties pursuant to the decree passed."⁴

reviewed by the Supreme Court under Rev. St. U. S. sect. 693, as it is not a final judgment or decree in the suit. *Morey v. Lockhart*, 8 S. Ct. Rep. 65.

Errors committed in the State court, in overruling defendant's challenges for cause to jurors, are not ground for reversal by the United States Supreme Court, unless it be shown that a partial juror was forced upon him, and put upon the case after he had exhausted his peremptory challenges. *Ex parte Spies*, 8 S. Ct. Rep. 22; *Hapt v. Utah*, 120 U. S. 430.

1. 14 U. S. Stat. at L. 9; *United States v. Adams*, 6 Wall. (U. S.) 101; *Ex parte Zellner*, 9 Wall. (U. S.) 244.

An appeal in behalf of the United States from a final judgment adverse to the United States, may be taken to the United States Supreme Court. 15 U. S. Stat. at L. ch. 71, p. 75, sect. 1.

Aliens, who are subjects of a government which allows United States citizens to sue in its courts, can sue in the court of claims, and take appeals as citizens of this country. 15 U. S. Stat. at L. 243. The following aliens can sue and take appeals: A Swiss, — *Lobsiger's Case*, 5 Ct. of Cl. 687, — an Englishman, — *United States v. O'Keefe*, 11 Wall. (U. S.) 178, — a Spaniard, — *Molina's Case*, 6 Ct. of Cl. 269, — a Prussian, — *Brown's Case*, 5 Ct. of Cl. 571, — a Frenchman, — *Rothschild's Case*, 6 Ct. of Cl. 204.

2. *Hecht v. Boughton*, 105 U. S. 235; 18 U. S. Stat. at L. 27.

3. 20 U. S. Stat. at L. 320; *Dennison v. Alexander*, 103 U. S. 522.

4. *Thompson v. Dean*, 7 Wall. (U. S.) 342; *Forgay v. Conrad*, 6 How. (U. S.) 201.

A denial of a writ of *supersedeas* by a State Supreme Court is final. *Williams v. Bruffy*, 102 U. S. 248.

A judgment denying a writ of *mandamus* is final, as *mandamus* is now an action, and not merely a prerogative writ. *Hartman v. Greenhow*, 102 U. S. 672.

A refusal by a State Supreme Court to allow the removal of a suit to the United States courts, is a final judgment. *Kanouse v. Martin*, 14 How. (U. S.) 23.

A decree upon motion to dissolve an injunction, where the bill is not finally disposed of, is not final. *Verden v. Coleman*, 18 How. (U. S.) 86.

If a decision rests in the discretion of a court of original jurisdiction, is not final. *Cook v. Burnley*, 11 Wall. (U. S.) 672; *Wells v. Gregory*, 13 Wall. (U. S.) 188.

A judgment of a State Supreme Court affirming that of a lower court, and remanding the case to that court, is not final. *Reddall v. Bryan*, 24 How. (U. S.) 420.

An order affirming a refusal of a State court to grant a new trial, is not final. *Sparrow v. Strong*, 4 Wall. (U. S.) 584.

A judgment reversing that of a lower court, and ordering a new trial, is not final. *Tracy v. Holcombe*, 24 How. (U. S.) 426; *Bostwick v. Brinkerhoff*, 106 U. S. 3.

ESCAPE.

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I. Definition. — Escape must be viewed in its double aspect as an offence which may be committed either by a prisoner, or by the jailer, or other person in whose custody the prisoner is at the time. Any person who, being a prisoner lawfully confined, or in custody, regains his freedom, either with or without force, before he is discharged by due course of law, or any person who has a prisoner lawfully in his custody, suffers such person to regain his freedom before he is liberated in the due course of law, is guilty of an escape.¹

II. What amounts to. — 1. *Actual Escape.*² — If a prisoner lawfully committed to custody escapes or departs from the place where

1. 2 Bishop Cr. L. §§ 1064-1066; 2 Whart. Cr. L. § 1667; 2 Hawk. P. C. c. 18, 19; 1 Gabbett's Cr. Law, 297.

Distinguished from Prison Breach and Rescue. — The offence of escape must be distinguished from the offences of prison breach and rescue. "Where the liberation of the party is by forcible means, if by himself, it is denominated 'prison-breaking,' and when by others, it is distinguished by the name of 'rescue.'" 1 Gabbett's Cr. Law, 297. It will be observed from this that the absence of force is the distinguishing feature in the crime of escape when committed by others than the custodian. In the case of the custodian, however, the only excuse is the act of God, or of the country's enemies; and, as will be shown, a liberation effected by force which does not come within either of these categories, will be no excuse. See *infra*, tit. II. 3.

Liability of Prisoner and Custodian. — "It is a clear principle of law that an indictment will lie not only against the party who gains his liberty before he is legally discharged, but also against the officer by whose default, and from whose legal custody, he has been suffered to escape. It will lie against the party himself, because all persons are bound to submit themselves

to the judgment of the law, and to be ready to be justified by it; and, therefore, whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of the law, is guilty of a high contempt, and punishable with fine and imprisonment. And it is even criminal in a prisoner to escape from lawful confinement, though neither force nor artifice be used by him for the purpose: thus, if he goes out of the prison-doors when opened by the consent or negligence of the jailer, he may be indicted for the escape. But an escape when effected by the negligence or connivance of the officer in whose custody the prisoner was at the time, is more properly an escape, and is much more culpable in him than in the prisoner, whose natural desire of liberty must plead strongly in his behalf." 1 Gabbett's Cr. Law, 297.

2. This term is used to express the escape of a prisoner viewed from the stand-point of the prisoner's responsibility. The responsibility of the custodian is technically understood to be for an escape, but is in reality for suffering, permitting, or aiding an escape.

he is confined, with or without force, the offence is complete.¹ It is essential, however, that the custody should be lawful.² A person detained pending the preliminary proceedings may commit the crime of escape;³ and if a person escapes while under

1. *State v. Davis*, 14 Nev. 439.

2. **Arrest on Mesne Process.**—In *Commonwealth v. Barker*, 133 Mass. 399, the Massachusetts court sustained an indictment against a person who had been arrested under mesne process, and after being surrendered by his bail, had escaped. It was argued that he could not be deemed to have been "committed" within the meaning of the statute relative to escapes, and that he was not guilty of any offence at common law, being confined only on mesne process. The court say, "An examination of the statute on the subject of bail shows that the surrender by his bail of a person who has been arrested on civil process, is there spoken of as a 'commitment,' and he himself as a 'prisoner' who has been 'committed.' . . . Nor is the proceeding by which a prisoner is surrendered upon civil process without an instrument which fulfils the office of a warrant. When one becomes bail, he is entitled forthwith to an attested copy of the bail-bond, upon which he may seize and take his prisoner whenever he will; and this is his warrant, as well as that of the jailer, when the surrender to him is made. The defendant was therefore a person committed to jail for a cause authorized by law. It is further urged that the forcible breaking from jail of a person confined therein on mesne process was not an offence at common law, and that, therefore, it cannot have been intended to constitute it an offence against the statute under which this indictment is drawn. We are by no means prepared to assent to the proposition that breaking jail, by one confined on mesne process, was not an offence at common law. *State v. Murray*, 15 Me. 100; 1 Hale, P. C. 608; 2 Hawk. P. C. c. 17, § 5, and c. 18, § 1; 2 Inst. 589; Whart. Crim. Law (8th ed.) § 1673. However this may be, the generality of the phrase 'lawfully imprisoned' indicates clearly the intention to punish every violation of custody by those who are properly held in any place of confinement established by law other than the State prison. Breaking jail, and an escape therefrom, even by a prisoner confined therein on mesne process, could not be otherwise than an outrage of its discipline, and a resistance to the lawful authority by which he was detained."

Surrender by Bail.—On the surrender of the accused by his bail, it is essential, to render the custody lawful, that the statutory provisions should be observed. Thus, where the statute requires that, on surrender, the bail should produce a copy of the

recognizance, a surrender without producing such copy will not put the prisoner lawfully in the custody of the sheriff. *State v. Beebe*, 13 Kans. 589. In this case the court say, "The real question is whether Lowe (the accused) escaped from lawful custody. Now, there is no ambiguity in the language of the statute upon this subject. The statute plainly enough prescribes what shall be done in such cases in order to place the person charged with the offence in lawful custody. But the difficulty arises where the statute has not been fully complied with. May the accused be in lawful custody, although the statute prescribing how he shall be placed in such custody has not been complied with? Lowe was at liberty on bail, and no one had any right to restrain him of his liberty except in a particular manner. . . . The sureties in the present case did not comply with the statute. They procured no copy of the recognizance from the clerk. The principal, however, voluntarily surrendered himself to them. But still it can hardly be questioned, that if the principal, at any time before he was delivered to the sheriff, had refused longer to remain in the custody of his bail, he could have done so legally, and without committing any offence. They could hold him as long as he voluntarily chose to remain with them, but when he chose to depart therefrom they could hold him no longer. After his voluntary surrender to his bail, they transferred their custody of him to the sheriff, and, as we are inclined to think, they transferred nothing more."

Necessity of Warrant.—To render a prisoner liable to punishment for an escape, it is essential that the sheriff should have a warrant for his detention. *State v. Hollon*, 22 Kans. 580.

Statutory Offence.—A house of correction was originally provided with a yard properly enclosed, appurtenant to the house. The city formed a street through the yard, cutting it in two; and fences were built along the line of the street so as to form two yards separated by the street. In an indictment for escaping from the farther yard, it was held that such yard, although separated from the house by the street, was "adjoining and appurtenant thereto," within the meaning of a statute providing for escapes from a house of correction or yard "adjoining and appurtenant thereto."

3. **Dismissal of Charge by Magistrates.**—W. was given into custody without a war-

indictment, a subsequent acquittal of the charge will not be a justification of the escape.¹ A plea in justification, that the prisoner was compelled to escape from necessity, e.g., to preserve himself from death or disease, will not be entertained except the proof of the necessity is clear and conclusive, and the act was no greater than the necessity required.² If a person is confined unlawfully, he may, without committing any crime, use sufficient force to effect his liberation, but cannot employ any greater; and the fact that other prisoners lawfully in custody escape in consequence of his acts, will not render him punishable, if his efforts were directed solely to obtain his own liberation.³

2. *Constructive Escape*. — Any relaxation of the confinement of the person of a debtor who is imprisoned on final execution is a constructive escape, although the sheriff should have him within his control, or in his power, the whole time.⁴

rant, on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W. was removed to a lock-up, from which he escaped. The charge of felony made against him was dismissed by the magistrates. It was *held* that the dismissal by the magistrates was not equivalent to an acquittal by a jury; that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand; and that these facts were no defence. *Reg. v. Waters*, 12 Cox, C. C., 390; s. c., 5 Moak's Eng. Rep. 469.

1. *Subsequent Acquittal*. — See *State v. Lewis*, 19 Kans. 260. In this case the defendant was indicted under a statute applicable to escapes "before conviction." The defendant urged that as he had been acquitted of the offence for which he was under indictment, he did not commit the offence charged, but the court *held* otherwise. In the opinion they used the following language: "His offence, of escaping from said jail, comes, as we think, within the letter and the spirit of the statute prohibiting escapes. He escaped from imprisonment for an alleged burglary, and had never been convicted of such burglary. His offence, therefore, comes within the exact letter of the statute. . . . When a party is in legal custody, and commits an escape, we do not think it depends upon some future contingency as to whether such an escape is an offence or not."

2. *Danger of Disease* because the jail was filthy, unwholesome, and loathsome, and full of vermin and uncleanness, will not justify an escape if it is not shown that the defendant has endeavored to obtain relief by every lawful means in his power, e.g., by complaint to the sheriff, or board of county commissioners. *State v. Davis*, 14 Nev. 439.

3. Imprisonment under Void Warrant. —

In *State v. Leach*, 7 Conn. 452; s. c., 18 Am. Dec. 118, the defendant, while imprisoned under a void warrant, effected his escape, and in consequence other prisoners confined in the same room also gained their freedom. The court said, "It appears that the prisoner attempted to effect the escape of the other prisoners, in no other way or manner than as a consequence of the attempt to effect his own escape. . . . The act of the prisoner was so far from being a high crime and misdemeanor, that it was justifiable; and here it is not intended to suggest that a prisoner might not do acts which would be unjustifiable, in order to escape from unlawful imprisonment. He might not, for example, kill the jailer, or set the prison on fire, or totally demolish it; for none of these acts might be at all necessary to effect his object. But he might lawfully free himself from this imprisonment, since it is confessed to have been illegal. A void process is no process. . . . It hence results that the keeper of the jail is vested with no authority; the building in which the prisoner was confined is not a jail, but as to him a mere private building, and hence he might regain that liberty of which he was unjustly deprived; and it is no part of the case that he made use of more force than was necessary to accomplish this object. Nor does the fact that he was confined with certain atrocious offenders, render it less proper for him to effect his escape."

4. *Benton v. Sutton*, 1 B. & P. 24; *Hawkins v. Plomer*, 2 W. Bl. 1048; *Crocker on Sheriffs*, § 566; *Plowd.* 36; 3 Co. 44; 2 Inst. 381; *Rolle's Abr.* 806.

Confinement of Debtor as Creditor's Satisfaction. — In *Planck v. Anderson*, 5 T. R. 41, *Buller, J.*, says, "There is a distinction between cases where a party is in custody

To constitute an arrest on civil process, it is not necessary that there should be a manual touching of the body, or actual force used: it is sufficient if the party be within the power of the officer, and submits to the arrest.¹ Every liberty given to a prisoner which is not authorized by law is an escape.²

in execution, and on mesne process. In the former, a creditor has a right to the body of his debtor every hour until the debt is paid, and, if the prisoner escape, may bring an action of debt upon the statute against the sheriff, in which he *may* (without considering how far he *must*) recover the whole debt.

1. *Emery v. Chesley*, 18 N. H. 198; *Pike v. Hanson*, 9 N. H. 491; *Browning's Ex'r v. Rittenhouse*, 40 N. J. L. (11 Vr.) 230; *Gold v. Bissell*, 1 Wend. (N. Y.) 210.

2. *Koonos v. Maddox*, 2 Har. & G. (Md.) 106; *Clap v. Cofran*, 7 Mass. 98; *Colby v. Sampson*, 5 Mass. 310; *Bartlett v. Willis*, 3 Mass. 86; *De Grand v. Hunnewell*, 11 Mass. 160.

Undue Liberty before Actual Confinement.

—If, after an arrest on execution, the sheriff permits the defendant to remain at home under a promise to go the same day to the sheriff's office with a surety to give bail for his appearance, this will constitute an escape. *Browning's Ex'rs v. Rittenhouse*, 40 N. J. L. (11 Vr.) 230; *Stickle v. Reed*, 23 Hun (N. Y.), 417.

Where a deputy sheriff arrested a defendant on an execution, and left him in the custody of two brothers of the defendant, and went to serve other process, and did not take the defendant to the jail until the next day, it was *held* that this was an escape for which the sheriff was liable, the persons in whose custody the prisoner was left having no authority to detain him in the absence of the deputy. *Palmer v. Hatch*, 9 Johns. (N. Y.) 329. If a sheriff's officer, having taken a prisoner in execution, permits him to go about with a follower of his before he takes him to prison, it is an escape. *Benton v. Sutton*, 1 B. & P. 24.

Temporary Freedom. — The fact that the debtor was out of the jail limits, however short the time or distance, is sufficient to establish an escape. *Dunford v. Weaver*, 84 N. Y. 445; *Hawkins v. Plomer*, 2 W. Bl. 1048. If the sheriff alone, on the ground of debtor's ill-health, makes any relaxation of the imprisonment, by letting the debtor reside out of prison, it would be an escape. *Haines v. East India Co.*, 11 Moore, P. C. 39.

Return to Custody after Escape. — If the debtor escape without the sheriff's knowledge, and goes beyond the limits, but returns again, the sheriff is not liable for the escape. *Peters v. Henry*, 6 Johns. (N. Y.) 124; s. c., 5 Am. Dec. 196.

Arrest under Mesne Process. — When the debtor is arrested under mesne process, the sheriff is only bound to produce his person at the return of writ, and may allow the debtor to go at large, provided he be able to so produce him.

An attachment for non-payment of money is in the nature of mesne process; and where the party had been taken, and permitted to go at large, and returned again into custody at the return of the writ, it was *held* that the sheriff was not liable for an escape. *Lewis v. Morland*, 2 Barn. & Ald. 56. Where, however, the sheriff, without taking bail, allowed a person taken upon an attachment for non-payment of money, to go at large, on his promise to surrender, and he shot himself before a recapture, but the officer retained his body, it was *held* that there was no recapture, and the sheriff was liable as for an escape. *Moore v. Moore*, 25 Beav. 8; s. c., 27 L. J. Ch. 385; 4 Jur. N. S. 250.

Production of Prisoner on Warrant. — If a sheriff who has a prisoner in custody on a *ca. sa.* necessarily takes him out of the county in obedience to the *habeas corpus ad testificandum*, and returns with him when the exigency of the writ is answered, and without unnecessary delay, he will not be liable as for an escape, should the prisoner stroll about, and sometimes be out of his view. *Hassam v. Griffin*, 18 Johns. (N. Y.) 48; s. c., 9 Am. Dec. 184. See also *Fuller v. Davis*, 67 Mass. (1 Gray) 612. *Compare* *Cargill v. Taylor*, 10 Mass. 206.

The marshal of the King's Bench Prison was not liable to an action of escape for obeying the warrant of commissioners of bankruptcy in bringing before them a bankrupt confined on his custody charged in execution, in order to be examined on the second day of the meeting of the commissioners, though it was not the last day of examination. *Spence v. Jones*, 1 D. & R. 377; s. c., 5 Barn. & Ald. 705.

Where a sheriff, in obedience to a warrant from a commissioner of bankruptcy, brought a party whom he had in custody in execution for debt beyond the limits of his county in order to be examined by the commissioner, he was bound to take such prisoner back again within a convenient time after the examination was over; but during the time the prisoner was so necessarily beyond the limits of the sheriff's county, it was sufficient if he was accom-

3. *Negligent Escape.* — A negligent escape takes place when a prisoner escapes against the will of his custodian, and is not freshly pursued and taken again before he has been lost sight of.¹ The obligation on the jailer in the case of prisoners confined for crimes, and on final process, is absolute; and an escape will only be excused by the act of God, or of the enemies of the country.²

panied and closely watched by the officer; and it was no escape by the sheriff that such prisoner was, during that time, allowed to go about with the sheriff's bailiff to several places, and to dine and sleep at an inn. *Nias v. Davies*, 2 Car. & K. 280; s. c., 4 C. B. 444; 11 Jur. 472.

Where the prisoner is arrested by authority of law, e.g., by the sergeant-at-arms of the House of Representatives, and is carried off the limits, against his will, and without his consent, but returns as soon as practicable after his release, there is no escape. *Wickelhausen v. Willett*, 12 Abb. (N. Y.) Pr. 319. Compare *Brown v. Tracy*, 9 How. (N. Y.) Pr. 93.

Bond for Jail Limits. — Prisoners committed in execution must be confined *in salvâ et arcâ custodiâ*, in close confinement day and night, and the sheriff is liable for an escape, except he have received a bond for the jail limits. *De Grand v. Hunnewell*, 11 Mass. 160. Thus, permission by a jailer to a prisoner to take meals in the part of the jail building occupied by the jailer's family is a voluntary escape from liability for which the jailer cannot exonerate himself by receiving and retaining the prisoner on his voluntary return. *Riley v. Whittiker*, 49 N. H. 145.

To allow a prisoner for debt to be at liberty within the outer walls of the jail does not render the sheriff liable for an escape; to appoint one turnkey, and give him the key of the outer door, is an escape as to that prisoner, but not as to the others, unless they do actually go at large. *Steere v. Field*, 2 Mason, C. C. 486.

The bond for the limits must be in accordance with the statute, otherwise it will be no justification to the jailer. *Hotchkiss v. Whitten*, 71 Me. 577; *Kingan v. Hall*, 23 Up. Can. Q. B. 503; *Calcutt v. Ruttan*, 13 Up. Can. Q. B. 220.

But a house appropriated by the county to the use of the prisoners was deemed part of the jail, if within the jail limits, although not controlled by the jailer. *Jacobs v. Tolman*, 8 Mass. 161. Compare *Colby v. Sampson*, 5 Mass. 310.

A bond given under a statute allowing the privilege of the jail limits during the day, will be no justification for allowing the privilege of the prison limits during the night. *Bartlett v. Willis*, 3 Mass. 86.

1. 1 Russell on Crimes (5th Eng. ed.), 570.

2. **Criminal Cases.** — The law was so laid down in the case of *Shattuck v. State*, 51 Miss. 575. The court say that the key to the solution is to be found in *Rex v. Layer*, 8 Mod. 83. The prisoner, who was confined on a charge of high treason, applied for an order directing his keeper to remove the irons; but the court refused to make any order, because, if they did, "it might be an excuse to his keeper if he (the prisoner) should escape; therefore, it must be left to his keeper's discretion how to use his prisoner, especially since he had already attempted to escape." The court of South Carolina say, "From the earliest times it has been the rule in England that for escapes, whether from arrests on civil or criminal process, the sheriff would be heard to excuse himself only on the plea that the escape was by the act of God or the public enemy. And in this country the same doctrine is universally applied in case of an arrest on civil process. Few, if any, cases have occurred in the United States of prosecutions of sheriffs for the escape of persons in arrest on criminal process. A most thorough search has failed to find even a single instance of the kind. . . . Numerous authorities are cited, but they are all of escapes from arrest on civil process. The reason and the re-assuring seem to be the same in both cases. No reason can apply to one which does not with equal force apply to the other. In one case the creditor alone is interested, but society is concerned in the other. The rule is attacked as a barbarity. It is not obnoxious to such a criticism: on the contrary, it is founded on public policy as much so as in the case of a common carrier, who is held to very stringent responsibilities. . . . If sheriffs were permitted to excuse escapes on the plea of defective jails, it would be equivalent to a judicial or legislative release of all responsibility for the safety of prisoners, especially in the present condition of our society. Combinations, either with the boards of supervisors or others, and aid from outside, would be wholly unnecessary. To insure escapes, it would only be necessary for the sheriff and jailer to retire to rest and sleep at night. If, in the morning, their prisoners were found to be missing, they would only have to plead a defective jail, and thus would society be at the mercy of criminals, irresponsible officials, and disorderly persons." In some

In the case of arrests on mesne process, a different rule is applicable. In such cases, if the party arrested rescues himself, or is rescued, the officer may return the escape, and that will be sufficient justification.¹ The officer is bound to use all reasonable and proper personal exertions to secure his prisoner, but he is not bound to call for aid.² All escapes happening without the knowledge or consent of the jailer or sheriff are to be deemed negligent;³ and the discharge of a criminal made under an order of court in the belief that it is valid, when, in fact, it is invalid, is

States the responsibility of the jailer is regulated by statute, and he is not responsible if he can show that the escape was not by his consent or negligence, but that he used all legal means to prevent the same, and acted with proper care and diligence. Under such a statute the State must show that the prisoner escaped, and then the burden of proof devolves upon the defendant to justify himself. *State v. Hunter*, 94 N. C. 829.

Commitment on Final Process.—There is no want of authority to support the rule stated when a debtor has been arrested on final process. See *Fairchild v. Case*, 24 Wend. (N. Y.) 381; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543; *Rainey v. Dunning*, 2 Murph. (N. C.) 386; *Shuler v. Garrison*, 5 Watts & S. (Pa.) 455; *State v. Halford*, 6 Rich. (S. C.) L. 58; *Cook v. Irving*, 4 Strobb. (S. C.) 204; *Smith v. Hart*, 2 Bay (S. C.), 395; *Saxon v. Boyce*, 1 Bail. (S. C.) 66; *Toll v. Alvord*, 64 Barb. (N. Y.) 568; *Smith v. Hart*, 1 Brev. (S. C.) 146; *Green v. Hern*, 2 Pen. & W. (Pa.) 167; *Wheeler v. Hambricht*, 9 Serg. & R. (Pa.) 390; *Slemaker v. Marriott*, 5 Gill & J. (Md.) 406.

Enlistment.—If a person in custody have enlisted, and he be forcibly removed by a party of soldiers, the sheriff is responsible for an escape. *Cargill v. Taylor*, 10 Mass. 206. The court say in this case, "A rescue before commitment, of one arrested upon mesne process, subjects the rescuers, and not the sheriff or officer who made the arrest, to an action for the benefit of the party injured; but after commitment, the sheriff or jailer is liable. And a rescue before commitment is no excuse for the officer where the arrest is by virtue of a writ of commitment; in short, after commitment in a civil suit, every discharge of the prisoner, without the consent of the plaintiff or creditor, or in due course of law, is an escape for which the sheriff or jailer is liable, with the exceptions only which are recognized as cases of necessity. Such, for instance, is the case of a prisoner who leaves the jail, when in danger from a sudden fire within the jail, or when the jail is broken by a public enemy; but a breach of prison by traitors is no excuse for the jailer."

1. *Whitehead v. Keyes*, 83 Mass. (1 Allen) 350; s. c., 85 Mass. (3 Allen) 495; *May v. Proby*, 3 Bulst. 200; *Fermor v. Phillips*, Holt, N. P. 538; Com. Dig. "Rescous," D, 4.

2. *Whitehead v. Keyes*, 85 Mass. (3 Allen) 495; *Griffin v. Brown*, 19 Mass. (2 Pick.) 304, 310; *Buckminster v. Applebee*, 8 N. H. 547; *Sutton v. Allison*, 2 Jones (N. C.), L. 341; *Gorges v. Gore*, 3 Lev. 46; *Bentley v. Donnelly*, 8 D. & E. 127; *May v. Proby*, 3 Bulst. 200; 1 Rol. R. 388, 440; Cro. Jac. 419.

3 **Temporary Freedom.**—A prisoner being sick, was, by the advice of a physician, admitted by the jailer to the dwelling-house part of the jail, and from there, without the knowledge or consent of the jailer, he walked out of doors a few rods, and returned. It was held that this was, in respect to the jailer, a negligent escape, as contradistinguished from a voluntary escape, and did not affect the legality of the subsequent imprisonment, nor give the creditor any right of action against the jailer. *Sanderson v. Rutland*, 43 Vt. 385.

Failure to Handcuff.—Whether a sheriff in charge of a prisoner is liable to conviction under an indictment, depends on the circumstances: a failure to handcuff is not negligence *per se*. *State v. Hunter*, 94 N. C. 829.

Failure to secure.—A, a sheriff's officer, went with B. to the house of C. to arrest him upon a *ca. sa.* A. read the warrant to C., whereupon C. rushed out against A., who caught C. around the waist, but was unable to hold him, and C. escaped; held, that the sheriff was liable for the escape. *Nicholl v. Darley*, 2 Y. & J. 399.

Payment to Sheriff.—If, upon the execution of a *ca. sa.*, which requires the sheriff to take and keep the body so that he may have it on the return-day of the writ at Westminster, to satisfy the plaintiffs of their damages, costs, and charges, the sheriff, before the return-day, receives the money due from his prisoner, and thereupon liberates him before he has paid it over in satisfaction to the party entitled to it, he is answerable for an escape. *Slackford v. Austen*, 14 East, 468.

also a negligent escape.¹ The sheriff is responsible for all escapes except those which occur through the contributory negligence of the person at whose suit the arrest is made.² But the general rule in the case of every escape is that negligence on the part of the jailer is implied.³

4. *Voluntary Escape*. — Wherever an officer, having the custody of a prisoner charged with, and guilty of, an offence, knowingly gives him his liberty, with an intent to save him either from his trial or execution, he is guilty of a voluntary escape.⁴ From the question, whether giving a liberty to a prisoner, which by law he has no right to give, without any intent to save the prisoner, is to be deemed a voluntary escape, the authorities do not seem to be unanimous.⁵ In the case of a debtor arrested on final process,

1. *Invalid Discharge*. — Where a jailer procures the discharge of a person in his custody from the justice who has committed him under a conviction, and discharges such prisoner under it in good faith, believing it to be legal, such jailer is not guilty of a voluntary escape, his crime being that of negligent escape. *Meehan v. State*, 46 N. J. L. (17 Vr.) 355.

2. *Contributed to by Plaintiff or his Agent*. — If the agent of the plaintiff takes upon himself to direct the sheriff's officer as to the mode of executing process, and an arrest is made, the legality of which is doubtful, the sheriff cannot be held liable for a subsequent escape. *Doe v. Trye*, 7 D. P. C. 636; s. c., 7 Scott, 704; 5 Bing. (N. C.) 573.

'Where an execution creditor is willing to allow a debtor to go out of prison for a temporary purpose, the custody continuing, the sheriff may refuse, unless ordered by a rule of court; but if, without any rule of court, all parties agree to the debtor leaving the prison, and from a laxity of surveillance of the sheriff's officers the debtor escapes, it is a question of fact for the jury, if the judgment creditor brings an action against the sheriff, whether the judgment creditor did not himself contribute to the escape. *Haines v. East India Co.*, 11 Moore, P. C. 39.

3. *State v. Hunter*, 94 N. C. 829; *Blue v. Commonwealth*, 4 Watts (Pa.), 215; 1 Hale, 601.

Suicide of Prisoner. — If a person in custody on a charge of larceny, suddenly and without assent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable. *Dalt. ch. 159*.

4. 4 Bl. Com. 129; 2 Hawk. P. C. ch. 19, sect. 10; *Staund. P. C.* 33.

5. "It seems to have been the opinion of Lord Hill that in some cases the officer might be adjudged guilty of voluntary escape who had no intent to save the prisoner, but meant only to give him a liberty

which by law he had no right to give. But Sergeant Hawkins dissents from this opinion, and observes that there are some cases where the officer has been found to have knowingly given his prisoner more liberty than he ought to have had (as by allowing him to go out of the prison on a promise to return, or to go amongst his friends to find some who would warrant goods to be his own which he is suspected to have stolen), and yet only adjudged guilty of a negligent escape. And he infers that the judgment to be made of all offences of this kind must depend upon the circumstances of the case, such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted, etc. (2 Hawk. P. C. ch. 19, sect. 10). But in general a negligent escape, as contradistinguished from a voluntary escape, is where the party arrested or imprisoned escapes against the will of him in whose custody or prison he is lawfully detained, and is not retaken before he has been lost sight of. *Dalt. ch. 159, sect. 6*." — 1 Gabbett, *Crim. L.* 298.

Escape Malo Animo. — In *Meehan v. State*, 46 N. J. L. (17 Vr.) 355, it was held that to constitute a crime of voluntary escape the act must be done *malo animo*, and that if the jailer discharged the prisoner through an erroneous interpretation of the law, he is not guilty of that crime, but of the lesser offence of negligent escape. In that case the prisoner had been sentenced to imprisonment for a term of sixty days, and before the expiration of that period the defendant, at the instance of the culprit, procured his written discharge from the committing magistrate, and thereupon suffered him to go at large. The court held that if the officer had acted in a *bona fide* belief that the justice had the power to discharge the prisoner, he did not act *malo animo*, either in the procurement

it is not essential that the debtor should be allowed to go at large without any restraint, or that there should be an intention to defeat the ends for which the execution was created.¹

5. *Aiding Escape*. — Any assistance given to one known to be a felon, for the purpose of hindering his apprehension or trial, or preventing his suffering the punishment for which he is condemned, is at common law sufficient to make the person giving such assistance an accessory after the fact to such felony.² To constitute this offence, the person rendering assistance must know the crime which had been committed by the prisoner whose escape he aided.³ This offence, however, is generally regulated by statute; and these statutes usually create a new offence, and are not merely declaratory of the common law.⁴ It is generally held that the statutory provision does not require that the person, whose escape is intended to be facilitated, should be guilty of felony, or known or believed to be by the party aiding;⁵ but the intent to facilitate the escape of a prisoner is essential;⁶ and while a general intent to liberate must exist, and must be found by the jury, it is not necessary that there should be specific intent to liberate any particular prisoner.⁷ To authorize a conviction, it

of the discharge or in allowing the prisoner to obtain his liberty.

1. *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; s. c., 1 Am. Dec. 142.

Instances. — It is a voluntary escape to allow the person arrested to go at large upon his promise to appear the next day, and give bail, even though he voluntarily surrenders himself in terms of the promise, — *Browning's Ex'r v. Rittenhouse*, 40 N. J. L. (11 Vr.) 230; *Stickle v. Reed*, 23 Hun (N. Y.), 417, — or to take him before a magistrate without a warrant. *Robinson v. Hall*, Tay. Up. Can. 453. It is also a voluntary escape to admit the debtor to the limits without a bond therefor, — *Kingman v. Hall*, 23 Up. Can. Q. B. 503, — or to take his meals in the part of the building occupied by the jailer's family. *Riley v. Whittiker*, 49 N. H. 145. And the release of a defendant, against whom a *capias ad satisfaciendum* has been lodged with the sheriff, is a voluntary escape, although the release may have been made by mistake. *Filewood v. Clement*, 6 D. P. C. 508; s. c., 1 W. W. & H. 165.

2. 2 Hawk. P. C. ch. 29, sects. 26, 27.

3. *Wilson v. State*, 61 Ala. 151. See also *State v. Jones*, 78 N. C. 420; *State v. Shaw*, 3 Ired. (N. C.) L. 20.

4. *Wilson v. State*, 61 Ala. 151, 154. In this case it was said, "The statute under which this defendant was indicted is not merely declarative of the common law. It creates a new offence, substantive and not accessory in its character, and makes it a felony. It punishes not only him who aids in an escape from confinement under a

charge of felony, but every person who attempts to render such assistance by conveying 'into the county jail, or into any other lawful place of confinement, any disguise, instruments, arms, or other thing useful to aid any prisoner to escape, with the intent to facilitate the escape of any prisoner therein, lawfully confined under a charge or conviction of felony, or who by any other act, or in any other way, assists such prisoner to escape, whether such escape be effected or not.' The offence has three main ingredients, — a prisoner confined under a lawful charge or conviction of felony, the conveying into a jail, etc., some disguises, instruments, etc., useful to aid the escape, and the intent to facilitate the escape, of such prisoner."

5. *Wilson v. State*, 61 Ala. 151; *Gunyon v. State*, 68 Ind. 79; *Holland v. State*, 60 Miss. 939; *State v. Addcock*, 65 Mo. 590; *State v. Fulton*, 19 Mo. 680; *State v. Presbury*, 13 Mo. 342.

6. *Wilson v. State*, 61 Ala. 151; *Vaughan v. State*, 9 Tex. App. 563.

7. *Hurst v. State*, 79 Ala. 55. The court in this case held that the jury might infer the intent, from any intentional breaking, or assistance in an attempt to so break the prison that the prisoners confined therein can escape. But the court say, "Suppose there are prisoners, one or more, confined in the prison, who will not escape even if the opportunity is offered, who have no intention to escape, and the alleged jail-breakers have knowledge that such prisoners do not intend to escape, this, if satisfactorily proven and found by the jury,

need not be shown that a prisoner had any thing to do with the attempt to liberate.¹ It has been held that two acting in concert are each guilty of assisting the escape of the other, although primarily intending to effect their own escape.² The attempt of a prisoner to escape is continuous so long, at least, as he flees, and the officer and posse are in sight and in hot pursuit; and the act of impeding the pursuit, by holding or obstructing any of the posse, is criminal.³

6. *Justification.* — *a. Illegality of Arrest or Commitment.* — The custodian can justify an escape, whether the prisoner be confined upon civil process or on a criminal charge, by showing that the warrant of commitment or execution is illegal and void.⁴ But a mere irregularity or error in the warrant, or in the judgment upon which the warrant is issued, will form no justification.⁵

disproves both special and general intent to aid or facilitate the escape of such prisoner or prisoners."

1. Hurst v. State, 79 Ala. 55.

2. Luke v. State, 49 Ala. 30.

3. Perry v. State, 63 Ga. 402.

4. Martin v. State, 32 Ark. 124; Austin v. Fitch, 1 Root (Conn.), 288; Housh v. People, 75 Ill. 487; Hitchcock v. Baker, 84 Mass. (2 Allen) 431; Goodwin v. Griffis, 88 N. Y. 629; Carpentier v. Willet, 1 Abb. (N. Y.) App. Dec. 312; Ontario Bank v. Hallett, 8 Cow. (N. Y.) 192; Scott v. Shaw, 13 Johns. (N. Y.) 378; Rigney v. Rutan, 5 Up. Can. Q. B. (O. S.) 707.

Ambiguity in Affidavit. — A person cannot legally be arrested under an affidavit for the arrest of "the defendant" in a writ against two defendants, without showing which of the two defendants is intended. Hitchcock v. Baker, 84 Mass. (2 Allen) 431.

Warrant granted on Insufficient Affidavit. — In Housh v. People, 75 Ill. 487, the warrant on which the prisoner had been arrested appeared to be regular, but the affidavit upon which it was issued failed to give the court issuing it jurisdiction. In their opinion the court say, "The affidavit being insufficient, the prisoner was improperly deprived of his liberty, and he was justified in asserting his right to his freedom granted to him by the constitution and the law by refusing to submit to the warrant: in breaking away from the officer's custody, he committed no offence. State v. Leach, 7 Conn. 452. The rule, as found in treatises upon criminal law, is that whenever an imprisonment is so far irregular that it is no offence in the prisoner to break from it by force, it will be no offence in the officer to suffer him to escape. 2 Hawk. P. C. ch. 29, sect. 2; Rosc. Cr. Ev. 459; 1 Russ. on Cr. 417. It is true, as urged by the State's attorney, that, as the warrant was regular on its face, the officer who made the arrest, and the appellant who received

the custody of the prisoner, would be protected in an action for assault and false imprisonment in consequence of his arrest and deprivation of liberty; but it does not follow therefrom that appellant was bound to obey the warrant. The somewhat anomalous condition, that a sheriff or constable escapes in such cases, is well explained in Tuttle v. Wilson, 24 Ill. 561. It is there said, 'The rule that a ministerial officer is protected in the execution of process issued by a court or officer having jurisdiction of the subject-matter and of the process, if it be regular on its face, and does not disclose a want of jurisdiction, is a rule of protection merely, and beyond that confers no right. It is held to be personal to the officer himself, and affords no shelter to the wrong-doer under color of whose process, if it be void, the officer is called upon to act.'"

5. State v. Lewis, 19 Kans. 260; Griffin v. Brown, 19 Mass. (2 Pick.) 304; Goodwin v. Griffis, 88 N. Y. 629; Dunford v. Weaver, 84 N. Y. 445; Morgan v. Cubitt, 6 D. & L. 444; s. c., 3 Ex. 612; 18 L. J. Ex. 288.

Warrant not specifying Offence. — The fact that a warrant for the arrest of an offender in charge of felony does not specify the kind of felony, does not avoid it, and is not a defence to the sheriff on indictment for a negligent escape. Martin v. State, 32 Ark. 124.

Remand to obtain Bail. — One W. was brought before magistrates in the custody of defendant, a constable, to answer a charge of misdemeanor, and, after witnesses had been examined, he was verbally remanded until the next day. Being then brought up again, and the examination concluded, the justices decided to take bail, and send the case to the assizes. He said he could get bail if he had time to send for it; and the justices verbally remanded him till the following day, telling defend-

b. Order of Discharge. — A sheriff is not justified in discharging a debtor imprisoned for debt except the order of discharge be granted by a court having jurisdiction;¹ and it is not essential that the order of discharge should have been served; it will be a good defence to the sheriff without service.²

c. Consent of Creditor. — An oral authority by a creditor to the jailer to discharge his debtor is a sufficient justification,³ but a verbal consent by the creditor's attorney is not sufficient.⁴ The attorney merely as such cannot discharge the defendant in execution without receiving the debt.⁵

III. Responsibility for Escape. — 1. *Responsibility of Escaping Prisoner.* — A prisoner who escapes, is guilty of a misdemeanor only;⁶

ant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted. *Held*, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody or discharge on bail; and that the conviction was proper. *Reg. v. Shuttleworth*, 22 Up. Can. Q. B. 372.

1. *Develin v. Cooper*, 84 N. Y. 410; *Wilckens v. Willet*, 4 Abb. Ap. Dec. (N. Y.) 596; *McNutt v. Bland*, 43 U. S. (2 How.) 9; bk. 11, L. ed. 159; *Graham v. Kingsmill*, 6 Up. Can. Q. B. (O. S.) 584.

Jurisdictional Facts. — Where a sheriff, in an action against him for an escape of one held in custody under a body execution, justifies under an order of the county judge discharging the prisoner, such order need only recite the jurisdictional facts; he may by proof *aliunde* show existence of any essential fact therein omitted. *Goodwin v. Griffis*, 88 N. Y. 620.

Discharge by Insolvent Debtor's Court. — It is a good defence to an action against a sheriff or jailer for an escape, that he discharged the prisoner from custody by virtue of an order of the insolvent debtor's court; and he need not show that the proceedings upon which the order is grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge. *Saffery v. Jones*, 2 Barn. & Ad. 598.

Fraud on the Part of a Defendant who has been taken on mesne process, in obtaining a judgment in his favor, upon which he is released, does not render the sheriff liable as for an escape. *Simms v. Slacum*, 7 U. S. (3 Cr.) 300; bk. 2, L. ed. 446; rev'g 1 Cr. C. C. 242.

2. *Richmond v. Praitm*, 24 Hun (N. Y.), 578.

3. *Bridge v. McLane*, 2 Mass. 520.

4. *Davis v. Cunningham*, 5 Up. Can. L. J. 254.

5. *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220; s. c., 6 Am. Dec. 335; *Brock v. McLean*, Tay. Up. Can. Q. B. 310.

Payment to Attorney. — The attorney may, on receipt of the debt and costs, authorize a discharge. *Stocking v. Cameron*, 6 Up. Can. Q. B. (O. S.) 475.

Authority of Attorney. — In *Savory v. Chapman*, 3 P. & D. 604; s. c., 11 Ad. & El. 829; 8 D. P. C. 656; 4 Jur. 411, the court say, "The authority of an attorney in general is determined after judgment, but he may still sue out execution, and receive the money; and his receipt is then the same as that of the principal, and according to it. Roll. Abr. 291, tit. "Attorney" (M.); cited in Com. Dig. "Attorney" (B. 10.) He may after judgment acknowledge satisfaction on the record; but here it is merely alleged that the attorney ordered the debtor to be discharged, without averring that the money was paid either to the attorney or the plaintiff. The mere fact that the party ordering was the plaintiff's attorney, was not sufficient to warrant such a discharge."

6. 2 Hawk. ch. 18, sec. 9.

Escape strictly so called. — It must be kept in view that this is for an escape strictly so called, and not for prison breach. *Hawkins* says with reference to prison breach, "There must be an actual breaking; for every indictment for this offence as a felony must have the words *felonice fregit prisonam*, which seems necessarily to import the use of some real force or violence, and not such only as may be implied by the construction of law in any act done in contempt of it, and therefore, if, without any obstruction a prisoner go out of the prison, doors being opened by the consent and negligence of the jailer, or otherwise escape, without using any kind of force or violence, he is guilty of a misdemeanor only, but not of felony." See also *Riley v. State*, 16 Conn. 47; *State v. Doud*, 7 Conn. 384; *State v. Brown*, 82 N. C. 585; 4 Bl. Com. 129, 130.

and it makes no difference that the escape was voluntary on the part of the keeper.¹

2. *Responsibility of Custodian.* — a. *Actual Custodian.* — At common law, if the keeper voluntarily permits a prisoner charged with felony to escape and go at large, it is a felony;² and if imprisoned for a misdemeanor, it is a misdemeanor in the keeper.³ When the escape is merely negligent on the part of the keeper, he is punishable by fine only.⁴ The punishment extends not only to the person who has the actual custody of the prisoner, but also to any person authorized to take bail. If such person allows a prisoner to escape by taking bail when the offence is not bailable, he is guilty of a negligent escape, and punishable accordingly.⁵ Generally, every person having the lawful custody of a prisoner is responsible for his escape;⁶ and it has been held that a person employed as a guard in the management of convicts, is criminally responsible for the escape of prisoners confided to his care, but that the responsibility for the custody of convicts employed in labors outside of the penitentiary would not be governed by the rigorous common-law rule, actual negligence being the test of guilt.⁷ In the case of arrests on civil process as between the

Prisoner confined under Municipal Ordinance. — Under Kans. Comp. Laws, 1881, ch. 31, sects. 179, 182, punishing any person confined in a place of confinement for any term less than life who shall break such prison or custody, or who, confined in any county jail, shall break therefrom, it was held that a person confined in a city prison for violation of a city ordinance could not be punished for breaking therefrom. *State v. Chapman*, 33 Kans. 134.

1. *Riley v. State*, 16 Conn. 47; *Cro. Car.* 209.

2. *Weaver v. Commonwealth*, 29 Pa. St. 445; 1 Russ. on Cr. (5th Eng. ed.) 574.

3. **Punishable in Same Degree as Offence.** — "Such escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party is guilty, and for which he was in custody, whether it be treason, felony, or trespass, and whether the party escaping were actually committed to some jail, or under an arrest only, and not committed, and whether he was attainted or only accused of such crime, and neither indicted nor appealed; and it is said to be no excuse of such escape that the prisoner had been acquitted on an indictment of death, and only committed till the year be passed to give the widow or heir of deceased an opportunity of bringing their appeal." 2 Hawk. P. C. ch. 19, sec. 22.

4. **Amount of Fine.** — "Wherever a person is found guilty, upon an indictment of imprisonment, of a negligent escape of a criminal, actually in his custody, he ought to be condemned, and a certain sum to be

paid to the king, which seems most properly to be called a fine. . . . And it seems by the common law that the penalty for suffering the negligent escape of a person attainted was, of course, one hundred pounds, and for suffering such escape of a person indicted and not attainted was five pounds; but if the person escaping were neither attainted nor indicted, it seems that it was left to the discretion of the court to authorize such a reasonable penalty as should seem proper; and if the party had escaped, it seems that the penalties above mentioned were, of course, to be doubled, yet it seems that a forfeiture was to be no greater for suffering a prisoner committed on two several accusations to escape than if he had been committed but on one." 2 Hawk. P. C. ch. 19, sects. 31, 33.

5. 1 Russ. on Cr. (5th Eng. ed.) 571.

6. *Martin v. State*, 32 Ark. 124; *State v. Baldwin*, 80 N. C. 390.

Offence indictable only. — Under Arkansas bill of rights, a sheriff charged with permitting the escape of a prisoner committed to his custody cannot be prosecuted otherwise than by indictment. *Haskins v. State*, 47 Ark. 243.

Killing to prevent Escape. — A constable has no right to kill a prisoner, in custody for a misdemeanor, to prevent his escape; and, if he does so, he will be guilty of murder or manslaughter, as the case may be. *Reneau v. State*, 2 Lea (Tenn.), 720.

7. **Actual Negligence as Test of Responsibility.** — *State v. Johnson*, 94 N. C. 924. In this case the court say, "The rigorous

jailer and the constable or other officer that makes the arrest, it is essential, in order to charge the jailer with an escape, that the constable should have delivered to him some warrant or authority for the debtor's detention. If the constable fail to do so, it is an escape from him, and not from the jailer.¹ It is the duty of the sheriff to have some person at the jail authorized to receive and detain debtors committed to his charge; and, if he fail to do so, he will be responsible for any escape caused thereby.² A sheriff, who as jailer receives a person arrested by a United States marshal on a process issuing from a federal court, is bound to keep the prisoner on the same responsibilities as if the arrest had been made under State process;³ and he alone, and not the marshal, is responsible for an escape.⁴ But if the sheriff, in obedience to a writ of *habeas corpus*, makes a proper return, and produces his prisoner before the court from which the writ issued, the custody of the prisoner while before such court is entirely in the direction and control thereof, and no responsibility attaches to the sheriff for an escape while in such custody.⁵ Notwithstanding the appointment or election of a new sheriff, prisoners on civil execution remain in the old sheriff's custody until assigned to his successor; but a mere neglect to assign them is not an escape.⁶ But if the prisoners be delivered over by the old to the new sheriff within the jail with the writs upon which they are detained, and the new sheriff does not require an indenture of assignment, the latter is chargeable in case of an escape after such delivery.⁷ To render a custodian criminally responsible for an escape, it is not essential that he should be an officer *de jure*: he is responsible although he be only an officer *de facto*.⁸

b. Of Officer for Deputy or Servant. — A sheriff is, as such, liable

rule of the common law must, we think, find some relaxation in its application to those officers and agents in whose custody, convicts sentenced to the State's prison are placed, and sent out from its walls to do public work; and when greater freedom in their movements is unavoidable, and increased facilities for making an escape are offered, in such case, to make such custodian criminally answerable, the means at his disposal to secure prisoners, and the service to which they are put, must be considered in determining whether there has been actual negligence or a failure to use the powers conferred in preventing the escape."

1. *Houghton v. Wilson*, 76 Mass. (10 Gray) 365.

2. **Responsibility for Escape in Case of Arrest by Coroner.** — *Colby v. Sampson*, 5 Mass. 310. In this case the coroner had arrested a deputy jailer, who was in charge of the jail, and left him at the jail, although there was no other person there. It was held that the sheriff, and not the coroner,

was responsible for his escape, notwithstanding the fact that the deputy was the person in charge of the jail at the time.

3. *Spafford v. Goodell*, 3 McL. C. C. 97.

4. *Long v. Palmer*, 41 U. S. (16 Pet.) 65; bk. 10, L. ed. 888; *Randolph v. Donaldson*, 13 U. S. (9 Cr.) 76; bk. 3, L. ed. 662.

5. *Barth v. Clise*, 79 U. S. (12 Wall.) 400; bk. 20, L. ed. 393.

6. *Hempstead v. Weed*, 20 Johns. (N. Y.) 64; 3 Co. 71; *Cro. Eliz.* 365.

7. *Power v. Johnston*, 2 Kerr (N. B.), 43.

Death of Sheriff. — On the death of a sheriff, his deputy is charged with the execution of his office until a new sheriff is appointed, and he must assign over by indenture as well the debtors on the limits as those in custody; and a new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment, without such assignment. *McPherson v. Hamilton*, 5 Up. Can. Q. B. (O. S.) 490.

8. 2 Hawk. P. C. ch. 19, sec. 23.

to answer for an escape suffered by his bailiff or deputy as if he had actually suffered it himself.¹ The responsibility for escapes is, however, confined to those officers upon whom the law casts the obligation of safe custody, and will not lie against the mere servant of such officer.² In the case of prisoners confined on civil process, an action lies against the sheriff for the negligence of his deputy;³ and the creditor has no remedy against the bailiff except the escape be in the nature of a rescue by such bailiff.⁴ But the bailiff is responsible to the sheriff for negligently allowing an escape; and the latter may obtain a judgment, not only for the damages and costs he may have had to pay the creditor, but also for his own costs, although no notice of the action by the creditor had been given to the bailiff.⁵

c. Of Private Individuals. — The general rule is, that whenever a person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffer him to go at large before he has discharged himself by delivering him over to some other, who, by law, ought to have the custody of him. A private person who has arrested any one on suspicion of felony, may thus be guilty of an escape; and if he delivered his prisoner into the custody of another person, who receives him, and suffers him to go at large, it is said that both of them are guilty.⁶ A delivery of his prisoner to the proper officer, as the sheriff, or his bailiff, or a constable, is sufficient to discharge him of any responsibility or a subsequent escape.⁷ At common law private persons are punishable for voluntary escapes in the same manner as officers, and for negligent escapes by fine and imprisonment at the discretion of the court.⁸ An indictment for a negligent escape may be maintained against the hirer of a convict under the convict-

1. *Rex v. Fell*, 1 Ld. Raym. 424; s. c., 1 Salk. 272; 5 Mod. 414; 2 Hawk. P. C. ch. 19, sec. 29.

2. *Rex v. Hill*, Old Bail. Jan. 1694; *Rex v. Rich*, Old Bail. Jan. 1694, M. S.

Watchman and Special Deputy. — A servant employed merely as a watchman is not such an officer as will be subject to indictment for a negligent escape. *State v. Errickson*, 32 N. J. L. (3 Vr.) 421. And a special deputy employed in particular cases by a sheriff is the mere agent of the sheriff, and is not an officer. *Kavanaugh v. State*, 41 Ala. 399. In this case it was held that such special deputy, although not an officer, might be subjected to punishment under a statute punishing escapes permitted by any sheriff, or other officer or person who has the legal custody of any person charged with or convicted of an indictable offence.

3. *Stanway v. Perry*, 2 Bos. & Pul. 157; *Woodgate v. Knatchbull*, 2 D. & E. 156; *Sturmy v. Smith*, 11 East, 25; *Plummer v. Whitchcott*, 2 Lev. 159; s. c., T. Jones, 62; 2 Mod. 124; *Odes v. Clark*, 5 Mod. 414;

Rex v. Fell, 1 Ld. Raym. 424; s. c., 1 Salk. 272; 5 Mod. 414; 2 Hawk. P. C. ch. 19, § 29.

4. *Wilson v. McCullough*, 5 Up. Can. Q. B. (O. S.) 680.

Liability of Bailor with Sheriff. — In this case the court say, "There are some cases in the books which appear on first view to sustain the doctrine that the bailiff of the sheriff is equally liable to an action like this as the sheriff; but upon a more careful examination with them the rule will be found to be limited to such cases only as are clearly in the nature of a rescue, as where the bailiff, after arresting a defendant, should advise, and actually assist, him to escape; in such case he would be a wilful wrong-doer, and would go within the principle of the cases reported in 1 Lev. 146; 1 Salk. 18 and 441; and 12 Mod. 466."

5. *Ruttan v. Shea*, 5 Up. Can. Q. B. 210.

6. 2 Hawk. P. C. ch. 20, sect. 2.

7. 2 Hawk. P. C. ch. 20, sect. 5.

8. 2 Hawk. P. C. ch. 29, sect. 26.

labor system,¹ and also against one in charge of a convict working on the county roads.²

IV. Recapture.—In criminal cases, where the officer has voluntarily suffered an escape, he has no power to retake the prisoner without a new warrant, although, if the party return, the officer may lawfully detain him.³ In the case of negligent escapes, an officer making fresh pursuit may retake the escaped prisoner at any time afterwards, whether he find him in the same or a different county; and, indeed, it would seem that there is nothing to prevent the retaking of the prisoner, although there should be no fresh pursuit.⁴ If the pursuit is so close that the officer never loses sight of his prisoner, it is generally considered that there is no escape, the law regarding the prisoner all the time as being in the power of the officer.⁵

In the case of escapes of prisoners under civil process, the same rule appears to apply. If the escape be voluntary, the sheriff cannot afterwards retake the prisoner without a new authority;⁶ and fraud on the part of a defendant, who has been taken on mesne process, in obtaining a judgment in his favor, on which he was released, does not authorize the sheriff to retake him.⁷

1. The indictment is sufficient, if it pursues, substantially, the form prescribed for a negligent escape by an officer. *Smith v. State*, 76 Ala. 69.

2. *State v. Sneed*, 94 N. C. 806.

3. 2 Hawk. P. C. ch. 19, sect. 12; ch. 13, sect. 19; Dalt. ch. 169; Burn's Just. tit. "Escape;" 1 Russ. on Cr. (5th Eng. ed.) 571.

Recapture after Voluntary Escape.—In *Clark v. Cleveland*, 6 Hill (N. Y.), 344, the court held that after an escape from an arrest on criminal process, the officer is bound to retake the prisoner whether the escape be voluntary or otherwise. But in *Doyle v. Russell*, 30 Barb. (N. Y.) 300, the court expressly overruled this decision, and held that in the case of a voluntary escape no re-arrest could be made: in that case the court say that the cases cited in *Clark v. Cleveland* do not support it, and also remark, "It seems to me that the doctrine of that case is eminently dangerous to the citizen, as well as eminently calculated to make officers corrupt and arbitrary. The power to arrest at the most annoying time and oppressive time, and in the worst manner; and voluntarily to let the person go without any understanding that he shall consider himself under arrest; to extort money for so doing; and then, with the same warrant, to be able to retake the prisoner against his will, and as oppressively as before,—seems to me a doctrine so monstrous, that no argument based on the blunders of officers or magistrates, as likely to leave public justice robbed of its sub-

jects, can for a moment let courts sanction it. Were the points settled by the courts of decision anywhere; did it not remain standing upon a solitary case, which is itself not sustained by its citations,—I might feel bound to submit, and to abide by the effect of the doctrine *stare decisis* on the ground that it was so well settled must be right, although I might not be able to see it." Compare *Butt v. Jones*, Gow. 99.

4. 2 Hawk. P. C. ch. 19, sect. 12; 1 Russ. on Cr. (5th Eng. ed.) 572.

5. *Staund. P. C.* 33; 1 Hale, 602; 2 Hawk. P. C. ch. 19, sects. 16, 13.

6. *Doane v. Baker*, 88 Mass. (6 Allen) 260; *Houghton v. Wilson*, 76 Mass. (10 Gray) 365; *Brown v. Getchell*, 11 Mass. 11; *Commonwealth v. Drew*, 4 Mass. 391; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; s. c., 1 Am. Dec. 132; *Atkinson v. Jameson*, 5 D. & E. 25; *Filewood v. Clement*, 6 D. P. C. 508; s. c., 1 W. W. & H. 165.

Power of State to retake.—A defendant in execution, under a writ of extent, at the suit of the crown, who has been taken from prison under an order of the commissioners of excise, for the purpose of giving evidence, without any writ or other process being issued, and after giving such evidence has been reconveyed to prison, is not entitled to his discharge; as even assuming it to amount to a voluntary escape, the crown has power to retake and detain him in custody under the original writ. *Reg. v. Renton*, 5 D. & L. 750; s. c., 2 Ex. 216.

7. *Simms v. Slacum*, 7 U. S. (3 Cr.) 300; bk. 2, L. ed. 446; s. c., 1 Cr. C. C. 242.

But if the escape have been negligent, the officer may lawfully retake or detain the prisoner without any further authority.¹ If the prisoner voluntarily return after a voluntary escape, he may, by renewal of process, be retained in custody.² And an agreement entered into between the creditor, the sheriff, and the debtor, by which the debtor is to be allowed certain privileges during sickness, but is, notwithstanding, to be considered under arrest, is sufficient to estop the prisoner from claiming that the judgment has been satisfied.³

V. Indictment. — 1. *For escaping.* — An indictment against a prisoner for effecting his escape will be insufficient if it fail to show that his custodian was lawfully authorized to detain him.⁴

2. *For attempting to escape.* — An indictment for an attempt to break prison⁵ is sufficient if it employs the phraseology of the

1. *Whithead v. Keyes*, 85 Mass. (3 Allen) 495; *Lockwood v. Mercereau*, 6 Abb. (N. Y.) Pr. 206; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; s. c., 1 Am. Dec. 142.

Retaking after Escape. — A bankrupt having escaped out of custody of the marshal, and being at large, surrendered to a commission subsequently issued, and received the protection conferred by 3 Geo. II. c. 30, sect. 5. *Held*, that he might, notwithstanding, be retaken and detained in custody by the marshal. *Anderson v. Hampton*, 1 Barn. & A. 308.

A Voluntary Return of a prisoner, after escape before action, is equal to a retaking on a fresh pursuit; but it must be pleaded. *Bonafous v. Walker*, 2 T. R. 126.

Retaking in Neighboring State. — Sheriff of a neighboring State has no right to pursue and recapture in Vermont a prisoner held on civil process, who has in such neighboring State escaped from his custody. *Bromley v. Hutchins*, 8 Vt. 194; s. c., 30 Am. Dec. 465.

2. *Stickle v. Reed*, 23 Hun (N. Y.), 417; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Littlefield v. Brown*, 1 Wend. (N. Y.) 398.

3. **Agreement with Creditor.** — A., in the custody of the sheriff, and confined in the jail at Bombay, under a writ of execution issued against him upon a judgment of the Supreme Court, was permitted by the sheriff, with the sanction and authority of the judgment creditors, by reason of illness, to go out of prison, and temporarily reside outside the precincts of the jail, upon the condition that he should continue under the surveillance of the sheriff's officers, and to which condition A. agreed, and continued for a time to reside out of the jail at a private house, where he was continually under such surveillance. Upon A.'s becoming convalescent, the sheriff, at the instance of the judgment creditors, took him back to jail. Upon application by A. to the court

to discharge him out of custody, on the ground that the writ was satisfied, *held*, that A. having agreed to the condition imposed on him by the judgment creditors, of continuing in the custody of the sheriff's officers while out of jail, was estopped from saying that he was out of the sheriff's custody when he was permitted to leave the jail, and that a change of the place of imprisonment, under the circumstances, did not amount to a discharge out of custody. *Haines v. East India Co.*, 11 Moore, P. C. 39.

4. **Recital of Warrant.** — An information for an escape, averring that the accused was in lawful custody of the sheriff by virtue of a certain order, and judgment, etc., "as entered of record," is fatally defective for not averring that he had a certified copy, required by Kans. Gen. Stat. 861, sect. 256, or any other paper by which to retain custody. *State v. Hollon*, 22 Kans. 580.

Requisites of Indictment. — By the proviso of the first section of the Alabama Act (1882-83, p. 166), providing that any person convicted and fined in the courts of that State may be discharged, as to the fine, on confession of judgment, with sureties, and execution of a contract to serve the surety, etc., a contract in writing, signed by the defendant in open court, and approved in writing by the judge before whom the conviction was had, enters into the definition, and is an essential ingredient of the offence of an escape; and an indictment for escaping from such service, which fails to charge that the contract was in writing, or that it was signed by the defendant in open court, or was approved by the justice of the peace who rendered the judgment of conviction, with the requisite precision and certainty, is bad. *Smith v. State*, 81 Ala. 74.

5. *State v. Johnson* (Mo.), 6 S. W. Rep. 77.

statute creating the offence. In an indictment under a statute for an attempt to escape, the court held, that except the statute make it an essential fact to be proved, that a certified copy of a judgment of conviction should have been delivered to the keeper, it is not essential that the judgment should contain any averment of its delivery.¹

3. *For aiding Escape.* — An indictment for aiding an escape must allege that the defendant acted with the intent to aid in the escape of a prisoner,² although it need not be averred that the intent to liberate any particular person exists.³ It is essential, however, that it should contain an averment of the intent to liberate a prisoner lawfully confined;⁴ but it need not set out the particular felony with which the prisoner is charged,⁵ nor the warrant upon which he is confined; nor need it allege that the defendant knew that the prisoner was confined upon a charge of felony;⁶ but an averment that the acts done, were done with intent to facilitate an escape, is indispensable,⁷ although it need not be shown that the defendant was acting in conjunction with a person actually confined.⁸

4. *For suffering Escape.* — An indictment for an escape, whether negligent or voluntary, must expressly show that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion.⁹ Every indictment should show that the prisoner went at large;¹⁰ and if the indictment be for a

1. **General Requisites.** — An indictment for an overt attempt to escape from the State prison is sufficient, if it alleges that the defendant, while lawfully confined in State prison under a judgment of a competent court, for the crime of burglary, did make an overt attempt to escape therefrom; that he did unlawfully, forcibly, and feloniously break out of the cell in said prison, in which he was confined, and out of the building in which said cell was and is. *State v. Angelo*, 18 Nev. 425.

2. *Vaughan v. State*, 9 Tex. App. 563.

3. *Hurst v. State*, 79 Ala. 55.

4. An indictment for assisting prisoners to break jail, which does not allege that such prisoners had committed any offence, or state facts or circumstances from which the court can see that they were lawfully in prison, is fatally defective. *State v. Jones*, 78 N. C. 420.

5. *Gunyon v. State*, 68 Ind. 79; *State v. Addcock*, 65 Mo. 590; *State v. Fulton*, 19 Mo. 680; *State v. Presbury*, 13 Mo. 342.

6. *Wilson v. State*, 61 Ala. 151; *Holland v. State*, 60 Miss. 939.

7. *Hurst v. State*, 79 Ala. 55; *Ramsey v. State*, 43 Ala. 404.

8. *Hurst v. State*, 79 Ala. 55.

9. 2 Hawk. P. C. ch. 19, sec. 14.

Allegation of Commitment. — Judgment

was arrested upon an indictment, which stated that the prisoner was in the defendant's custody, and charged with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge. *Rex v. Fell*, 1 L. Raym. 424; s. c., 1 Saik. 272. It is not necessary, however, to the sufficiency of the indictment, that it should charge that the officer had the prisoner in his custody by virtue of a sufficient warrant, or that it should set out a copy of the warrant. *State v. Sparks*, 78 Ind. 166. Where a bill charged that "one A. and one B. charged with the murder of one C. were duly committed to the care and custody of D., he, the said D., then and still being keeper of the common jail" of a certain county. It was held that it sufficiently appeared that the commitment was to the defendant, as keeper of the jail, upon a specific charge of murder, and that the indictment was sufficient. *State v. Baldwin*, 80 N. C. 390.

Duplicity. — A count in an indictment charging that the defendant, as an employee in a penitentiary, did "assist and suffer" the escape of a prisoner, charges only one offence, and is not void for duplicity. *Clemons v. State*, 4 Lea (Tenn.), 25.

10. 2 Hawk. P. C. ch. 19, sect. 14.

voluntary escape, it must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large.¹ Under a statute providing for the offence, it has been held to be surplusage to aver the particulars of the crime, arrest, or trial of the person whose escape is alleged;² but at common law the species of crime for which the party was imprisoned must be shown,³ although the events charged may be only a negligent escape, and therefore a misdemeanor. The inapt use of the word "feloniously" is not sufficient ground for quashing the indictment.⁴

VI. Evidence.—Wherever an escape is shown, the law implies negligence on the part of the sheriff into whose custody the prisoner has been placed; and it is not necessary for the State to prove negligence in order to procure conviction.⁵ In an indictment against the hirer of a convict, the bond executed by the hirer, reciting therein the terms of the contract of hiring, and the name and sentence of the convict, is admissible in evidence to prove the fact of the hiring as therein recited, although a record of those facts is required to be kept.⁶

VII. Punishment.—An escape from arrest without force is itself a misdemeanor, and punishable as such.⁷ On recapture, the prisoner will be required to serve out the whole term, without deducting the time during which he was at large.⁸ A prisoner convicted for an escape or an attempt to escape, may be punished by imprisonment in a jail or prison other than the one from which he escaped or attempted to escape.⁹ A person who is guilty of voluntarily allowing an escape, is guilty of the same kind of crime as the offence of which the party was guilty, and for which he was in custody;¹⁰ and if a person be found guilty of negligently suffering an escape, he is punishable by fine, which, in the case of a prisoner attainted, was, of course, one hundred pounds; and in the case of a prisoner indicted, but not attainted, five pounds; and in the case of prisoners neither attainted or indicted, was left to the discretion of the court.¹¹ This punishment, however, is not generally abrogated by statute; and the punishment varies according to the provisions of the enactments of the different States.¹²

1. 2 Hawk. P. C. ch. 19, sect. 14.

2. State v. Hedrick, 35 Tex. 485.

3. 2 Hawk. P. C. ch. 19, sect. 14.

4. State v. Sparks, 78 Ind. 166.

5. Shattuck v. State, 51 Miss. 575; State v. Hunter, 94 N. C. 829; Blue v. Commonwealth, 4 Watts (Pa.), 215; Dalt. ch. 159; 1 Hale, 600.

6. Smith v. State, 76 Ala. 69.

7. State v. Brown, 82 N. C. 585; 1 Hale, 611; 2 Hawk. P. C. ch. 18, sects. 9, 10.

8. Matter of Clifford, 29 Ind. 106; State v. Wamire, 16 Ind. 357; Hollon v. Hopkins, 21 Kans. 638; Dolan's Case, 101 Mass. 219; Commonwealth v. Mott, 38 Mass. (21 Pick.) 492; Matter of Edwards, 43 N. J. L. (14 Vr.) 555, s. c., 25 Alb. L.

J. 68; 3 Cr. L. Mag. 201, 206; Haggerty v. People, 6 Lans. (N. Y.) 332; People v. Potter, 1 Park. (N. Y.) Cr. Cas. 47; s. c., 4 N. Y. Leg. Obs. 177; 1 Edm. Sel. Cas. 235, 250, 256; Laws, 1874, ch. 451, sect. 10, p. 598; State v. Cockerham, 2 Ired. (N. C.) L. 204; Cleek v. Commonwealth, 21 Gratt. (Va.) 777; Rex v. Ratcliffe, 18 How. St. Tr. 429; s. c., 1 Wils. 150; Rex v. Okey, 1 Lev. 61; Rex v. Harris, 1 Ld. Raym. 482; 1 Hale, P. C. 602.

9. State v. Strauss (N. J. L.), 11 Cent. Rep. 561.

10. State v. Sparks, 78 Ind. 166; 2 Hawk. P. C. ch. 19, sect. 22.

11. 2 Hawk. P. C. ch. 19, sect. 31.

12. Penalty on Hirer of Convict.—One

VIII. Civil Liability of Custodian. — Where the sheriff suffers the escape of a debtor committed either upon execution or upon mesne process, the creditor has a right of action against him for damages suffered thereby; ¹ and in such an action the measure of damages is the law sustained by the creditor through the escape, or, in other words, the value of the custody of the debtor at the time of the escape.² The insolvency of the debtor is no bar to an action,³ but the defendant may mitigate the damages by show-

who hires, convicts, and makes himself responsible for their safe-keeping, as provided in S. C. Act of 1878, is liable, upon their escape, for the amount of the damages stipulated in the act; viz., at the rate of fifty dollars for each year of their unexpired terms. As the amount thus fixed is stipulated damages, and not a technical penalty, an action to recover is not barred in two years from the time of the escape. The action may be brought in the name of the superintendent of the penitentiary, and may be maintained, although the statutory bond was not given by the hirer. *Lipscomb v. Seegers*, 19 S. C. 425.

1. Action by Administratrix. — An administratrix may maintain an action in her own name against the marshal, for the escape of a prisoner, who is in execution on a judgment obtained by her as administratrix. *Bonafous v. Walker*, 2 T. R. 126.

2. *State v. Newcomer*, 109 Ind. 243; *Russell v. Turner*, 7 Johns. (N. Y.) 189; s. c., 5 Am. Dec. 254; *Potter v. Lansing*, 1 Johns. (N. Y.) 215; s. c., 3 Am. Dec. 310; *Sheldon v. Upham*, 14 R. I. 493; *Blanding v. Rogers*, 2 Brev. (S. C.) L. 394; s. c., 4 Am. Dec. 595; *Macrae v. Clark*, L. R. 1 C. P. 403; s. c., 35 L. J. C. P. 247; 12 Jur. N. S. 708; 14 L. T. 408; 1 H. & R. 479; *Moore v. Moore*, 25 Beav. 8; s. c., 27 L. J. Ch. 385; s. c., 4 Jur. N. S. 250; *Arden v. Goodacre*, 11 C. B. 371; s. c., 2 L. M. & P. 383; 20 L. J. C. P. 184; 15 Jur. 776; *Reg. v. Leicestershire*, 9 C. B. 659; s. c., 1 L. M. & P. 414; 19 L. J. C. P. 320; 14 Jur. 1026; *Hemming v. Hale*, 7 C. B. N. S. 487; s. c., 29 L. J. C. P. 137; 6 Jur. N. S. 554; *Williams v. Mostyn*, 4 Mees. & W. 145; s. c., 7 D. P. C. 38; 2 Jur. 643; *Scott v. Henley*, 1 Moo. & R. 227; *Atkinson v. Mitchell*, 6 Allen (N. B.), 345; *Kelly v. Jones*, 2 Allen (N. B.), 465.

Proof of Debt. — In an action for the escape of a prisoner on mesne process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner who escaped. *Alexander v. Macauley*, 4 T. R. 611.

Insolvency of Debtor. — In an action against a sheriff for an escape, it was proved that the debtor, though insolvent, was the

only son of a wealthy father, who was upwards of a hundred years old; and that, shortly before the arrest, the debtor's solicitor had offered to pay a composition on his debts, of six shillings in the pound. The judge directed the jury to give as damages the value to the creditor of the chance of the debt, or any portion of it, that would have been extracted by the debtor's remaining in custody. *Held*, a right direction; and, the jury having given substantial damages, the court refused to disturb the verdict. *Moore v. Moore*, 25 Beav. 8; s. c., 27 L. J. Ch. 385; 4 Jur. N. S. 250.

Ascertainment of Amount of Loss. — The principle on which the amount is to be ascertained, is by charging the sheriff with the debt, and throwing on him the onus of proving that less would have been recovered if the debtor had remained in custody or given bail. *Moore v. Moore*, 25 Beav. 8; s. c., 27 L. J. Ch. 385; 4 Jur. N. S. 250.

Assault by Escaped Prisoner. — When a sheriff negligently permits one in his custody, under an indictment for an assault with a deadly weapon upon B., with intent to inflict bodily injury, to escape and go at large, and such person makes a further assault upon A., and threatens to take his life, whereby A. is put to expense in having him bound over to keep the peace, A. cannot maintain an action on the case against the sheriff for the escaped prisoner, as they are not the natural and probable consequence of the escape. *Hullinger v. Worrell*, 83 Ill. 220.

In the Older Decisions it would appear that the creditor was entitled to recover the amount of the judgment debt and costs for which the debtor was confined. *Levett v. Letteney*, and *Solly v. Greathead*, cited in *Beames on Costs*, 138; *Robertson v. Taylor*, 2 Chitt. 454; *Bonafous v. Walker*, 2 D. & E. 126; *Dewes v. Beresford*, 5 Sim. 531.

3. *Dunford v. Weaver*, 84 N. Y. 445; *Barnes v. Willett*, 12 Abb. (N. Y.) Pr. 448; s. c., 11 Abb. (N. Y.) Pr. 225; s. c., 35 Barb. (N. Y.) 514; *McCreery v. Willett*, 4 Bosw. (N. Y.) 643; *Loosey v. Orser*, 4 Bosw. (N. Y.) 391; *Renick v. Orser*, 4 Bosw. (N. Y.) 384; *Wilson v. Wright*, 9 How. (N.

ing the plaintiff's inability to pay.¹ An action may also be maintained against the sureties on the sheriff's bond, and the liability of the principal need not be first ascertained.² It would appear that, in an action against the sheriff, he stands in the same position as the original defendant, and may reduce his liability by any acts which the defendant would have had against the plaintiff.³ Any negligence or default of the plaintiff in directing the sheriff not to attach property, or in relinquishing security for the defendant's debt, may be shown by the sheriff for the purpose of affecting the creditor's recovery.⁴ If, after a voluntary escape, the defendant surrenders himself to the sheriff, the creditor may either bring an action against the sheriff for the escape, or elect to retain the defendant in custody under the writ.⁵ The sheriff has a right of action against the jailer for permitting an escape without the sheriff's knowledge or authority, and may recover any

Y.) Pr. 459; *Smith v. Commonwealth*, 59 Pa. St. 320.

1. *Chase v. Keyes*, 68 Mass. (2 Gray) 214; *Danforth v. Pratt*, 63 Mass. (9 Cush.) 318; *West v. Rice*, 50 Mass. (9 Metc.) 564; *Whitehead v. Varnum*, 31 Mass. (14 Pick.) 523; *Brooks v. Hoyt*, 23 Mass. (6 Pick.) 468; *Griffin v. Brown*, 19 Mass. (2 Pick.) 304; *Shackford v. Goodwin*, 13 Mass. 187; *Rice v. Hosmer*, 12 Mass. 127; *Nye v. Smith*, 11 Mass. 188; *Young v. Hosmer*, 11 Mass. 89; *Weld v. Bartlett*, 10 Mass. 470; *Porter v. Sayward*, 7 Mass. 377; *Burrell v. Lithgow*, 2 Mass. 526.

False Return.—But a sheriff who untruly returns that he has taken bail, or does not deliver the bail-bond, becomes bail, and cannot mitigate by showing the debtor's poverty. *Seeley v. Brown*, 31 Mass. (14 Pick.) 177; *Simmons v. Bradford*, 15 Mass. 82.

2. *Smith v. Commonwealth*, 59 Pa. St. 320.

3. *Evans v. Maners*, 9 D. P. C. 256. Compare *Huntley v. Smith*, 4 Up. Can. Q. B. 181, where it was held that, in an action for an escape on an attachment for non-performance of an award, the sheriff will not be allowed to deny the submission or award, or to set up any defence which might have been taken in the proceedings upon the award. He cannot go farther back than the order authorizing the attachment.

Money lost at Play.—In an action against the marshal for the escape of a prisoner in custody under an execution on a judgment obtained adversely against him, it is no defence that the judgment was to recover the amount of a bill of exchange given for money lost at play, the 16 Car. 2 c. 7 and 9, Ann. c. 14, not including judgments obtained adversely, but those already

given to secure money lost at play. *Chapman v. Lane*, 1 G. & D. 523; s. c., 11 A. & E. 980.

4. **Direction not to attach Property.**—A creditor might have collected the amount of a jail-bond but for his fault in directing the sheriff not to attach property. It was held that such creditor was chargeable with want of due diligence, and could not maintain an action against the sheriff because of the debtor's escape from the liberties of the jail-yard. *Weed v. Preston*, 54 Vt. 648.

Relinquishment of Security.—If the plaintiff, having sufficient security from the defendant for his debt, relinquish it, after knowledge of escape, the sheriff, in an action against him, may avail himself of this fact in the mitigation of damages; and where the jury in such a case gave nominal damages only, the court refused to set aside the verdict. *Russell v. Turner*, 7 Johns. (N. Y.) 189; s. c., 5 Am. Dec. 254.

5. *Richardson v. Rittenhouse*, 40 N. J. L. (11 Vr.) 230; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3; *Littlefield v. Brown*, 1 Wend. (N. Y.) 398; s. c., 7 Wend. (N. Y.) 454; 11 Wend. (N. Y.) 467.

Waiver of Escape.—If, having knowledge of the escape, the plaintiff appears in court as a creditor and opposes the debtor's charge, whereupon he is again surrendered into the custody of the sheriff, the plaintiff's election must be considered to be made, and his right of action for escape waived. *Richardson v. Rittenhouse*, 40 N. J. L. (11 Vr.) 230. Compare *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; s. c., 5 Am. Dec. 291. But the appearance of the creditor's attorney, on a notice to disclose, at the time and place appointed, but refusing to choose a justice, and protesting

damages sustained thereby, although the jailer may have acted upon good faith, and on advice of counsel.¹

IX. Suit by Sheriff against Debtor.—An officer who permits a prisoner to go at large upon his promise to pay the debt to his creditor, in consequence of which he is obliged to pay the creditor himself, cannot recover back the money from the debtor, being guilty of a breach of duty out of which he cannot derive a cause of action.²

X. Presumption of Guilt arising from Escape.—If a prisoner, who has been arrested on a criminal charge, escape, or attempt to escape, before trial, such apparent attempt to avoid justice may be considered by the jury as tending to establish his guilt.³ But to repudiate the inference of guilt arising therefrom, the accused may show apprehension of such danger as could not be rightly provided against, although a mere apprehension of danger to health from the condition of the jail cannot be proved.⁴

XI. Waiver of Appeal by.—Where the defendant in an indictment has escaped after conviction and pending an appeal, at his instance the court will refuse to entertain such appeal.⁵ In a number of cases the court have refused to order the immediate dismissal of the appeal, and have ordered instead that the appeal should stand dismissed, unless the defendant, before a specified time, should return to the custody of the proper officers of the law.⁶

against the jurisdiction of the magistrates and against a discharge, is not a waiver of the escape, though he may examine the debtor. *Hotchkiss v. Whitten*, 71 Me. 577.

1. *Duncan v. Klinefelter*, 5 Watts (Pa.), 141; s. c., 30 Am. Dec. 295.

2. *Carpenter v. Fifield*, 14 R. I. 73; *Pitcher v. Bailey*, 8 East, 171; *Ruttan v. Ashford*, 6 Up. Can. Q. B. (O. S.) 280.

3. *Bowles v. State*, 58 Ala. 335; *People v. Stanley*, 47 Cal. 113; *Revel v. State*, 26 Ga. 275; *Whaley v. State*, 11 Ga. 123; *State v. Beatty*, 30 La. An. 1266; *People v. Pitcher*, 15 Mich. 397; *Fanning v. State*, 14 Mo. 386; *State v. Rand*, 33 N. H. 216; *People v. Rathbun*, 21 Wend. (N. Y.) 509; *Cordova v. State*, 6 Tex. App. 207.

4. *Kennedy v. Commonwealth*, 14 Bush (Ky.), 340.

5. **Appeal dismissed after Escape.**—*People v. Redinger*, 55 Cal. 290; s. c., 1 Cr. L. Mag. 290; *Woodson v. State*, 19 Fla. 549; *Sargent v. State*, 96 Ind. 63; *Wilson v. Commonwealth*, 10 Bush (Ky.), 526; *State v. Marion*, 15 La. An. 495; *Anonymous*, 31 Me. 592; *Commonwealth v. Dowdican*, 115 Mass. 133; *Commonwealth v. Andrews*, 97 Mass. 543; *Hamil-*

ton v. Flowers, 57 Miss. 14; *Matter of Walker*, 53 Miss. 366; *People v. Genet*, 59 N. Y. 80; s. c., 17 Am. Rep. 315; 3 T. & C. (N. Y.) 734; 1 Hun (N. Y.), 292; *Brown v. State*, 5 Tex. App. 126; *Moore v. State*, 44 Tex. 595; *Edwards v. Republic*, Dall. Dig. Tex. 535; s. c., 11 Cent. L. J. 399; *Leftwich v. Commonwealth*, 20 Gratt. (Va.) 716; *Smith v. United States*, 94 U. S. (4 Otto) 97; bk. 24, L. ed. 24; *Reg. v. Caudwell*, 17 Q. B. 502; *Rex v. Buckeridge*, 2 Showers, 297; *Rex v. Gibson*, 2 Strange, 968; s. c., *Kidgeway's Hardw.* 50.

Recapture.—A prisoner does not "escape," within the meaning of Tex. Code, sect. 846, forfeiting his right of appeal, if, after breaking jail, he is recaptured two or three hundred yards away, and brought back within twenty minutes. *Loyd v. State*, 19 Tex. App. 137.

6. *People v. Redinger*, 55 Cal. 290; s. c., 36 Am. Rep. 32; *Woodson v. State*, 19 Fla. 549; *McGowan v. People*, 104 Ill. 100; *Leftwich v. Commonwealth*, 20 Gratt. (Va.) 716; *Sherman v. Commonwealth*, 14 Gratt. (Va.) 677; *State v. Sites*, 20 W. Va. 13; *State v. Conners*, 20 W. Va. 1; *Smith v. United States*, 94 U. S. (4 Otto) 97; bk. 24, L. ed. 24, 32.

ESCHEAT. — See also ALIENS; FORFEITURE and TENURE.

I. Definitions, 854.

II. What Escheats, 855.

III. Conveyance of Escheated Lands, 856.

IV. How enforced, 856.

I. Definitions. — Originally escheat was the determination of the tenure or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means,¹ in which case the land naturally resulted back, by a kind of reversion, to the original grantor or lord of the fee.²

In modern law it denotes a falling of the estate into the general property of the State, either because the tenant is an alien, or because he has died intestate without lawful heirs to take his estate by succession.³

1. 2 Bl. Com. *72. As "if he [the tenant] died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, whereby every inheritable quality was entirely blotted out and abolished. . . . In the one case there were no heirs subsisting of the blood of the first feudatory or purchaser to which heirs alone the grant of the feud extended. In the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject, and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon." 2 Bl. Com. *72.

Hence escheats were sometimes divided into two classes, *propter defectum sanguinis* (on account of defect of blood), and *propter delictum tenentis* (on account of the crime of the tenant). 2 Bl. Com. *245.

The estate which escheated was itself called an escheat. Bouv. L. Dict.

According to Blackstone, land escheated, 1, when the tenant died without relations on the part of his ancestors; 2, or on the part of those ancestors from whom the estate descended; 3, when there were no relations of the whole blood; 4, when there were no relations except a monster which "had not the shape of mankind;" 5, when there were no relations except a bastard, or a bastard dying left no issue of his body; 6, when the tenant or the only relations left by him were aliens; 7, when the tenant was attainted for treason or felony. 2 Bl. Com. *246-257.

These rules are greatly changed by statute. See title "Descent."

Distinction between Escheat and Forfeiture. — "Forfeiture of lands, and whatever else the offender possessed, was the doctrine of the old Saxon law as a part of punishment for the offence, and does not at all relate to the feudal system, nor is the con-

sequence of any seigniori or lordship paramount: but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat, therefore, operates in subordination to this more ancient and superior law of forfeiture." 2 Bl. Com. *251, 252.

Escheat, in the feudal sense, existed in Maryland before the Revolution. *Matthews v. Ward*, 10 G. and J. (Md.) 443.

2. 2 Bl. Com. *245, 72. See *Hughes v. State*, 41 Tex. 10.

"In the beginning of the Feodal Tenure this Right was a strict reversion. The Grant determined by failure of heirs; the Land returned as it did upon the Expiration of any less temporary Interest. 'Twas no Fruit, but the Extinction of Tenure, . . . 'twas the Fee returned." *Burgess v. Wheate*, 1 W. Bl. 123.

3. 3 Washb. R. Prop. *443; *Hughes v. State*, 41 Tex. 17.

Attainder of treason cannot disinherit in England except during the life of the offender. Stat. 3 and 4 Wm. IV. c. 106, enlarging 54 Geo. III. c. 145. In the United States there can be no forfeiture except for treason, and attainder of treason works corruption of blood during the life of the person attainted only. U. S. Const. art. 3, sec. 3; *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *Miller v. United States*, 11 Wall. (U. S.) 268.

Escheat on account of alienage is largely done away with in the United States. See title "Aliens." Compare, however, Comp. Stat. Neb. (1887), ch. 73, secs. 63, 64; *State v. Witz*, 87 Ind. 190; *Wiederanders v. State*, 64 Tex. 133.

Where aliens cannot take or hold lands, equity has held that lands held in trust to be sold or conveyed for their benefit do not escheat or become forfeited. *Taylor*

II. What Escheats.¹ — Lands are the common subject of escheat.² Under the feudal system movables did not escheat,³ but the modern statutory rule is otherwise.⁴ Trust estates, on the death of the trustee without heirs, escheated, and the lord took the estate freed from the trust;⁵ but, by statute, it is now otherwise.⁶ On the death of the *cestui que trust* without heirs, the title remained in the trustee for his own benefit.⁷ At common law, on

v. Benham, 5 How. (U. S.) 233; *Ludlow v. Van Ness*, 8 Bosw. (N. Y.) 178; *Anstice v. Brown*, 7 Pai. (N. Y.) 448; *Commonwealth v. Martin*, 5 Munf. (Va.) 117. *Compare Leggett v. Dubois*, 5 Pai. (N. Y.) 114; s. c., 28 Am. Dec. 413.

At the present time, therefore, defect of heirs is the most important cause of escheat. 4 Kent Com. *426-428; 3 Washb. R. Prop. *444. See also *Sewall v. Lee*, 9 Mass. 363.

Lands of intestate bastards dying without issue escheat, where the rule is not changed by statute. *Doe v. Bates*, 6 Blackf. (Ind.) 533.

The lands of a lunatic or madman were held to escheat on his death without heirs, though previously granted by him by deed of bargain and sale. *Desilver's Case*, 5 Rawle (Pa.) 111.

Land abandoned by owner was held to escheat. *Holliman v. Peebles*, 1 Tex. 673.

Laws regulating escheats are not *ex post facto* laws within the meaning of the Federal Constitution. *White v. Wayne*, T. U. P. Charit. (Ga.) 94.

Statutes directing the payment of unclaimed fees, etc., by clerks of courts, etc., into public funds, are in the nature of escheat laws, and constitutional. *Deaderick v. County Court*, 1 Coldw. (Tenn.) 202.

To Whom. — In some States escheated property goes into the school fund. *State v. Reeder*, 5 Nebr. 203; *State v. Meyer*, 63 Ind. 33; *Hinkle v. Shadden*, 2 Swan (Tenn.), 46; *Parchman v. Charlton*, 1 Coldw. (Tenn.) 381.

In North Carolina to the State University. *University v. Foy*, 2 Hayw. (N. Car.) 310; *University v. Harrison*, 90 N. Car. 385. In Illinois to the county. *Cothran's Ann. Stat. Ill. c. 49, sec. 1.*

In England escheats went generally to the King. 1 Bl. Com. *302. In Maryland before the Revolution to the Lord Proprietary. *Thomas v. Hamilton*, 1 H. & M'H. (Md.) 190. The Massachusetts and Plymouth colonies claimed escheats as incident to the sovereignty they exercised over the lands in their patents. 3 Washb. R. Prop. *446; 3 Dane Abr. 140.

In America escheats for defect of heirs belong universally to the State or some corporation thereof as the ultimate proprietor. 4 Kent Com. *424; 1 Cooley's

Bl. Com. *302, n.; *People v. Folsom*, 5 Cal. 373.

1. Before 54 Geo. III. c. 155, and 3 and 4 Wm. IV. c. 106, sec. 10, escheat for corruption of blood by attainder attached to estates coming by descent after the attainder, as well as to estates held at the time. 2 Bl. Com. *253, 254.

2. The following escheated: "A fee simple; an estate-tail where the tenant-in-tail has in himself the reversion in fee, otherwise the estate would pass to the reversioner; and a copyhold.

The following things do not escheat; viz., gavelkind, *propter delictum tenentis*; a rent charge; a right of common, free warren, or, indeed, any kind of inheritance which does not lie in tenure, because they rather become extinct; . . . an equity of redemption." Whart. L. Lex. See also 2 Bl. Com. *84.

A vested remainder in fee dependent on a life estate escheats, though the life estate has not terminated. *People v. Conklin*, 2 Hill (N. Y.), 67. *Compare Commonwealth v. Naile*, 88 Pa. St. 429.

3. 4 Kent Com. *426, n. Their disposition was with the king. *Commonwealth v. Blanton's Exr.*, 2 B. Mon. (Ky.) 393. But fallen branches of trees were said to belong to the lord. *Abbott's L. Dict.*; *Brown's L. Dict.*

4. *State v. Reeder*, 5 Nebr. 203.

5. 4 Kent Com. *425. So of incumbrances generally. *O'Hanlon v. Den*, 20 N. J. L. 31; *Den v. O'Hanlon*, 21 N. J. L. 582.

6. 1 Chit. Gen. Pr. 279; 4 Kent Com. *425, 426, n.; *Cooley's Bl. Com.* *246, n. It is believed that the State now takes only the interest of the decedent subject to all incumbrances and debts due by the decedent. *Watson v. Lyle*, 4 Leigh (Va.), 236; *Casey v. Inloes*, 1 Gill (Md.), 430; s. c., 39 Am. Dec. 658; *Farmer's, etc., Co. v. People*, 1 Sandf. Ch. (N. Y.) 139; 3 Washb. R. Prop. *185. See, however, *Brown v. State*, 36 Tex. 282.

7. 4 Kent Com. *426; 2 Washb. R. Prop. *185; *Burgess v. Wheate*, 1 W. Bl. 123; s. c., 1 Eden, 177.

The rule seems different under the statutes in some States. *Matthews v. Ward*, 10 G. & J. (Md.) 443; *Wood v. Mather*, 38 Barb. (N. Y.) 473; *Commonwealth v. Naile*, 88 Pa. St. 429.

the dissolution of a corporation, the real estate belonging to it reverted to the grantor, and the personal property escheated to the crown or State.¹

III. Conveyance of Escheated Lands. — Where the title to escheated lands vests in the State without office found, it may convey its interest at once;² and where title does not vest before inquest of office, it may give a valid release of its claim to a party in possession.³ Where the title of the State is not complete before office found, its conveyance before such time to one not in possession probably passes no interest in the escheated lands.⁴

IV. How enforced. — To complete title by escheat, it was necessary that the lord make entry on the lands and tenements escheated, or sue out a writ of escheat.⁵ Inquest of office, or office found, is still deemed necessary to vest the title in some States;⁶ but by

1. *Fox v. Horah*, 1 Ired. Eq. (N. Car.) 358; s. c., 36 Am. Dec. 48; *Coulter v. Robertson*, 24 Miss. 278; s. c., 57 Am. Dec. 168; 2 Bl. Com. *256.

2. *Ettenheimer v. Heffernan*, 66 Barb. (N. Y.) 374; *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376; *In re Malone*, 21 S. Car. 435; *Rubeck v. Gardner*, 7 Watts (Pa.), 455.

3. *State v. Tilghman*, 14 Ia. 474; *Colgan v. McKeon*, 24 N. J. L. 566.

4. *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *Jackson v. Adams*, 7 Wend. (N. Y.) 367; *Fairfax v. Hunter*, 7 Cranch (U. S.), 603; *Jones v. Badley*, 4 Md. Ch. 167; *Casey v. Inloes*, 1 Gill (Md.), 430; s. c., 39 Am. Dec. 658; *Jackson v. Adams*, 7 Wend. (N. Y.) 367; *Commonwealth v. Hite*, 6 Leigh (Va.), 588; s. c., 29 Am. Dec. 226. Compare *Nettles v. Cummings*, 9 Rich. (S. Car.) Eq. 440.

After the lapse of many years escheat proceedings may be presumed. *Vickery v. Benson*, 26 Ga. 582.

An escheat grant ordinarily passes all the interest held by the original grantee. *Casey v. Inloes*, 1 Gill (Md.) 430; s. c., 39 Am. Dec. 658. See also *Jones v. Badley*, 4 Md. Ch. 167.

5. 2 Bl. Com. *245.

Waiver. — Any act which amounted to an implied waiver, as accepting rent or homage, barred the escheat. 2 Bl. Com. *245. See also *Kelly v. Greenfield*, 2 H. & M'H. (Md.) 121.

The assessment of taxes on escheated property, and the sale thereof to pay the same, have been held not to be a waiver of the State's right to assert title by escheat. *Reid v. State*, 74 Ind. 252.

Possession of lands under void deed by persons of color incapable of holding title continued after the incapacity was removed, the State never having escheated the lands, is good as against all others. *Beatty v. Benton*, 73 Ga. 187.

By grant and warranty the State may

estop itself to claim lands as escheated on account of alienage. *Commonwealth v. André*, 3 Pick. (Mass.) 224.

6. 3 Washb. R. Prop. *444; *People v. Folsom*, 5 Cal. 373; *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *Bradstreet v. Supervisors*, 13 Wend. (N. Y.) 546; *Jackson v. Adams*, 7 Wend. (N. Y.) 367; *Commonwealth v. Hite*, 6 Leigh (Va.), 588; s. c., 29 Am. Dec. 226; *Fairfax v. Hunter's Lessee*, 7 Cranch (U. S.), 603. See also *Taylor v. Benham*, 5 How. (U. S.) 233.

In Indiana title vests without information found, unless some one is in possession, when the State must first establish its title. *Reid v. State*, 74 Ind. 252. See also *People v. Cutting*, 3 Johns. (N. Y.) 1; *Catham v. State*, 2 Head (Tenn.), 553; *Commonwealth v. Hite*, 6 Leigh (Va.), 588; s. c., 29 Am. Dec. 226.

The burden of proof is on the State, and without proper proof that the lands are subject to escheat, it cannot succeed, even as against a mere occupant. *Hammond v. Inloes*, 4 Md. 138; *People v. Cutting*, 3 Johns. (N. Y.) 1; *University v. Harrison*, 90 N. Car. 385.

An inquisition that does not find the death of the tenant intestate and without heirs, is a nullity. *Ramsey's Appeal*, 2 Watts (Pa.), 228; s. c., 27 Am. Dec. 301.

For what is sufficient evidence, see *University v. Harrison*, 90 N. Car. 385; *State v. Teulon*, 41 Tex. 249.

For the practice in various States, see *Congregational Church v. Morris*, 8 Ala. 182; *Bradley v. Dwight*, 62 How. Pr. (N. Y.) 300; *Commonwealth v. North Am.*, etc., Co., 57 Pa. St. 102; *Olmsted's Appeal*, 86 Pa. St. 284; *In re Malone*, 21 S. Car. 435; *Wiederanders v. State*, 64 Tex. 133; *Hall v. Claiborne*, 27 Tex. 217; *Reid v. State*, 74 Ind. 252.

Where the occupant has been long in possession, and there are no heirs, distributees, or creditors, the public escheator

the weight of authority the title vests at once upon the death of the tenant without office found,¹ and parties in possession may be dispossessed by appropriate proceedings.²

ESCROW. — See also **BILLS AND NOTES; BONDS AND DEEDS.**

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| <p>I. Definition, 857. II. The Instrument to be delivered, 858. III. Party to whom Delivery may be made, 858. 1. <i>Grantee</i>, 858. 2. <i>Obligor or Co-Obligor</i>, 859. 3. <i>Grantee's Agent</i>, 861. IV. Condition to be performed, 863. V. Escrows and Deeds Presently, 863.</p> | <p>VI. How created, 866. VII. Second Delivery, 867. VIII. No Title passes until Conditions are performed, 867. IX. Rights of Innocent Purchaser, 869. X. When Title passes, 870. XI. Death or Disability of one of the Parties, 871. XII. Statute of Frauds, 871.</p> |
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I. Definition. — An escrow is an obligatory writing (usually, but not necessarily, in the form of a deed), delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, and then to be delivered by the depositor to the obligee, when it becomes of full force and effect.³

only, not an administrator, can recover the premises. *Smith v. Gentry*, 16 Ga. 31.

1. 4 Kent Com. *424; *White v. White*, 2 Met. (Ky.) 185; *Stevenson v. Dunlap's Heirs*, 7 T. B. Mon. (Ky.) 134; *Fry v. Smith*, 2 Dana (Ky.), 38; *Farrar v. Dean*, 24 Mo. 16; *State v. Reeder*, 5 Neb. 203; *Crane v. Reeder*, 21 Mich. 24; s. c., 4 Am. Rep. 430; *Montgomery v. Dorion*, 7 N. H. 475; *Colgan v. McKeon*, 24 N. J. L. 566; *Den v. O'Hanlon*, 21 N. J. L. 582; *O'Hanlon v. Den*, 20 N. J. L. 31; *Rubeck v. Gardner*, 7 Watts (Pa.), 455; *Hinkle's Lessee v. Shadden*, 2 Swan (Tenn.), 46; *Puckett v. State*, 1 Sneed (Tenn.), 355; *Holliman v. Peebles*, 1 Tex. 673; *Sands v. Lynham*, 27 Gratt. (Va.) 291; s. c., 21 Am. Rep. 348; *Haigh v. Haigh*, 9 R. I. 26. See also *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376.

2. Ejectment has displaced the writ of escheat. *Bliss Am. Code of N. Y. sec. 1977*. Generally conveyances of escheated lands cannot be made under provisions for the conveyance of vacant lands. *Straub v. Dimm*, 27 Pa. St. 36; *Hughes v. State*, 41 Tex. 10. See also *Armstrong v. Bittenger*, 47 Md. 103.

A grant by the State while heirs of the original grantee are living, passes nothing. *Hall v. Gittings*, 2 H. & J. (Md.) 112.

One of four owners of real estate died, and it escheated. After partition proceedings, the State conveyed an undivided fourth interest in the land. *Held*, that the grantee was not bound by the partition proceedings, the State not having assented thereto. *Holmes v. Pattison*, 25 Pa. St. 484.

Authorities for Escheat. — 2 Bl. Com. *244-257; *Coke on Littleton*; 4 Kent Com. *423-426; 3 Washb. Real Prop. *443-446; 29 Am. Dec. 232-235, note.

3. By the Touchstone an escrow is defined to be "where one doth make and seal a deed, and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed." *Sheppard's Touchstone*, 59. This definition is not exactly accurate, as will hereafter appear, and has been considerably criticized by the authorities.

Some of the other definitions of an escrow to be found in the books are, "There may be a conditional delivery, where the deed, though delivered, will not take effect until the happening of some condition annexed thereto. A deed thus delivered is called an *escrow*." 3 Washburn on Real Property, 584.

"A deed is delivered as an escrow when it is delivered conditionally; i. e., when it is delivered to a third person to keep until something be done by the grantee; and it is of no force until the condition is fulfilled." *Jackson v. Catlin*, 2 Johns. (N. Y.) 248.

"An escrow is a deed delivered to a third person, upon a future condition to be performed by either party. It must be delivered to a stranger, and the condition mentioned." *Raymond v. Smith*, 5 Conn. 559.

"A delivery may be made to a third person conditional on the performance of an act or the happening of an event, whereupon it is to be delivered to the grantee. Such delivery to a third person is called an *escrow*." *Devlin on Deeds*, § 312.

II. The Instrument to be delivered. — The instrument which may be delivered as an escrow is not necessarily a deed, but may be a bond, mortgage, note, or other obligatory writing.¹ A deed, however, is the instrument usually spoken of in the cases.

A deed differs from an escrow in one particular only, and that is in its delivery. To make the deed an escrow, the parties must have bargained and sold, and performed every act necessary to constitute a complete contract. Until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor, or is placed in the hands of a third person, pending the proposals for sale or delivery.²

III. Party to whom Delivery is made. — 1. *Grantee.* — A deed or other instrument cannot be delivered to the grantee or obligee as an escrow, to take effect on a condition not appearing on its face. In order to operate as an escrow, the delivery must be made to a stranger (one not a party), otherwise the deed or other instrument will become absolute at law, and parol evidence of conditions qualifying it is inadmissible.³

1. *Andrews, Adm'x, v. Thayer*, 30 Wis. 228; *Foy v. Blackstone*, 31 Ill. 538; *Taylor v. Thomas*, 13 Kans. 217; *Couch v. Meeker*, 2 Conn. 302; *Henshaw v. Dutton*, 59 Mo. 139; 1 *Parsons Notes and Bills*, 51.

2. *Fitch v. Bunch*, 30 Cal. 209; *Dear-dorff v. Foresman*, 24 Ind. 481; *State v. Potter*, 63 Mo. 212; *Hicks v. Goode*, 12 Leigh (Va.), 479.

3. "If I seal my deed, and deliver it to the party himself, to whom it is made, as an escrow upon certain conditions, etc., in this case, let the form of words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently." *Shep. Touch.* 59; and this is the general rule. *McCann v. Atherton*, 106 Ill. 32; *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Ill. 305; *Fairbanks v. Metcalf*, 8 Mass. 230; *Ward v. Lewis*, 4 Pick. (Mass.) 520; *Arnold v. Patrick*, 8 Paige Ch. (N. Y.) 310; *Warrall v. Munn*, 5 N. Y. 229; s. c., 55 Am. Dec. 330; *Seymour v. Cowing*, 1 Keyes (N. Y.), 535; *Braman v. Bingham*, 26 N. Y. 483; *Brackett v. Barney*, 28 N. Y. 333; *Cocks v. Barker*, 49 N. Y. 110; *Gilbert v. North Am. Ins. Co.*, 23 Wend. (N. Y.) 43; *Lawton v. Sager*, 11 Barb. (N. Y.) 349; *Brown v. Reynolds*, 5 Sneed (Tenn.), 639; *Johnson v. Branch*, 11 Humph. (Tenn.) 521; *Berry v. Anderson*, 22 Ind. 36; *M. & Ind. Plank Road Co. v. Stevens*, 10 Ind. 1; *State v. Crisman*, 2 Ind. 126; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18; s. c., 32 Am. Dec. 49; *Mossman v. Holcher*, 49 Mo. 87; *State v. Potter*, 63 Mo. 212; *Jones v. Shaw*, 67 Mo. 667; *Cin-*

cinnati, etc., R. Co. v. Iliff, 13 Ohio St. 235; *Lloyd v. Geddings*, 7 Ohio, 50; *Ordinary of New Jersey v. Thatcher*, 12 Vroom (N. J.), 403; s. c., 32 Am. Rep. 225; *Black v. Shreve*, 13 N. J. 457; *Jordan v. Pollock*, 14 Ga. 145; *Duncan v. Pope*, 47 Ga. 445; *Graves v. Tucker*, 18 Miss. 9; *Hagood v. Harley*, 8 Rich. (S. Car.) 325; *Fireman's Insurance Co. v. McMillen*, 29 Ala. 147; *Dawson v. Hall*, 2 Mich. 390; *Beers v. Beers*, 22 Mich. 42; *Herdman v. Bratten*, 2 Harr. (Del.) 396; *Pawling v. United States*, 4 Cranch (U. S.), 319; *Brown v. State*, 18 Tex. App. 326; *Truman v. McCollum*, 20 Wis. 360; *Hicks v. Goode*, 12 Leigh (Va.), 479; s. c., 37 Am. Dec. 677; *Miller v. Fletcher*, 27 Gratt. (Va.) 403; *Fuller v. Hollis*, 57 Ala. 435. Compare *Bibb v. Reid*, 3 Ala. 88.

But in *Flagg v. Mann*, 2 Sum. (U. S.) 486, *Justice Story* says, "Though there is a technical difficulty in the suggestion of the delivery of the deed to the grantee as an escrow, yet a court of equity will not govern itself exclusively by technical principles of law where the intentions of the parties will be thereby defeated. And see *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Fraser v. Davie*, 11 S. Car. 56.

And in *Dietz v. Farish*, 53 How. (N. Y.) Pr. 217, the court say, "But it is only in cases falling strictly within the exception stated — that is to say, in cases of delivery of the deed with intent to part with it as a deed, and for the benefit of the grantee — that the law, for reasons of public policy, fails to carry out the intention of the parties

A bond cannot be delivered as an escrow to one of several co-obligees, as a delivery to one is a delivery to all.¹ But where a deed is handed to the grantee, to place it in a third person's hands to keep as an escrow, and it is so received and transmitted, no title vests in the grantee till a second delivery.²

2. *Co-Obligor*. — It has been frequently decided that a deed may be delivered in escrow to a co-obligor, even though such obligor be a principal bondsman.³ Thus, the agreement of a surety with his principal, that a bond which he has signed shall not be delivered to the obligee until other signatures are secured, has been regarded as creating an escrow, and thus relieving the surety from liability in case the condition is not performed, especially where

as expressed in the condition annexed to the delivery, and rejects parol evidence as to such condition. If, though there be a delivery to the grantee, the deed is delivered with the intent that the grantee shall not take it as the deed of the grantor, nor receive it as grantee, but as the agent of the grantor for a special purpose, as, for instance, for the purpose of transmitting it to a third person, to be held by the latter in escrow, the case does not come within the exception. A deed may be deposited with the grantee, or handed to him, for any purpose other than as the deed of the grantor, or as an effective instrument between the parties, without becoming at all operative as a deed," citing *Ford v. James*, 2 Abb. Ct. of App. 159; *Gilbert v. North Am. Fire Ins. Co.*, 23 Wend. 43; *Cocks v. Barker*, 49 N. Y. 107; *Braman v. Bingham*, 26 N. Y. 483; *Warrall v. Munn*, 5 N. Y. 229.

And in *Brckett v. Barney*, 28 N. Y. 341, it is held that the application of the rule is limited by this, that it shall apply to those cases only where it is intended that the conveyance shall ultimately take effect from the force of such delivery, without further act on the part of the grantor.

In *Seymour v. Cowing*, 4 Abb. App. Dec. 200, it is held that an instrument not under seal may be delivered on conditions to the payee or other person entitled to the benefit of it, so as to render the performance of the conditions necessary to perfect such person's title.

It has also been held that the rule of law, that a deed cannot be delivered to a party to whom it is made, as an escrow, to be the deed of the obligor only on condition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; not to deeds which upon their face import that something more is to be done besides delivery to make them competent and per-

fect contracts according to the intention of the parties. *Wendlinger v. Smith*, 75 Va. 309; *Hicks v. Goode*, 12 Leigh (Va.), 479; s. c., 37 Am. Dec. 677.

And where a composition deed was executed on part of a surety, and delivered to a creditor, to be void if the creditors did not sign it, the creditor taking it to get their signatures, it was held to be an escrow of no binding obligation unless all the creditors signed it. *Johnson v. Baker*, 4 Barn. & Ald. 440.

1. *Moss v. Riddle*, 5 Cranch (U. S.), 351; *Perry v. Patterson*, 5 Humph. (Tenn.) 133; *State v. Crisman*, 2 Ind. 126; *Blume v. Bowman*, 2 Ired. (N. Car.) L. 338.

2. 3 Washburn on Real Prop. (5th ed.) 318; *Shep. Touch.* (Prest. ed.) 59; *Murray v. Stair*, 2 Barn. & C. 82; *Den. d. Gibson v. Partee*, 2 Dev. & B. (N. Car.) 530; *Simonton's Estate*, 4 Watts (Pa.), 180; *Jackson v. Sheldon*, 22 Me. 569; *Gilbert v. North Am. F. Ins. Co.*, 23 Wend. (N. Y.) 43; s. c., 35 Am. Dec. 543; *Fairbanks v. Metcalf*, 8 Mass. 230. Compare *Braman v. Bingham*, 26 N. Y. 283.

3. *State Bank v. Evans*, 15 N. J. L. 155; s. c., 28 Am. Dec. 400; *Black v. Lamb*, 1 Beas. (N. J.) 108; *Pawling v. United States*, 4 Cranch (U. S.), 219; *Duncan's Heirs v. United States*, 7 Pet. (U. S.) 435; *Roberts v. Jackson*, 1 Wend. (N. Y.) 478; *Blume v. Bowman*, 2 Ired. (N. Car.) L. 338; *Fertig v. Bucher*, 3 Pa. St. 308; *Bibb v. Reid*, 3 Ala. 88. But see 3 Washburn on Real Property (5th ed.), 318, where it is said, "If an obligor execute an instrument, and deliver it to his co-obligor, or retain it himself, as an escrow, to be delivered to the obligee, it will not have that character. The importance of this will be perceived when it is recollected, that, after a deed has been delivered as an escrow, it is no longer revocable by the maker; but the same will take effect whenever the condition shall have happened, or been complied with, upon which it is to be finally delivered."

the condition is an express one, and the instrument is incomplete upon its face.¹ In most of the cases, however, it is held that the obligor, by his incaution, imparts to the depository of the instrument delivered in escrow such an apparent right to pass it away in an unqualified form to the obligee, as to prevent such obligor from setting up the existence of a condition that was to have been complied with before such instrument became deliverable. It is a question of estoppel.²

1. *Johnson v. Baker*, 4 B. & Ald. 440; *Leaf v. Gibb*, 4 C. & P. 466; *State Bank v. Evans*, 3 Green (N. J.) L. 155; s. c., 28 Am. Dec. 400; *Ayres v. Milroy*, 53 Mo. 516; *Fletcher v. Austin*, 11 Vt. 447; *Daniels v. Gower*, 54 Iowa, 319; *Preston v. Hull*, 23 Gratt. (Va.) 600; *Crawford v. Foster*, 6 Ga. 202; *United States v. Hammond*, 4 Biss. (U. S.) 283; *People v. Bostwick*, 32 N. Y. 445. See, however, distinguishing the last cited case, *Russell v. Freer*, 56 N. Y. 67; *Richardson v. Rogers*, 50 How. (N. Y.) Pr. 403.

In *Pawling v. United States*, 4 Cranch (U. S.), 219, *Chief Justice Marshall* said, "The bond upon its face purports to be delivered absolutely, and it is not to be doubted that obligees would be much more secure against fraud if the evidence that the writing was delivered as an escrow appeared upon its face, than by admitting parol evidence of that fact; but the law is settled otherwise, and is not to be disturbed by this court."

In *Smith v. Kirkland*, 81 Ala. 345, the court say, "It has been long settled in this State, by a line of decisions which seem to be supported by the weight of authority, that it is a good defence to an action on a bond that a defendant, who is a surety, intrusted the bond to the principal obligor as an escrow, with authority to deliver it only on the express condition that other named persons should join as sureties in its execution prior to such delivery, and that the instrument was delivered to the obligee in violation of this condition. *Guild v. Thomas*, 54 Ala. 414, and authorities there cited; *Bibb v. Reid*, 3 Ala. 88. There are two established modifications of this rule: (1) It does not apply to commercial paper which has come into the hands of a *bona fide* purchaser before maturity, who is without notice of the condition. *Marks v. First National Bank*, 79 Ala. 550; 1 *Daniel Neg. Instruments*, 3d ed. §§ 855, 856. (2) It does not apply where the surety, having knowledge or notice of the delivery of the bond, suffers the principal to act under it to the prejudice of the obligee, so as to waive the condition, and thus estop the surety from insisting on the defence. *Wright v. Lang*, 66 Ala. 389."

To make out the defence of the delivery

of a bond as an escrow, the delivery must be upon an express condition; mere expectation, based upon the statement of the principal obligor made casually, and not by way of promise, that other persons would execute the instrument, is not sufficient. *Currick v. French*, 7 Humph. (Tenn.) 460.

2. *State v. Peck*, 53 Me. 284; *Dair v. United States*, 16 Wall. (U. S.) 1; *Butler v. United States*, 21 Wall. (U. S.) 272; *State v. Pepper*, 31 Ind. 76; *Deardorff v. Foresman*, 24 Ind. 481; *Webb v. Baird*, 27 Ind. 368; *Blackwell v. State*, 26 Ind. 204; *State v. Crisman*, 2 Ind. 126; *Taylor v. Craig*, 2 J. & J. Marsh. (Ky.) 449; *Hall v. Smith*, 14 Bush (Ky.), 604; *Jordan v. Jordan*, 10 Lea (Tenn.), 124; *Dixon v. Dixon*, 3 Vt. 450; *Nash v. Fugate*, 32 Gratt. (Va.) 595; *Cutler v. Roberts*, 7 Neb. 4; *State v. Potter*, 63 Mo. 212; *Russell v. Fr  er*, 56 N. Y. 67; *Chicago v. Gage*, 95 Ill. 593; *Trustees v. Sheik*, 119 Ill. 579; *Smith v. Peoria Co.*, 59 Ill. 414; *Abbey Hom. Assn. v. Willard*, 48 Cal. 614; *Taylor County v. King* (Iowa), 34 N. W. Rep. 774.

A plea by A., a surety on a bond, that he signed and delivered the bond to the principal obligor as an escrow, not to be delivered to the obligor unless B. should sign it, is not good unless the condition is indicated to the obligee by something apparent upon the bond, or is brought to his knowledge by extraneous evidence before he accepts it. *State v. Churchill*, 48 Ark. 426.

Where a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others, not named in the instrument, shall sign before it is delivered to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of such condition or circumstances which should put him upon inquiry, the condition being imposed will not avail the surety. This is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel. *State v. Pepper*, 31 Ind. 76; overruling *Pepper v. State*, 22 Ind. 399.

The question was directly raised in *Dair v. United States*, 16 Wall. (U. S.) 1, and it was held that the surety was bound. *Judge Davis* said, "Why should not this principle

3. *Grantee's Agent.* — A delivery to the agent of the grantee or the party who is to have the benefit of the instrument has the same effect as a delivery directly to the grantee, and cannot create an escrow.¹ But it appears that the agent of the grantee or beneficiary is not by this alone "incapacitated from

of estoppel, on every reason of justice and good faith, be applied to the covenant on which this action is founded? The bond was in all respects regular, executed according to prescribed forms, and accepted by the officer whose duty it was to take it, as a completed contract. There was nothing on the face of the paper, or in the transaction itself, to put the officer on inquiry, or to raise even a suspicion in his mind that a condition was annexed to the delivery of the instrument. . . . If the sureties who were relied on to perform the conditions in case of the failure of the principals can defeat a recovery on the ground that they did not intend to be bound unless another shared the responsibility, and so told the principal obligors who solicited their signatures. But they did not inform the revenue officer of this condition, and their omission to do so then estops them from setting it up now. The silence which they imposed upon themselves at the time makes their present conduct culpable; for it is not to be doubted that the officer in charge of this business would have acted differently if the information which the principals received had been communicated to him. In the execution of the bond the sureties declared to all persons interested to know that they were parties to the covenant, and bound by it; and, in the belief that this was so, they were accepted, and the license granted. They cannot, therefore, contravene the statement made and relied on without a fraud on their part and injury to another; and where these things occur, the estoppel is imposed by law. . . . The case of *Pawling v. U. S.*, 4 Cranch, 219, has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. . . . We are aware that there is a conflict of opinion in the courts of this country upon the point decided in this case, but we think we are sustained by the weight of authority. At any rate, it is clear, on principle, that the doctrine of estoppel *in pais* should be applied to this defence."

For a valuable article upon this subject see 37 *Abb. L. J.* 188.

Negotiable Instruments. — If a surety signs and delivers a note to his principal, to be held until it is signed by another surety, it is not an escrow; and if the

principal delivers it to the obligee before it is signed by the other surety, it will be valid and binding on those who have signed it. *Millett v. Parker*, 2 Metc. (Ky.) 608.

And generally in such cases, where the question arises between the injured party to the note and a payee who has taken it for value, without notice of the condition, the former, having executed it, and intrusted it to a maker, is regarded as having constituted him his agent to negotiate it; and, having clothed him with the means of perpetrating the fraud, must bear the loss. *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; *Passumpsic Bank v. Goss*, 31 Vt. 315; *F. & M. Bank v. Humphrey*, 36 Vt. 354; *Ayres v. Milroy*, 53 Mo. 516; *Bank v. Phillips*, 17 Mo. 29; *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; *Merriam v. Rockwood*, 47 N. H. 81; *Gage v. Sharp*, 24 Iowa, 15; *Daniels v. Grover*, 54 Iowa, 319; *Steaver v. Weld*, 61 Iowa, 704; *Deardorff v. Foreman*, 24 Ind. 481; *Clark v. Brice*, 64 Ga. 486; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Clark v. Thayer*, 105 Mass. 216; 1 *Daniel Neg. Inst.* sec. 854.

But there are some decisions not in conformity with this rule. In *Perry v. Patterson*, 5 *Humph. (Tenn.)* 133; s. c., 42 *Am. Dec.* 424, it was held that it constitutes an escrow for one person to sign a note as surety upon the express condition that another person's signature is also to be obtained, and to deliver the note to the maker for that purpose; and a court of equity will enjoin a suit at law upon such a note, if delivered to the payee or his agent, without the other signature, if the note was not taken as a full compliance with his previous agreement to receive a note with two sureties.

A party who signed his name as surety to certain clerk and master's notes, with the understanding that the suretyship should not become operative until another solvent surety had been procured, which, however, was neglected, and judgment by motion taken on the notes, is entitled to relief in equity. *Major v. McNeiley*, 7 *Heisk. (Tenn.)* 294.

And see *People v. Bostwick*, 32 *N. Y.* 445, directly denying the doctrine of *Millett v. Parker*, *supra*.

1. *M. & Ind. Plank Road Co. v. Stevens*, 10 *Ind.* 1; *Wight v. Shelby*, etc., *R. Co.*, 16 *B. Mon. (Ky.)* 4; *Duncan v. Pope*, 47 *Ga.* 445.

becoming, as the agent of both parties, the depository of an escrow.¹

And it is held that there is not such a personal identity between a corporation and its officers, that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition.²

1. In *Watkins v. Nash*, L. R. 20 Eq. 262, a reconveyance was executed by one of two trustee mortgagees expressly as an escrow, conditional on payment of the mortgage debt, and was left by him with his co-trustee. The co-trustee afterwards also executed the reconveyance expressly as an escrow "upon the faith of an undertaking that the business should be forthwith settled," and handed the reconveyance to the solicitor of the mortgagor. This was held to be a good delivery as an escrow, the vice-chancellor remarking, "It was a delivery to him as an agent for all parties for the purpose of that delivery."

This is also the position taken in the case of *Cincinnati, etc., R. Co. v. Iliff*, 13 Ohio St. 235, where, in a very well considered opinion, the court hold that the delivery by the releasor of an otherwise perfectly executed deed of release, to a known agent of the releasee, is, in law, a delivery to the principal; and it will be operative, according to its terms, from the time of such delivery, no matter what verbal stipulations or conditions may have accompanied its delivery in respect to the operation of the deed after delivery. But the mere delivery of manual possession of the deed is not necessarily a delivery of the deed; and in cases where an acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make the agent of the releasee his own agent, for the purpose of holding the deed as an escrow, and returning it to him, the releasor, in case of the non-performance of a stipulated condition. There is no such personal identity between the releasee and his agent as to preclude the latter from becoming the depository of an escrow. The court, after giving Chancellor Kent's definition of an escrow, says, "The phrase 'a stranger,' used in this definition, or the phrase 'a third person,' which in many of the books is used interchangeably with it, it seems to me can mean no more than this — a stranger to the deed, as not being a party to it; or at most, this — a person so free from any personal or legal identity with the parties to the instrument, as to leave him free to discharge his duty as a depository to both parties, without involving a breach of duty to either. And I believe that no case can be found, no opinion of any jurist can be cited, to the effect that the agent of one

party is incapacitated from becoming the depository of an escrow; and if we were to decide that such incapacity existed, we would originate a distinction hitherto unknown to the books." Citing *Warrall v. Munn*, 5 N. Y. 229; *Fairbanks v. Metcalf*, 8 Mass. 230; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359.

2. *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327.

In the case first cited the court say, "In *Bowker v. Burdekin*, 11 Mees. & W. 145, *Parke, B.*, says, 'I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that, in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words; but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction: and therefore, though it is in form an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.' We find no sufficient proof of the delivery of the deeds in question. The presumption of a delivery as an independent and substantive contract is repelled, not only by the answer, but by the proofs of the contract which was in fact made, and of which the deeds were but an integral part; a contract of which the company had full notice, for it was not an unimportant party thereto. It must be borne in mind that this court is now sitting as a court of equity, which regards not the circumstances or outward ceremonial, but the substance of the act; and therefore we think that, if the respondent had entered the parlor of the company, the president and directors being there in session, and by the most formal act had delivered the deeds in question to the head of the corporation, stating the circumstances under which, and to accomplish which, they were executed, we should be compelled to regard it as a delivery, to take effect only on the final consummation of the contract."

In *Andrews v. Thayer*, 30 Wis. 228, it is held that the fact that one is a director of a railroad company, or even that he has a limited or quasi agency in behalf of the company to procure the execution of its

IV. Condition to be performed.—It is a general rule that a deed delivered to a third person is viewed as an escrow only in case it is agreed that the deed is to be delivered to the grantee upon the performance by him of a stipulated condition, or the happening of a certain event; hence a deed deposited with a third person by the grantor, to be delivered to the grantee upon the order of the grantor, is not an escrow, as it is deemed in law to be still in the possession of the grantor.¹ In order to create an escrow, the grantor must part with all dominion and control.² The condition to make the instrument an escrow must be one to be performed by the grantee.³ And, where a deed is delivered as an escrow, subsequent instructions by the grantor to the depositary cannot change the original nature of the transaction.⁴

The condition upon which a deed is placed in escrow may be expressed in writing, or rest in parol, or be part in writing and part oral.⁵

V. Escrows and Deeds Presently.—A distinction is recognized by many of the authorities between the delivery of an instrument as the deed of the party, to be delivered to the grantee upon the happening of some contingency or the performance of a condition, and the delivery of the instrument as an escrow, to take effect as a deed upon such contingency happening or condition performed. In the former case it is said to be the party's deed presently; and

notes and mortgages, will not prevent his receiving such a note and mortgage as an escrow.

1. *Fitch v. Bunch*, 30 Cal. 208. See also *James v. Vanderheyden*, 1 Paige (N. Y.), 385; *Arnold v. Patrick*, 6 Paige (N. Y.), 310; *Evans v. Gibbs*, 6 Humph. (Tenn.) 405; *Carrick v. French*, 6 Humph. (Tenn.) 459; *Johnson v. Branch*, 11 Humph. (Tenn.) 521; *Loubat v. Kipp*, 9 Fla. 60; *State v. Thatcher*, 41 N. J. L. 403; *Graves v. Tucker*, 18 Miss. 9; *Devlin on Deeds*, § 318.

2. *Devlin on Deeds*, § 324; *Campbell v. Thomas*, 42 Wis. 437.

Where a conveyance of land, and a bond and mortgage to secure the purchase-money, were left "as escrows" subject to the direction of the parties: *held* not an escrow. *James v. Vanderheyden*, 1 Paige, 385; *Stinson v. Anderson*, 96 Ill. 373.

The person to whom an escrow has been delivered is agent of both grantor and grantee. He does not hold the deed subject to the control of the grantor, who has no power over it, and can no more countermand its delivery than he could that of an absolute deed. *Wellborn v. Weaver*, 17 Ga. 267; s. c., 63 Am. Dec. 235.

"But it seems that if a person execute a voluntary conveyance without consideration, intending it as a donation of land, and place it in the hands of a custodian,

he may withdraw it at any time before delivery; the custodian is not the judge of the performance of the conditions, where delivery is conditional, and he has no power to deliver the instrument until the donor is satisfied. Therefore where a deed was thus executed, and left with a person not to be delivered until signed and acknowledged by the grantor's wife, nor until the grantee should execute a mortgage, as the grantor termed it, securing to him and his wife a life estate in the premises, and the custodian placed the deed on record without authority, after the grantor's death, although it had not been signed and acknowledged by the grantor's wife, and the mortgage had not been delivered, the deed was set aside at the suit of the heirs of the grantor, as a cloud upon their title." *Devlin on Deeds*, § 325; citing and criticising *Haig v. Adrian*, 83 Ill. 267.

3. *White's Adm'rs. v. Williams*, 2 Green Ch. (N. Y.) 376.

But in *Raymond v. Smith*, 5 Conn. 555, it was held that a conveyance deposited with the agreement that it is to be delivered back to the grantor upon the performance of some condition by him, as give the grantee certain security for a debt, is an escrow.

4. *Robbins v. Magee*, 76 Ind. 381.

5. *Stanton v. Miller*, 58 N. Y. 192.

in the latter, not until the event happens or the condition be performed.¹

Whether, when a deed is executed and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words and purposes expressed, than upon the name which the parties give to the instrument.² When the future delivery is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be generally deemed the grantor's deed presently.³ But if it be expressly delivered as an

1. Washburn on Real Property (5th ed. vol. 3, p. 318) says, "But a deed is a presently operative deed, and not an escrow, though placed in a stranger's hands, with a direction to deliver it to the grantee at some future day or upon a certain event, unless there be some condition connected with such delivery, the happening of which, by the terms of the authority in the receiver, must precede delivery to the grantee; and until then the deed is to have no effect. . . . The law is thus stated by Perkins: 'If I deliver an obligation or other writing unto a man as my deed, to deliver unto him to whom it is made, when he shall come to York it is my deed presently; and if he shall deliver it to him before he come to York, yet I shall not avoid it; and if I die before he come to York, and afterwards he cometh to York, and he delivereth the deed unto him, it is clearly good, and my deed, and that it cannot be if it were not my deed before my death' (Perkins, § 143)."

In Com. Dig. title Fait., A, 3, it is said, "If it be delivered as his deed, to a stranger, to be delivered to the party upon the performance of a condition, it shall be his deed presently; and if the party obtain it, he may sue before condition performed." And for this the digest cites 2 Roll. 25, L. 30, and 1 Leon. 152.

This doctrine is sustained by Wheelwright v. Wheelwright, 2 Mass. 447; Foster v. Mansfield, 3 Metc. (Mass.) 412; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436; Murray v. Stair, 2 Barn. & C. 82; Shaw v. Hayward, 7 Cush. (Mass.) 175.

Materiality of Distinction. — "This distinction is material, because if it be an escrow, no title passes to the grantee until the second delivery; while, if it be a present deed, the title upon the happening of the contingency, or upon the lapse of the specified time, passes by relation from the time the instrument was placed in the hands of

the depository or trustee. As the intent of the parties is the point to be ascertained, each case must be decided upon its own peculiar circumstances, upon the language employed, the situation of the parties, the objects to be obtained, and such other facts as may throw light upon the intention of the parties. In a case in New York, — *Hathaway v. Payne*, 34 N. Y. 92, — *Potter*, J., reviews the cases at some length, and in delivering the opinion of the court observes, 'The cases can be multiplied, each varying from every other by some nice shade of difference upon the question whether in the present case the deed was an escrow in the hands of the depository, or whether the depository was made the trustee of the grantor. In the former case a second delivery is generally required before the title passes; in the latter the title passes at the instant of delivering the deed to the depository. This, I think, is the true distinction. In the case at bar there was no direction by the grantors that the deed was left as an escrow, and it presents no evidence of *intent* on the part of the grantors to make this deed an escrow. There is no condition mentioned in the agreement to be performed before delivery which in law would create it an escrow; and presumptions arising from the language of the agreement, being taken most strongly against the grantor, forbids any implication of its being an escrow.' " Devlin on Deeds, § 320.

2. *Foster v. Mansfield*, 3 Metc. (Mass.) 412; 3 Washburn on Real Property (5th ed.), 319.

3. 3 Washburn Real Prop. (5th ed.) 319; *Foster v. Mansfield*, 3 Metc. (Mass.) 412. "Still," say the court in this case, with reference to a deed presently, "it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery. But the distinction is not now

escrow, to be delivered at a future time, it is not a present conveyance.¹

What the nature of the delivery was, whether absolute or conditional, and what were the actual intentions of the parties, are questions of fact to be settled by a jury, where the evidence leaves any doubt upon the subject.²

But there is another line of decisions which hold that a writing delivered by the maker of it, as his deed, to a third person, in confidence that the latter will not deliver it to the grantee until a certain condition is performed, or delivered in such manner, as an escrow, to take effect as the maker's deed, upon a certain matter being done, is in either case an escrow.³

very material, because where the deed is delivered as an escrow, and afterwards and before the second delivery the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. *Wheelwright v. Wheelwright*, 2 Mass. 254."

In *Prutsman v. Baker*, 30 Wis. 644; s. c., 11 Am. Rep. 592, *Chief Justice Dixon* said, "Many and perhaps most of the authorities make a distinction between cases where the future delivery is to depend upon the payment of money or the performance of some other condition, and cases where it is to depend on the happening of some contingency; holding that the former is an escrow, but that the latter will be deemed the grantor's deed presently. This distinction will be found, however, not to be in all cases correct, since it will frequently happen that it will defeat the manifest intention of the parties which it is conceded should govern."

In *Clark v. Gifford*, 10 Wend. (N. Y.) 310, it is held that a statement by the grantee that he delivers the instrument as his deed, even though he afterwards adds a condition, strongly indicates an intention that it shall take immediate effect. "Such a declaration, however," say the court, "is, I apprehend, but matter of evidence to be weighed in connection with the other circumstances of the case in order to determine the real character of the transaction."

1. 3 Washburn Real Prop. (5th ed.) 320; citing *Foster v. Mansfield*, 3 Metc. (Mass.) 414; *Price v. Pittsburg*, etc., R. Co., 34 Ill. 13. See 2 Roll. Abr. 24, pl. 17; *Tooley v. Dibble*, 2 Hill (N. Y.), 641; *Braman v. Bingham*, 26 N. Y. 483; *Hathaway v. Payne*, 34 N. Y. 92; *Cook v. Brown*, 34 N. H. 460.

2. *Clark v. Gifford*, 10 Wend. (N. Y.) 310; *White v. Bailey*, 14 Conn. 271; *Hatch*

v. Hatch, 9 Mass. 310; *Furness v. Meek*, 27 L. J. Ex. 34.

3. *State Bank v. Evans*, 3 Green (N. J.) L. 155; s. c., 28 Am. Dec. 400; *Johnson v. Baker*, 4 Barn. & Ald. 440; *Jackson v. Sheldon*, 22 Me. 569; *Millett v. Parker*, 2 Metc. (Ky.) 608.

This is also the position taken by *Chancellor Kent*. He says, "The distinction on this point is quite subtle, and almost too evanescent to be relied on." 4 Kent Com. 454.

In *Stone v. Duvall*, 77 Ill. 475, the grantor executed a deed in favor of his married daughter, and handed it to a third person, with instructions to have it recorded, but not to deliver it to the grantee until the grantor's death. Afterwards the grantee died, and the grantor filed a bill against her heirs to set the deed aside. The court decided that the deed was not delivered absolutely, but as a mere escrow; but that the grantor could not revoke it, or set it aside, although he was entitled to the use of the premises until his death. The court said, "The fact that he (the custodian of the instrument) was directed to hold the deed, and not deliver it till the death of Duvall, renders it absolutely certain that the grantor did not intend that the deed should take effect until that time. . .

Was this, then, a delivery as an escrow? *Kent, C. J.*, in the case of *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, says, 'A deed is delivered as an escrow when the delivery is conditional; that is, when it is delivered to a third person to keep until something be done by the grantee: and it is of no force until the condition be fulfilled.' Sheppard, in his *Touchstone*, p. 58, gives substantially the same definition, except that he does not limit the performance of the act to the grantee, which seems to us to be the more accurate rule. Now, this deed was to be delivered on the death of Duvall. That was the express condition upon which it was placed in the hands of the justice; and, according to the authority in the case

VI. How created. — It is not necessary that the term "escrow" should be used when an instrument is delivered to a third person, to prevent its taking immediate effect. That term evinces more clearly and distinctly than any other the actual intention of the parties; but where such intention is indicated in any other manner, effect will be given to it, unless the technical or legal phraseology employed by the parties renders it impracticable.¹

of *Jackson v. Catlin*, *supra*, it was delivered as an escrow, and could not take full effect until the thing happened that was conditional to its delivery; and, Duvall not having died, the deed has not yet vested the title in full, and cannot until that event shall occur. Sheppard lays it down as the law, that 'the delivery is good; for it is said in this case, that, if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the lifetime of the parties; and *postea consummata existens*, by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery.' But in such a case, the delivery only relates back to the first delivery so as to carry out the intention of the grantor, and to vest the title. It would not give the grantee a right to intervening rents and profits. So in this case the deed is an escrow that will not take effect until Duvall's death, when it may be delivered to the heirs of the grantee, and it will be held to have taken effect so as to have vested such a title in the mother as to pass the fee to them. Until that time, Duvall will be entitled to the use of the property as though he had a life estate, and the children of Mrs. Stone the remainder."

1. *Clark v. Gifford*, 10 Wend. (N. Y.) 310; *Gilbert v. North Am. Fire Ins. Co.*, 23 Wend. (N. Y.) 43; *Jackson v. Catlin*, 2 Johns. (N. Y.) 259; *Jackson v. Sheldon*, 22 Me. 569; *Fairbanks v. Metcalf*, 8 Mass. 230; *White v. Bailey*, 14 Conn. 271.

In Sheppard's Touchstone, 58, it is said, "The words, therefore, that are used in the delivery must be after this manner: I deliver this (writing) to you as an escrow (namely, *scriptum*, a mere writing; thus negating the application of the terms to a perfect deed), to deliver (it) to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon the condition that he deliver up the old bond that he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep until such a day, etc., upon condition that, if before this day he to whom the escrow is made shall pay to me 20*l.*, or give me a horse, or infeoff me of the manor of Dale,

or perform any other condition, that then you shall deliver this escrow to him as my deed. For if, when I shall deliver the deed to the stranger, I shall use these or the like words: I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or, I deliver this to you as my deed, to deliver to him to whom it is made when he comes to London,—in these cases the deed doth take effect presently (because the party hath made the writing his deed by the mode of delivery; for, as he has delivered the writing as his deed, the writing shall have that effect), and the party is not bound to perform any of the conditions (and its operation cannot be defeated or suspended by reason of the conditions; but equity will relieve if the conditions be not performed)."

But the strictness of the old rule is greatly relaxed by modern decisions; and if the instrument is delivered as an escrow, and not in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery, as soon as the event happens, or the consideration is performed upon which the effect had been suspended, if this construction should be then necessary in furtherance of the intentions of the parties. *Hatch v. Hatch*, 9 Mass. 307; *Price v. Pittsburg, etc., R. Co.*, 34 Ill. 13.

"I take it to be now settled," said *Parke, B.*, in *Bowker v. Burdekin*, 11 M. & W. 128, "though the law was otherwise in ancient times, that, in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words; but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction; and therefore, although it is in form an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will, nevertheless, operate as an escrow."

What, then, are the circumstances from which such an intention may be inferred? It was inferred, in *Johnson v. Baker*, 4 B. & Ald. 440, from the circumstance that a composition deed, after being executed by the surety, was delivered to one of the creditors to get it executed by the rest of the creditors. But see *Ponsford v. Walton*, L.R. 3 C. P. 167.

VII. Second Delivery. — The depository of an escrow is regarded as the agent of both the grantor and the grantee. He is hence as much bound to deliver the instrument to the grantee when the condition is performed, as he is to withhold it until such performance. Consequently no formal delivery to the grantee is generally necessary, as, upon the condition being performed, it is already in the possession of the grantee's agent.¹ The necessity of the second delivery, however, may be created by the words of the first, and in such case equity will enforce the delivery of a deed held as an escrow, where the condition has been fulfilled.²

The destruction or detention of the deed by the grantor after performance of the condition, will not prevent the deed taking effect.³

VIII. No Title passes until Conditions are performed. — When a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. The transaction is incomplete. It is not the grantor's deed until the second delivery. Even if the grantee obtains possession of it before the

In *Gudgen v. Besset*, 6 E. & B. 896, lease by deed, executed by the lessor, was held to be an escrow, on the ground that it was retained by the lessor, the lessee being let into possession as tenant from year to year only, until he paid a certain sum for fixtures. In this case *Coleridge, J.*, said that the "detention of the parchment by the plaintiff himself is a fact very significant of what the intention was."

1. Laws of escrow, 15 Cent. L. J. 162;
3 Washburn on Real Prop. (5th ed.) 323.

"Whether an actual delivery to the grantee is necessary in order to give effect to the instrument as the deed of the grantor, seems not to be well settled; but the inference would appear to be, that it is not. The indication from the authorities quite clearly is, that it becomes the grantor's deed the moment the conditions have been performed, or the event has happened upon which the grantee is entitled to the possession of it, and that henceforth the depository, or holder, is regarded as the mere agent or trustee for the grantee." *Prutman v. Baker*, 30 Wis. 644; s. c., 11 Am. Rep. 592.

The depository of an escrow is as much bound to deliver the deed on performance of the condition, as he is to withhold it until performance; and being thus in the hands of the agent of the grantee, the deed takes effect the moment the condition is performed, without any formal delivery into the hands of the grantee. *Shirley v. Ayres*, 14 Ohio, 308; and see *Simpson v. McGlathery*, 52 Miss. 723; *Whitfield v. Harris*, 48 Miss. 710.

2. To compel the delivery of deeds and

other instruments in favor of persons legally entitled to them is an old head of equity jurisdiction, is a most important branch of that jurisdiction, and is exerted in all suitable cases in favor of persons entitled to the possession of deeds or other instruments. And a case where a deed has been delivered in escrow, upon a condition which has been fulfilled, would seem to be one which especially justifies and calls for the exercise of this jurisdiction, since the withholding of the deed interferes with, and probably prevents, the vesting of the legal title. *Stanton v. Miller*, 65 Barb. (N. Y.) 58.

After a vendor has been put in possession of the purchased premises, and a deed has been executed and placed in the hands of a third person, to be delivered upon payment of the price, such deed is an escrow. The vendor will have no right to recall it; but the vendee, upon tender of the price, will be entitled to delivery of it. *Cannon v. Handley* (Cal.), 13 Pac. Rep. 315.

Defendant executed to plaintiff his note and mortgage in settlement of a cause of action against him in her favor. The securities were delivered to a third party, to be handed by him to plaintiff when she had executed and delivered to him a good and sufficient release and satisfaction of her claim. *Held*, that this was a delivery in escrow, and that, when plaintiff tendered the release to the third party, she was entitled to the possession of the securities. *Schmidt v. Deegan* (Wis.), 34 N. W. Rep. 83. And see *Knopf v. Hansen* (Minn.), 33 N. W. Rep. 781.

3. *Regan v. Howe*, 121 Mass. 424.

condition has been performed, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. The grantee cannot acquire the title by gaining possession of the deed by theft, by fraud, or by the voluntary act of the depository, but only by performance of the condition. The depository has no authority to waive such performance, and an unauthorized delivery by him of the deed which he holds in escrow is entirely ineffectual to pass the title.¹ Until the performance of the condition, the

1. Daggett v. Daggett, 143 Mass. 516; Wheelwright v. Wheelwright, 2 Mass. 447, 452; Foster v. Mansfield, 3 Met. 412; O'Kelly v. O'Kelly, 8 Met. 436; Calhoun v. American Emigrant Co., 93 U. S. 124, 127; Watkins v. Nash, L. R. 20 Eq. 262; 3 Washb. Real Prop. (5th ed.) 321; Jackson v. Rowland, 6 Wend. (N. Y.) 666; Cagger v. Lansing, 57 Barb. (N. Y.) 421; Green v. Putnam, 1 Barb. (N. Y.) 500; People v. Bostwick, 32 N. Y. 450; Smith v. S. R. Bank, 32 Vt. 341; Stiles v. Brown, 16 Vt. 563; Dyson v. Bradshaw, 23 Cal. 528; Fitch v. Bunch, 30 Cal. 208; Carr v. Hoxie, 5 Mason (U. S.), 60; Carter v. Mills, 30 Mo. 439; Townsend v. Hawkins, 45 Mo. 285; Everts v. Agnes, 4 Wis. 343; s. c., 65 Am. Dec. 314; Berry v. Anderson, 22 Ind. 36; State Bank v. Evans, 15 N. J. L. 155; Black v. Shreve, 13 N. J. Eq. 458; Rhodes v. Gardiner, 30 Me. 110; Abbott v. Alsdorf, 19 Mich. 157; Land Co. v. Peck, 112 Ill. 408; Illinois Cent. R. Co. v. McCullough, 59 Ill. 170; White v. Core, 20 W. Va. 272; Patrick v. McCormick, 10 Neb. 1; Peter v. Wright, 6 Port. (Ind.) 183; Fraser v. Davie, 11 S. Car. 56; Roberts v. Mullenix, 10 Kan. 22.

The delivery of a deed by one in whose possession it is placed to be delivered only upon condition, before a compliance with the condition, is invalid; such deed passes no title to the grantee, and the grantor may assail and overthrow it. In such case the grantor is not estopped to set up the invalidity of the deed by acting upon the belief that the condition imposed had been complied with before its delivery to the grantee. Robbins v. Magee, 76 Ind. 381.

In People v. Bostwick, 32 N. Y. 445, it is held, that, if the custodian be the general agent of the signer in the business to which the instrument relates, his delivery thereof, though contrary to his instructions, would bind his principal. If such custodian be the special agent, and if his agency relate only to the particular document which he is authorized to deliver only on specified conditions, which he does not observe, but delivers the instrument in violation of his instructions, the delivery is a nullity, and will not bind the principal. And in Black v. Shreve, 13 N. J. Eq. 455, Whippley, J., said, "If the party to be bound suffer the

paper to go into the hands of a third person, with authority to deliver it in case certain conditions are complied with, a transfer of the paper without compliance with the conditions is no delivery, for want of authority in the agent to do the act. It is the duty of the party thus accepting a tradition of the instrument to see to it that the agent in the act of transfer is authorized to do it, unless he be the party's general agent." But in Chicago, etc., Land Co. v. Peck, 112 Ill. 408, it is held that the fact that a person is the depository of an escrow, renders him a special and not a general agent, and the person dealing with him is bound to know the extent of his powers. And see Smith v. S. R. Bank, 32 Vt. 341.

In Hinman v. Booth, 21 Wend. (N. Y.) 267, it was held that the condition must be literally fulfilled, and that, where the condition was that the grantee was to give a bond for the support of a third person, and such bond had not been given, the deed could not take effect, although the support had been in fact furnished such third person during his life, and he had deceased.

Where a deed has been delivered without authority, the grantor may recover it by action, or have it removed as a cloud upon his title. Prutsman v. Baker, 30 Wis. 644.

The plaintiff had executed its negotiable coupon bonds, which, by their terms, bore interest at the rate of six per cent per year, and had deposited them in escrow, to be delivered to the defendant only upon the performance of certain conditions. The defendant had wrongfully procured the delivery of the bonds without the performance of the conditions, and had sold and disposed of them for a valuable consideration. Held, that the measure of plaintiff's damages (the bonds still outstanding) is the amount of the bonds, so procured and negotiated, at the time of the recovery; interest being computed at the rate of six per cent upon the principal of the bonds to the date of said judgment, and also upon coupons maturing before the judgment at the legal rate of seven per cent from the time of their maturity until judgment. City of Winona v. Minnesota R. Construction Co., 29 Minn. 68.

legal title is in the grantor;¹ and that the condition upon which he was to receive the deed has been performed, cannot be inferred from the fact that the grantee has the unexplained possession of the deed.²

IX. Rights of Innocent Purchaser.—Although it is well settled that an escrow delivered without authority, or obtained fraudulently, passes no title to the grantee or obligee, there is some conflict of opinion as to the right of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions; but the better opinion seems to be, that such a purchaser acquires no title.³

1. Devlin on Deeds, § 323; Harkreader v. Clayton, 56 Miss. 383; s. c., 31 Am. Rep. 369; Patrick v. McCormick, 10 Neb. 1.

2. Black v. Shreve, 13 N. J. Eq. 455.

3. It would seem that, where a deed deposited as an escrow is obtained without performance of conditions, by operating upon the fears or credulity of the depository, or by fraudulent collusion with him, or by other undue means, it bears a closer analogy to the case of a forged or stolen deed than it does to that of a fraud practised directly upon the grantor, by means of which he is induced to deliver it. In the latter case the legal title passes, and a subsequent *bona fide* purchaser is protected. In the former no title passes whatever, and a subsequent purchaser is not protected. Everts v. Agnes, 4 Wis. 343.

In Smith v. South Royalton Bank, 32 Vt. 341; s. c., 76 Am. Dec. 179, it is held that a deed delivered in escrow, to be delivered to the grantee after the performance of some other act, will not be valid for any purpose until the condition upon which it was to be delivered to the grantee has been performed; and the fact that the deed has since come into the hands of an innocent purchaser for value will not change the rule.

In Berry v. Anderson, 22 Ind. 36, an owner of a tract of land, having subscribed for stock in a railroad company, signed and acknowledged the deed for the land, which, it was agreed, the company should take in payment for the stock subscribed. The deed was placed in the hands of a third person, the grantor telling him that an agent would call in a short time and deliver a certificate for the stock subscribed; and the depository was instructed, upon receipt of the certificate, to deliver the deed to the company's agent. The agent called, but did not have any certificate of stock; he, however, requested the depository to place the deed in his hands, so that he might give it to the attorney of the company for examination. This was done, and the company sold the land. But it was held that the delivery by the de-

positary before the performance of the condition did not convey the title, and that the owner was entitled to have his deed, and the deed made by the railroad company to its grantee set aside as void.

The rule that a fraudulent delivery by the depository of a deed deposited as an escrow will not operate to pass the title, even as to a subsequent *bona fide* purchaser, does not extend so far as to enable the grantor to recognize the grantee's possession under the deed as valid for some purposes, and disclaim it as nugatory for all others, when to do so would result in an injury to an innocent party. Cotton v. Gregory, 10 Neb. 125. And see generally, to effect that such purchaser acquires no title, Titus v. Phillips, 3 C. E. Green (N. J.), 541; Illinois Cent. R. Co. v. McCullough, 59 Ill. 166; Abbott v. Alsdorf, 19 Mich. 157; Kellogg v. Steiner, 29 Wis. 629; Walker v. Ebert, 29 Wis. 194; Southern Ins. Co. v. Cole, 4 Fla. 359; Cincinnati, etc., R. Co. v. Iliff, 13 Ohio St. 235,—even in the case of a negotiable instrument. Burson v. Huntington, 21 Mich. 415; Chipman v. Tucker, 38 Wis. 43.

In some cases, however, it has been held that a deed delivered by one with whom it has been left in escrow, before the performance of the condition on which the delivery was authorized, is not void in the hands of an innocent purchaser. Blight v. Schenck, 10 Pa. St. 285; s. c., 51 Am. Dec. 478; Peter v. Wright, 6 Port. (Ind.) 183.

In Bailey v. Crim, 9 Biss. (U. S.) 95, it was held that where persons exchanging lands place their deeds in escrow, and transfer their possession, and the depository records one of the deeds without the knowledge of the grantor, and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land, though the mortgagor misappropriates the money.

And generally, as to bills and notes, the defence of an improper delivery or failure of the contingency under these circum-

Such an instrument may, however, be used as evidence of a contract to sell and purchase land, and thus have an effect as a writing signed by the parties.¹

X. When Title passes. — Where an instrument has been deposited as the writing or escrow of the grantor, it does not become the grantor's deed, and no title passes until the event has happened upon which it is to be delivered to the grantee, or until the second delivery — or re-delivery, as it is sometimes called — by the depository to the grantee.² But in certain cases, by fiction of law, the writing is allowed to take effect from the first delivery. This relation back to the first delivery is permitted, however, only in case of necessity, and where no injustice will be done, to avoid injury to the operation of the deed from events happening between the first and second delivery.³ And it may be stated that, so far as the capacity of the grantor is concerned, the deed is to take effect from the first delivery.⁴

stances, though good against the payee, will not avail against a *bona fide* holder for value. *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Fearing v. Clark*, 16 Gray (Mass.), 74; *Clarke v. Johnson*, 54 Ill. 296. 1. *Cagger v. Lansing*, 57 Barb. (N. Y.) 421.

2. *Prutsman v. Baker*, 30 Wis. 644; *Everts v. Agnes*, 4 Wis. 343; *Frost v. Beekman*, 1 Johns. (N. Y.) Ch. 288; *Green v. Putnam*, 1 Barb. (N. Y.) 500; *James v. Vanderheyden*, 1 Paige (N. Y.), 385; *Perkins*, § 143; *Shep. Touch*, 59.

If, at any time between the first and second delivery, the property is levied upon by a creditor of the grantor, he will hold by virtue of such levy in preference to the grantee mentioned in the deed. *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 287; *Jackson v. Catlin*, 2 Johns. (N. Y.) 248.

A., the owner of a tract of land, executed a deed as an escrow, which purported to convey an undivided two-thirds interest in the property to his children. Upon the back of the deed the following provision was indorsed; viz., "The foregoing deed is not to be delivered, recorded, or take effect, except in the event of the death or the written order of the said A., and is placed in the hands of B. as an escrow (signed) A." This deed was not recorded until after A's death, which occurred in 1872. After the execution of said escrow, A. executed a deed of relinquishment of a right of way over the property described in the escrow to a railroad company, and the company went into possession under the deed of relinquishment in 1870, and it and its successors held possession ever since, but the deed was not recorded. *Held*, that said deed was valid, and that the grantees in the escrow took subject to

the railroad's right of way. *Blair v. St. Louis, etc., R. Co.*, 24 Fed. Rep. 539.

3. *Prutsman v. Baker*, 30 Wis. 644. See "Death or Disability of one of the Parties," *infra*.

In *Price v. Pittsburg, etc., R. Co.*, 34 Ill. 13, it was held that where it is the intention of the parties that the conveyance is, after the performance of the condition, to take effect from the date of delivery in escrow, their intention will control.

If equity requires it, the second delivery will be made to relate back to the first, so as to protect the grantee against intervening claims. *Simpson v. McGlathery*, 52 Miss. 723.

While a deed left in escrow is frequently held to relate back for the purpose of avoiding the difficulty of incapacity of the grantor, or his death occurring before the deed is handed over by the depository, yet, except for that formal purpose, there is no universal relation; and so far as the authorities go, ancient or modern, they all assume that the relation back is founded on the unintended or unexpected occurrence of some disability without which the second delivery would have been the act, at its date, of the grantor, prevented without his original design. *Taft v. Taft*, 59 Mich. 185.

4. *Devlin on Deeds*, § 328.

A grantor executed a deed, his wife joining in the conveyance, and deposited it in escrow. Before the payment of the purchase-money and the acceptance of the deed, the wife of the grantor died, and he remained; but it was *held* that the claim of the second wife to dower was taken away by relation of the deed back to the time of its delivery in escrow. *Vorheis v. Ketch*, 8 Phila. (Pa.) 554.

"If at the time of the first delivery the

XI. Death or Disability of one of the Parties. — An original delivery cannot be made by or on behalf of a dead man. But when the condition on which an original delivery made in the lifetime of a party transpires, the conditional delivery becomes absolute, and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition.¹

If a *feme covert* deliver a deed as an escrow, and become discoverd before the second delivery, such second delivery would give no validity to the deed, the first being void.²

XII. Statute of Frauds. — The delivery of a deed of land in escrow, to be delivered to the purchaser on performance of certain agreements on his part, does not take an oral contract of sale out of the statute of frauds, the terms of the contract not appearing from the deed.³

lessor be a *feme sole*, and before the second delivery she take a husband, or if before the second delivery she dieth, in this case, if the second delivery shall not have relation to this intent to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases should be void, and therefore in such case, for necessity, and *ut res magis valeat quam pereat*, to this intent, by fiction of law, it shall be a deed *ab initio*; and yet, in truth, it was not a deed until the second delivery." Butler & Baker's Case, 3 Rep. 34. And the same rule applies if the party who makes the deed dies before the event happens when it is to be delivered. 3 Washburn on Real Prop. (5th ed.) 324, citing 3 Prest. Abst. 65; Butler & Baker's Case, 3 Rep. 36; Perryman's Case, 5 Rep. 84 b; Perkins, §§ 11, 138-140; Shep. Touch. Prest. ed. 59; Jackson d. Gratz v. Catlin, 2 Johns. (N. Y.) 248, 259; Hatch v. Hatch, 9 Mass. 307, 310; 1 Wood, Conv. 197; Jackson d. Russell v. Rowland, 6 Wend. (N. Y.) 666; Halford v. Parker, Hob. 246 a, and Williams's note; Shirley v. Ayres, 14 Ohio, 307; Ruggles v. Lawson, 13 Johns. (N. Y.) 285. See Carr v. Hoxie, 5 Mason (U. S.), 60; Evans v. Gibbs, 6 Humph. (Tenn.) 405; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288; Hall v. Harris, 5 Ired. (N. Car.) Eq. 303; Price v. Pittsburg, etc., R. Co., 34 Ill. 13.

1. Bostwick v. McEvoy, 62 Cal. 496.

"If a man delivers a bond as an escrow to be delivered on condition performed, before which the obligor or obligee dies, and the condition is afterwards performed, here there could be no second delivery, yet it is the deed of the obligor from the first delivery, although it was only inchoate, but it shall be deemed consummated by the performance of the condition." Parsons,

C. J., in Wheelwright v. Wheelwright, 2 Mass. 454; s. c., 3 Am. Dec. 66; Hatch v. Hatch, 9 Mass. 310; s. c., 6 Am. Dec. 67; Bodwell v. Webster, 13 Pick. (Mass.) 414, 415; Harkreader v. Clayton, 56 Miss. 383; Lindley v. Graff (Minn.), 34 N. W. Rep. 26.

So, says Coke, "If the grantee dies between the first delivery and the deed becoming absolute, the deed is good, for there was *traditio inchoata* in the life of the parties; *sed postea consummata existens* by the performance of the condition takes its effect by force of the first delivery, without any new delivery." Perryman's Case, 5 Co. 84 b; Peck v. Goodwin, Kirby (Conn.), 64.

2. Butler & Baker's Case, 3 Rep. 34; Com. Dig. Fait. B. 5; Jennings v. Bragg, Cro. Eliz. 447; 3 Washburn on Real Prop. (5th ed.) 324.

3. Thomas v. Sowards, 25 Wis. 631; Campbell v. Thomas, 42 Wis. 437. In the latter case Ryan, J., said, "I have no doubt that an escrow may be proved by parol. The difficulty here is not in the proof of the alleged escrow, but in the proof of the contract of sale and purchase itself. When there is a valid contract under the statute, the papers constituting it, or executed in compliance with it, may be delivered in escrow, and the escrow may be proved by parol. But the validity of the escrow rests on the validity of the contract, and the validity of the contract rests on the statute. I am informed that it was argued, on the rehearing, that the contract sought to be enforced for the respondent did not or might not so bind him that the appellant could have enforced it. A contract, even by deed poll, essentially implies two parties, and the remedies upon it must be mutual; and to concede that the

ESPECIAL PRIVILEGES—ESPLEES—ESQUIRE.

ESPECIAL PRIVILEGES.¹

ESPLEES.—The products of lands; as the hay of meadows, herbage of pasture, corn of arable land, rents, services, etc.; also the lands, etc., themselves.²

ESQUIRE.—A title applied by courtesy to officers of almost every description,³ to members of the bar, and others. No one is entitled to it by law; and, therefore, it confers no distinction in law.⁴

appellant could not have enforced this contract, is to concede that the respondent cannot; it is to concede that there is no contract. If there be a valid contract for the respondent, it is equally so for the appellant. If the respondent can have specific performance of it, so could the appellant have had. Let us see how that would work under the statute. An avowed vendor assumes to deliver in escrow to a stranger a conveyance of land, reciting a consideration. He accompanies it with a statement that the assumed vendee has bargained for the purchase, and is to pay so much money, or to execute such a mortgage, or to convey such another estate, to satisfy the consideration, at such a time, when the conveyance is to be delivered. The stranger receives the deposit in good faith, crediting the statement made with it. And by and by, when the alleged vendee repudiates the whole thing, and denies it upon oath, the depositor not unnaturally takes him for a knave, trying to evade his contract by perjury; and yet all the while the assumed vendee may know nothing of the matter until he is sued for specific performance of a contract which he may never have made. In such a case the parties may contradict each other, one or the other necessarily attempting just such fraud, and committing just such perjury, as the statute was passed to prevent. It is easy to assume that in such a case the truth would appear. The statute assumes that it may not appear, and my observation inclines me to share the doubt of the statute."

The fact that, on the making of a parol agreement for the sale of land in consideration of the delivery of lumber, the vendor of the land has deposited a deed in escrow of the land, and a bill of sale of the chattels on the farm does not take the contract out of the operation of the statute of frauds. *Popp v. Swanke* (Wis.), 31 N. W. Rep. 916.

But in *Cannon v. Handley*, 13 Pac. Rep. 315, it was held that an oral contract for the sale of land, where a deed is executed in escrow at the time of the

contract, is not within the statute of frauds.

1. The term "especial privileges," in the Act of Congress of March 2, 1867, which provides that "the legislative assemblies of the several Territories shall not, after the passage of this act, grant private charters or especial privileges," refers to the granting of monopolies, such as ferries, trade-marks, the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others. The granting of a charter to a municipal corporation does not confer any especial privileges within the meaning of the act. *Elk Point v. Vaughn*, 1 Dak. 118.

2. *Whart. Law Dict.; Fosgate v. Herkimer Man. & Hydraulic Co.*, 9 Barb. (N. Y.) 293.

3. In *Commonwealth v. Vance*, 15 S. & R. (Pa.) 36, it was held that an act requiring the occupation or profession of a possessor of a slave to be registered was complied with by the registration of such possessor as an esquire, if he was an associate justice, though he was also a farmer. See also *Wilson v. Belinda*, 3 S. & R. (Pa.) 396. In an action for slander, the charge was thus laid: "You have taken a false oath against me in a suit before Squire H., and sworn me out of some money" (thereby meaning in a suit . . . before P. H., Esquire, he, the said plaintiff, had sworn falsely and committed perjury). It was held that this was a sufficient averment of the magisterial character of P. H. Said the court, "The import of the word esquire, or squire, is, in popular parlance, of which the courts will take notice, precisely the same as that of justice." *Call v. Foresman*, 5 Watts (Pa.) 331.

4. *Bouv. Law Dict.*

An Esquire in England.—Esquires and gentlemen are confounded together by Sir Edward Coke, who observes that every esquire is a gentleman; and a gentleman is defined to be one . . . who bears coat-armour. . . . It is, indeed, a matter somewhat unsettled what constitutes the distinction, or who is a real esquire; for it is not

ESSENTIAL.¹**ESTABLISH.²**

an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them, — 1. The eldest sons of knights, and their eldest sons in perpetual succession; 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; . . . 3. Esquires created by the king's letters-patent or other investiture, and their eldest sons; 4. Esquires by virtue of their offices, as justices of the peace, and others who bear any office of trust under the crown, and are named esquires by the crown in their commission or appointment. To these, however, may be added barristers-at-law, and the esquires of knights of the bath, each of whom constitutes three at his installation; and all foreign peers. For not only these, but the eldest sons of peers of Great Britain (though frequently titular lords), are only esquires in the law, and must be so named in all legal proceedings. 2 Steph. Com. 615; 1 Bl. Com. 406.

The fact that a man is a miller, or a farmer, or an ironmonger, does not prevent his being an esquire. *In re Doughty's Est.*, 18 L. T. N. S. 188; *Perrins v. M. & Gen. Trav. Ins. Co.*, 2 El. & El. 317.

1. Essential Oil. — Nitro-benzole, a manufacture from benzole and nitric acid, is not an essential oil under the tariff act of July 12, 1862. *Murphy v. Arnsen*, 96 U. S. 131.

2. The ordinary meaning of the word "establish" is to settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed. *Smith v. Forrest*, 49 N. H. 237; *Suc. of Weigel*, 18 La. Ann. 49.

Under an act which declared that "the relation of husband and wife amongst persons of color is established," it was *held* that the word "established" might be interpreted to signify recognized, acknowledged, ratified, and confirmed. "Such signification," said the court, "is supported, not only by judicial construction, but by common use and on the best authorities." It, however, remarked that, "upon few words could there be more room for argument than upon the word 'establish.'" *Davenport v. Caldwell*, 10 S. Car. 389.

"Establish," as used in the Constitution of the United States. — In 1 Story on Const. § 454, the word "establish" is given as an example of a word that is used in the Constitution with various meanings. "Thus, in the preamble, one object of the Constitution is avowed to be 'to establish justice,'

which seems here to mean to settle firmly, to fix unalterably, or rather, perhaps, as justice, abstractly considered, must be considered as forever fixed and unalterable, to dispense or administer justice. Again, the Constitution declares that Congress shall have power 'to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies,' where it is manifestly used as equivalent to make, or form, and not to fix or settle unalterably and forever. Again, 'Congress shall have power to establish post-offices and post-roads,' where the appropriate sense would seem to be to create, to found, and to regulate, not so much with a view to permanence of form as to convenience of action. Again, it is declared that 'Congress shall make no law respecting an establishment of religion,' which seems to prohibit any laws which shall recognize, found, confirm, or patronize, any particular religion, or form of religion, whether permanent or temporary, whether already existing or to arise in future. In this clause, establishment seems equivalent in meaning to settlement, recognition, or support. And again, in the preamble, it is said, 'We, the people, etc., do ordain and establish this Constitution,' etc., where the most appropriate sense seems to be to create, to ratify, and to confirm."

Establishment or Etablissement. — An ordinance or statute. Especially used of those ordinances or statutes passed in the reign of Edw. I. Co. 2d Inst. 156; *Britt. c. 21*. That which is instituted or established for public or private use. *Etablissement* is also used to denote the settlement of dower by the husband upon his wife. *Britt. c. 102*; *Bouv. Law Dict.*

Establishment is not Incorporation. — As used in the Acts of Massachusetts against counterfeiting, the terms "incorporated banking company in this State," and "banking company established in this State," are not identical. "The former necessarily implies a bank organized under a legal charter or authority, in the form of a special act, or some general law authorizing and giving a corporate charter to such association. The term 'established' may imply nothing more than a voluntary association organized by its own independent agreement, and not in pursuance of any statute [of] incorporation." *Commonwealth v. Simonds*, 11 Gray (Mass.), 306.

The constitution and statutes of Minnesota recognize a similar distinction between organized and established counties. "The

establishing of a county is the setting apart of certain territory to be in the future organized as a political community, or *quasi* corporation for political purposes; and the organizing of a county is the vesting in the people of such territory such corporate rights and powers." *State v. Parker*, 25 Minn. 221; *State v. McFadden*, 23 Minn. 40.

The Establishment of a Dispensary, as used in a will in which a bequest was made for that purpose, was held to include the procuring of a site and the erection of suitable buildings. *Beckman v. People*, 27 Barb. (N. Y.) 264.

Established Highway.—An allegation in an indictment that the road described was and is "a common highway, in Putnam County, in this State, made and laid out for the people of this State, to go, return, and pass, at their free pleasure and will, on foot, on horseback, and in vehicles," is equivalent to an allegation that the road was and is an "established highway" under a statute punishing the obstruction of any public road or established highway, and providing for the removal of the obstruction. *Palatka, etc., R. Co. (Fla.)* 3 South Rep. 158.

Established by Law, ex vis terminorum, means declared by legislative enactment. *Dane v. Smith*, 54 Ala. 49.

An Established or Usual Place of Business.—Under a statute which permits actions to be brought by or against such a corporation, in any county in which it has "an established or usual place of business," a turnpike company exercising its franchise in several counties, and having in one of them a toll-house, where it keeps an agent to collect tolls and sell tickets, and where its treasurer sometimes pays workmen whom it employs, may there sue or be sued, although it has an office in another county, where its books are kept, and its meetings are held, and which is used by its treasurer and superintendent. *Rhodes v. S. Turnpike Co.*, 98 Mass. 95.

To establish and regulate Markets.—A general power conferred upon cities to "establish and regulate markets and market-places," is a continuing power; and its exercise at one period by establishing a market-place, and erecting a market-house in a particular locality, will not prevent a city from removing such building, or abandoning such locality for market purposes. *Gall v. Cincinnati*, 18 Ohio S. 563; *Wartman v. Philadelphia*, 33 Pa. St. 210.

Under a charter giving to a city power "to establish and regulate markets," it was held that the city had the power to purchase market-grounds. "Although these words" [to establish], said the court, "may

mean simply to confirm, yet their more common import is, permanently to create or found. In the connection in which they stand here, at least, this would seem to be their natural meaning, because otherwise they would add nothing to the power conferred by the words 'to regulate.' . . . Assuming then . . . that the words 'to establish' mean to found originally, it may still be said that it does not follow that the power to purchase land is conferred, because markets may be, and frequently are, established in cities and villages upon the lands of private individuals. This view, however, would leave it at the option of individuals whether any market should exist or not. If no one was willing to have a market upon his premises, the power of the common council to establish markets would be annulled. But it is . . . a sound rule that when power is given to a corporation to do an act, it has a right to do whatever is necessary to accomplish the act. . . . A market is a public place for the sale of commodities. Without the power to procure a suitable place, the first step could not be taken towards the establishment or foundation of a market. The power to establish, therefore, must of necessity include that of procuring the requisite site." *Ketchum v. Buffalo*, 14 N. Y. 361; *People v. Lowber*, 28 Barb. (N. Y.) 65.

Manufacturing Establishments—Under a statute taxing manufacturing establishments, it was held that the pipes of a gas-company used by them to convey the gas from the place where manufactured to the consumers, were taxable. "In order that a particular article or class of articles," said the court, "should constitute a part of a manufacturing establishment, it is not essential that they be actually employed in the process of manufacture. The establishment includes, also, all the usual and necessary appliances for storing, measuring, weighing, packing, and delivering the manufactured article, after the process of manufacture is completed." *Memphis Gaslight Co. v. State*, 6 Coldw. (Tenn.) 310.

The interpretation clause of the Regulation of Labor in Print Works Act, 8 & 9 Vict. c. 29, provides that "the words 'incidental printing process' shall be taken to mean any process of preparing, dyeing, etc., . . . incident or necessary to the completion of the chief process of printing figures, etc., . . . carried on within buildings, sheds, fields, or portions of ground lying adjacent to each other, or forming part or parts of the establishment where the chief process of printing as aforesaid is carried on." It was held, that a factory where the preliminary processes of calico-printing were per-

ESTATES.

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I. Definition. — An estate in land is the degree, quantity, nature, and extent of interest which a person has in real property.¹

Estates are classified as follows: estate in fee; estate tail; estate for life, — estate *pur autre vie*, dower, curtesy, homestead; estate for years; estate at will, — estates from year to year; estate at sufferance; joint estates, — joint tenancy, tenancy in common, coparcenary, estate by entirety; estate in severalty; estate on condition, — mortgage; estate of freehold; estate of inheritance;

formed, belonging to the same firm as the factory at which the principal process was performed, though situated at a distance of seven miles from it, was a "part of the establishment where the chief process" was carried on. *Hoyle v. Oram*, 12 C. B. N. S. 124.

Permanently established. — By an act of the Legislature of Ohio, passed in 1846, it was provided, that, upon the fulfilment of certain terms and conditions by the proprietors or citizens of the town of C., in M. County, the county-seat should be "permanently established" at that town. Those terms and conditions having been shortly afterwards complied with, the county-seat was established accordingly. In 1874 the legislature passed an act providing for the removal of the county-seat to Y. Certain citizens of C. thereupon filed a bill setting forth that the act of 1846, and the proceedings under it, constituted within the meaning of the constitution an executed contract, the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. It was *held*, that even if a contract was created, which was denied, it was satisfied on the part of the State by establishing the county-seat at C., with the intent that it should remain there, but that there was no stipulation that it should remain there in perpetuity. Said the court, "Domicile is acquired by residence and the *animus manendi*, the intent to remain. A *permanent*

residence is acquired in the same way. In neither case is the idea involved that a change of domicile or of residence may not thereafter be made. . . . So the county-seat was permanently established at C. when it was placed there, with the *intention* that it should remain there. This fact, thus complete, was in no wise affected by the further fact, that, thirty years later, the State changed its mind, and determined to remove, and did remove, the same county-seat to another locality." *Newton v. Commissioners*, 100 U. S. 548.

1. *Bouv. Law Dict.* Besides this precise use of the word, it is often more loosely used to indicate, not merely the interest in land, but the land itself; e.g., "My estate at A." *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537. So the word "estate" is in common use in wills, to designate all the testator's property. A devise of "all my estate" generally passes both the real and personal property of the testator. *Jackson v. De Lancey*, 11 Johns. (N. Y.) 365; *Andrews v. Brumfield*, 32 Miss. 107; *Blewer v. Brightman*, 4 McCord (S. Car.), 60. But the word may pass real or personal property, or both, according to the way in which it is used in different clauses of the will. *Stump v. Deneale*, 2 Cranch, C. C. 640; *Den v. Snitcher*, 14 N. J. L. 53.

A devise of a "factory estate" passes merely the land and buildings, and not the machinery. *Brainerd v. Cowdry*, 16 Conn. 1.

estate in remainder; estate in reversion; estate in possession; estate in expectancy; estate by elegit.

II. Estate in Fee-simple. — This is the largest estate in land known to the law. It is an estate of inheritance unlimited in duration. The owner has full power of disposal of it during his life; and on his death, if undisposed of, it goes to his heirs. At the present day, as tenure¹ in its proper sense does not exist in this country, an estate in fee cannot be created anew, but the rules formerly applicable to the creation of such estates now apply to the transfer. It is an absolute rule of law, that no estate in fee can be created or transferred by deed unless the conveyance is expressed to be to the grantee and his heirs. Without the word "heirs," the estate conveyed is merely for the life of the grantee.² Where the gift is by will, this rule is not applied in its strictness, and any words which may be construed to mean heirs will pass a fee.³ In this country, however, this rule has been very generally broken down for deeds or wills, or both, by statute.⁴ In case of a conveyance to a corporation, the word "heirs" is obviously unnecessary.⁵

1. In some States a statute declares that land is held allodially. Wis. Rev. St. p. 313. In Pennsylvania this was decided to be the common law of the State. *Wallace v Harmstead*, 44 Pa. St. 492; 4 Kent, Com. 3.

2. "Heirs." — *Sisson v. Donnelly*, 36 N. J. L. 432, *Edwardsville R. R. Co. v Sawyer*, 92 Ill. 377; *Merritt v. Disney*, 48 Md. 344; *Sedgwick v. Laffin*, 10 Allen (Mass.), 430. See, however, *Stevens v. Dewing*, 2 Vt. 411, where a lease "to A. and his heirs for 1,000 years, or as long as wood grows and water runs," was held to pass a fee.

In New Hampshire the rule has been distinctly repudiated. In *Cole v. Lake Co.*, 54 N. H. 242, 290, the court say, "When a case arises where the intention of the grantor to convey a fee-simple is clearly shown by other words in the deed, we think the court have no power to say a fee shall not pass, because he has not, in addition, inserted this technical word. This rule, which would destroy the plainly expressed contract of the parties in the present case, is not adapted to our institutions, or the condition of things in this State, and it never became a part of the law of this State." In Tennessee the court, in construing a gift in a deed to "A. and his children forever," recognize the rigid rule of law, but say that the omission of the word "heirs" is an evident mistake of an ignorant grantor; and equity will reform the instrument, so as to include the term "heirs." *Cromwell v. Winchester*, 2 Head (Tenn.), 389. So in *Guthrie v. Guthrie*, 1 Call (Va.), 7, a power to sell was construed to convey a fee without the use of the word "heirs."

3. *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Jackson v. Housel*, 17 Johns. (N. Y.) 281. See *Urich's App.* 86 Pa. St. 386, where it was held that a life estate was given by a will, although the word "heirs" was used.

4. In only two States, *Connecticut* and *Louisiana*, is the statute-book silent on this point. The reader is referred to the statutes of his own State. These statutes seem to fall into two classes: in one class, the use of the word "heirs" is dispensed with in both deeds and wills; and in the other, the statute refers to wills only. New York is a State in the former class. Its statute reads, § 1. "The term 'heirs,' or other words of inheritance, shall not be requisite to create or convey an estate in fee; and every grant or devise of real estate, or any interest therein, hereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear, by express terms, or be necessarily implied in the terms of the grant." III. Rev. St. N. Y. p. 2205. See *Karmuller v. Krotz*, 18 Iowa, 352, where, by analogy of the statute, it was held that the word "heirs" was not necessary to pass a right of way in fee.

The statute of Massachusetts belongs to the second class. It reads, "Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate." Mass. Pub. Stat. Ch. 127, § 24.

5. *Corporation.* — *Wilcox v. Wheeler*, 47 N. H. 488; *Cong. Soc. v. Stark*, 34 Vt.

So, too, in case of a conveyance to a trustee, no particular form of words is necessary to create a trust, and a trustee will take a fee without the word "heirs" when a less estate will not be sufficient to satisfy the purposes of the trust; and, *per contra*, the trust estate continues in equity no longer than the thing sought to be accomplished by the trust demands.¹ So, too, where a devisee of lands is personally charged with the payment of money, the devisee takes a fee whatever the expression used.² In equity, the necessity of the use of the word "heirs" is sometimes dispensed with.³

It is against the policy of the law to allow restraints to be imposed on the alienation of an estate in fee. No one is allowed to create what is, in the intendment of the law, an estate in fee, and deprive the tenant of those essential rights and privileges of free alienation that the law annexes to it. No condition or conditional limitation against alienation attached to a fee-simple is good.⁴

243; *Overseers v. Sears*, 22 Pick. (Mass.) 122, 126. See *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121, where a corporation took a fee, though its existence was limited by its charter to fifty years. The English statutes of mortmain did not extend to this country, — *Jackson v. Phillips*, 14 Allen (Mass.), 539, 591, — except in Pennsylvania and Canada, where corporations cannot hold land except by special statute. *Methodist Ch. v. Remington*, 1 Watts (Pa.), 218; *Anderson v. Todd*, 2 U. C. Q. B. 82.

1. **Trustee.** — *Kirkland v. Cox*, 94 Ill. 400 (will); *Sears v. Russell*, 8 Gray (Mass.), 86 (will); *Angell v. Rosenbury*, 12 Mich. 241, 266 (deed); *North v. Philbrook*, 34 Me. 532 (deed); *Doe v. Considine*, 6 Wall. (U. S.) 458, 471; *Koenig's App.* 57 Pa. St. 352, where the court says, "It matters not what may be the nominal duration of an estate given by will to a trustee. It continues in equity no longer than the thing sought to be secured by the trust demands." *Fisher v. Fields*, 10 Johns. (N. Y.) 495.

2. "When the charge is upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee on the principle that he might otherwise be a loser." *Jackson v. Bull*, 10 Johns. (N. Y.) 148, 151; *Wait v. Belding*, 24 Pick. (Mass.) 129.

3. *Defraunce v. Brooks*, 8 W. & S. (Pa.) 67. In a bill for the specific performance of a contract to convey land, equity will compel the conveyance of a fee, if such is the intention of the contract, though the word "heirs" is not used.

4. **Restraints on Alienation.** — *Doebler's App.* 64 Pa. St. 9, 17. *Re Machu*, 21 Ch. Div. 838; *Gleason v. Fayerweather*, 4 Gray

(Mass.), 348; *Lovett v. Gillender*, 35 N. Y. 617; *Kepple's App.* 53 Pa. St. 211; *McDowell v. Brown*, 21 Mo. 57. But see, for restrictions aimed at a particular method of alienation which may be good, *Re Macleay*, L. R. 20 Eq. 186.

A condition not to alienate to particular persons is good, — *Cowell v. Spring Co.*, 100 U. S. 55; *Jaureche v. Proctor*, 48 Pa. St. 466, 472; — but a condition not to alienate except to particular persons is void, — *McCullough v. Gilmore*, 11 Pa. St. 370, — where the grantee was not to alienate except to members of his family. So *Anderson v. Carey*, 36 Ohio St. 506, where a gift was made to two, with a proviso that they should not alienate, except each to the other. See, however, *contra* to this case, on the same facts, *Blackwell v. Blackwell*, 15 N. J. L. 386. Where alienation is restricted as to time, the authorities are in conflict. A restriction on a devisee not to sell until he reached the age of thirty-five years was held good in *Stewart v. Brady*, 3 Bush (Ky.), 623; *Hill v. Hill*, 4 Barb. (N. Y.) 419. See *contra*, *Twitty v. Camp*. Phil. Eq. (N. Car.) 61; but the weight of authority seems to be against the validity of such restraints, however limited as to time. *Oxley v. Lane*, 35 N. Y. 340, 346, 347; *Mandlebaum v. McDonell*, 29 Mich. 78. But see *contra*, *Langdon v. Ingram*, 28 Ind. 360 (not to alien during minority); *Dougal v. Fryer*, 3 Mo. 40 (not before age of twenty-five); *Earls v. McAlpine*, 27 Grant (Ont.), 161 (devise to sons not to alien during life of mother without her consent).

A gift over, if the grantee dies without having disposed of the property by will or deed, is void. *Shaw v. Ford*, 27 Ch. Div. 669; *Karker's App.* 60 Pa. St. 141; *Gray, Restraints on Alienation.*

1. *Rule in Shelley's Case.* — When an estate is given to a man for his life, with the remainder to his heirs, the law by an arbitrary rule vests an estate in fee directly in the ancestor.¹ This is an unbending rule of law, and applicable even where there is an express direction that it shall not apply.² The rule applies only where the word "heirs," or its equivalent, is used.³ It is not a rule for discovering the intention of the testator, but applies when that intention has been ascertained by the ordinary rules of construction. There must be an estate in freehold in the first taker, and the remainder must be created by the same instrument.⁴ The rule applies to equitable estates, but both estates must be equitable or both legal.⁵ This rule has been largely done away with, or modified, in this country. In most States, the rule is abolished, and the heirs take a contingent remainder.⁶

2. *A Base, or Determinable, Fee*, is an interest which may continue forever, but is liable to be determined by some act or event

1. *Kleppner v. Laverty*, 70 Pa. St. 70, 74; *Siceloff v. Redman*, 26 Ind. 251; *Butler v. Huestis*, 68 Ill. 596; *Hawkins v. Lee*, 22 Tex. 544. The rule is still in force everywhere that it has not been repealed by statute. *Baker v. Scott*, 62 Ill. 86. See *Hileman v. Bouslaugh*, 13 Pa. St. 344; opinion by *Gibson, C. J.*, who defends the rule.

2. *Doebler's App.* 64 Pa. St. 9; *Warner v. Sprigg*, 62 Md. 14, 20. But see *Belslay v. Engel*, 107 Ill. 182, 186, where the court says that "the rule has always given way to the clear intention of the testator, when that intention can be ascertained from the instrument in which the words supposed to be words of limitation are used."

3. *Adams v. Ross*, 30 N. J. L. 505; *Price v. Taylor*, 28 Pa. St. 95.

"Words of purchase will be treated as such until it has been unmistakably shown that the grantor designed to use them in a different sense." *Tyler v. Moore*, 42 Pa. St. 374. But the word "heirs" may be construed as a word of purchase, if the intention of the grantor is unequivocal. *Criswell's App.* 41 Pa. St. 290 (*semble*); *May v. Ritchie*, 65 Ala. 602; *Clarke v. Smith*, 49 Md. 106. On the other hand, it seems that "children" may be a word of limitation if the intention is clear. *Oyster v. Oyster*, 100 Pa. St. 538; *Belslay v. Engel*, 107 Ill. 182; *Stump v. Jordan*, 54 Md. 619. See for the interpretation of the word "issue," in a deed and will, *Taylor v. Taylor*, 63 Pa. St. 483; and *Robins v. Quinliven*, 79 Pa. St. 333.

4. *Webster v. Cooper*, 14 How. (U. S.) 488, 500; *Adams v. Guerard*, 29 Ga. 651.

5. *Tillinghast v. Coggeshall*, 7 R. I. 383; *Croxall v. Sherrerd*, 5 Wall. (U. S.) 268,

281. "If an executed trust, the limitations must be construed by this rule of law precisely as if they were legal limitations: if executory, the court will look at the general purpose and particular intent of the creator of the trust, as expressed in the instrument, and construe the limitations as these may require." 7 R. I. 392. See, for the non-application of the rule to a marriage settlement, *Berry v. Williamson*, 11 B. Mon. (Ky.) 245, 258.

Both estates must be legal, or both equitable. *Bacon's App.* 57 Pa. St. 504.

6. The rule has been abolished by statute, both as to deeds and wills, in *Alabama, California, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, New York, Tennessee, Virginia, West Virginia, Wisconsin*. It has been abolished as to wills only in *New Hampshire, New Jersey, Kansas, Ohio, and Oregon*. See *Dennett v. Dennett*, 40 N. H. 498; *Den v. Demarest*, 21 N. J. L. 525. In *Mississippi*, the rule has been abolished as to real estate. *Powell v. Brandon*, 24 Miss. 343 (a case of slaves). In *Rhode Island*, the rule by statute does not apply to the case of a devise to A. for life, remainder to his children or issue. *Williams v. Angell*, 7 R. I. 145. But the rule is still in force where the remainder is limited to the heirs generally. *Bullock v. Waterman St. Soc.*, 5 R. I. 273. Where the rule is abolished, the immediate grantee takes an estate for life, with a contingent remainder in his heirs. *Williamson v. Williamson*, 18 B. Mon. (Ky.) 329; *Richardson v. Wheatland*, 7 Met. (Mass.) 169. That the heirs take a vested remainder, see *Moore v. Littel*, 41 N. Y. 66. But this case stands alone. See *Monarque v. Monarque*, 80 N. Y. 320; *Tesson v. Newman*, 62 Mo. 198; *Voris v. Sloan*, 68 Ill. 588.

circumscribing its continuance or extent. It is deemed a fee because there is a possibility that it may last forever.¹

III. Estate Tail, or conditional fee, is an estate of inheritance limited to the issue, or a particular class of the issue, of the grantee. On the failure of such issue, the estate reverts to the grantor. The estate is inalienable, but has all the other characteristics of a fee-simple. The ancient conditional fee, where the estate granted was conditional on the birth of issue, and on failure of such issue reverted to the grantor, was changed into an estate tail by the English statute of *de donis* 13 Edw. I. By this statute, the right of alienation was cut off, and a perpetuity was created. The proper words of limitation in the creation of an estate tail are "heirs of the body;" and the word "heirs" is necessary in a deed, while an equivalent expression is allowed in a will.²

An estate tail may be general, where it is limited to the heirs of the body; or special,³ where the limitation is to a special class of such heirs; e.g., the heirs by a certain wife named, or to the heirs male, or female, of the body.

An estate tail after possibility of issue extinct exists where the estate is limited to the heirs by a certain wife, and the wife has died without issue: there the grantee holds for his life as a tenant in tail.

The restriction against alienation was early broken down, and the tenant in tail was allowed by a bit of judicial legislation to bar the entail, and convey a fee-simple by levying a fine, or suffering a recovery. In this country fines and recoveries have been abolished or never existed, but generally the entail can be barred by deed.⁴ Fees-tail have been very generally abolished or seriously modified in this country, and would perhaps not be recognized in the jurisdictions where the statutes are silent.⁵

1. 4 Kent, Com. 9; Jamaica Pond Co. v. Chandler, 9 Allen (Mass.), 159, where there was a conveyance to A. and his heirs "so long as the grantor shall keep (water) pipes in the land, and no longer." This was held to create a base fee. *In re* N. Y., L. & W. R. Co., 105 N. Y. 89. And see Wiggins Ferry Co. v. O. & M. R. R. Co., 94 Ill. 83; State v. Brown, 27 N. J. L. 13 (so long as premises are used for a canal).

2. 4 Kent, Com. 11-22; Hill v. Hill, 74 Pa. St. 173; Arnold v. Brown, 7 R. I. 188; Nightingale v. Burrell, 15 Pick. (Mass.) 104. A devise to A., but if she dies without heirs, then to her brother, creates an estate tail in A., for she cannot die without heirs while her brother lives. *Fahrney v. Holsinger*, 65 Pa. St. 388.

In the absence of a statute referring in terms to estates tail, the estate descends always to the eldest son, and not to all the children. *Wight v. Thayer*, 1 Gray (Mass.), 284; *Williams' Real Prop.* *35, n. 2.

3. Estates tail special still exist in Mary-

land unaffected by statute. *Newton v. Griffith*, 1 H. & G. (Md.) 111.

4. *McGregor v. Comstock*, 17 N. Y. 162, 166; *Richman v. Lippincott*, 29 N. J. L. 44. That they never existed, see *Moreau v. Detchemendy*, 18 Mo. 522. Any restriction against barring an entail was declared void in *Dewitt v. Eldred*, 4 W. & S. (Pa.) 414.

5. The statute *de donis* never existed in Mississippi. *Jordon v. Roache*, 32 Miss. 481. In *Jewell v. Warner*, 35 N. H. 176, the court says, "If our statutes have overturned the two great objects of the statute *de donis* to secure to the eldest sons in succession of the grantee and his heirs an inalienable interest in property, and to the grantor and his heirs the reversion on the failure of the heirs of the body of the grantee, we may regard the statute as repealed, and with it all the doctrines of the English law on the subject of estates tail." After showing that the statute of descent, and the statute granting full power of conveyance, do effect this result in New Hamp-

An estate tail in personalty cannot exist, and an attempt to create it carries an absolute estate.¹ The rule in Shelley's case applies to estates tail except in so far as it has been abolished in this country.²

IV. Estates for Life. — Strictly speaking, an estate for life is an interest whose extent is limited by the life or lives of certain persons; but the term has been extended to include all estates that may last during the life of the tenant, although they may be determined at an earlier time; e.g., an estate to a woman *durante viduitate*. The termination is entirely uncertain, as the contingency may never happen. So that an estate for life in its broadest sense is every estate, not of inheritance, without a fixed limit.³ Estates for life fall into two classes: 1. Those created by act of law; 2. Those created by act of the parties. In the first class are, (a) dower, (b) curtesy, (c) tenancy in tail after possibility of issue extinct, (d) homestead. For a treatment of these estates, see titles DOWER, CURTESY, ESTATES TAIL, and HOMESTEAD. In the second class, estates are either for the life of the grantee, or for the life of some other person. Estates of this latter kind are known as estates *pur autre vie*.

1. *Estates pur autre vie.* — These estates are not common in this country, but most often occur where a tenant for his own life conveys his estate to a third person. He cannot convey more than

share, the court goes on to say, that "Not one object of the statute *de donis* remained; no characteristic of an estate tail continued to exist; and no other conclusion can be drawn than that the statute *de donis* was impliedly repealed, and estates tail finally abolished."

So in Connecticut in *Hamilton v. Hempsted*, 3 Day (Conn.), 339, the court declares that "Our courts have never adopted the fee conditional at common law, nor the statute *de donis*; but from the principle that the law abhors a perpetuity, they have decided that a deed or devise, using words proper to create an estate in fee-tail, should vest an estate in fee-simple in the issue of the first donee in tail; and the statute on that subject has been considered to be in affirmance of the common law."

In many States, estates in fee-tail are abolished by statute, and a grant in tail passes a fee-simple. *Allen v. Craft*, 109 Ind. 476; *Knoderer v. Merriman*, 7 Atl. Rep. (Pa.) 152. But in *New York*, *Indiana*, *Michigan*, and *California*, the land reverts to the grantor, if the first taker leaves no issue. 3 Rev. St. N. Y. 2175.

In *Arkansas*, *Colorado*, *Illinois*, *Missouri*, and *Vermont*, estates tail are made life estates in the first donee, with remainder in fee to the persons to whom the estate would descend at common law, or by the terms of the grant, on the death of the

donee. Rev. St. of Mo. § 3941. See *Wight v. Thayer*, 1 Gray (Mass.), 284.

In *Connecticut*, *New Jersey*, and *Ohio*, the children of the donee take as tenants in common in fee. Rev. St. Ohio, § 4200.

In *Massachusetts*, *Maine*, *Maryland*, *Delaware*, and *Pennsylvania*, an estate tail can still exist, and may descend as such; but a fee-simple can be conveyed by the donee by deed. Pub. St. Mass. Ch. 120, § 15.

In *Maryland*, however, estates tail descend as fees. *Posey v. Budd*, 21 Md. 477.

A tenant in tail in remainder cannot convey any estate by deed. He must be in possession. *Whittaker v. Whittaker*, 99 Mass. 364. But see *Coombs v. Anderson*, 138 Mass. 376.

In *Rhode Island* there are special provisions. Pub. St. R. I. c. 182. See *Cooper v. Cooper*, 6 R. I. 261.

1. *Albee v. Carpenter*, 12 Cush. (Mass.) 382. And see *Hall v. Priest*, 6 Gray (Mass.), 18, 22.

2. See cases cited in note to rule in Shelley's case, *supra*. The rule has been abolished only as to estates tail in Illinois. *Baker v. Scott*, 62 Ill. 86.

3. *Rosenboom v. Van Vechten*, 5 Den. (N. Y.) 414 (*durante viduitate*); *Hurd v. Cushing*, 7 Pick. (Mass.) 169 (so long as grantee maintains salt-works on his land); *Warner v. Tanner*, 38 Ohio St. 118. But see *Gilmore v. Hamilton*, 83 Ind. 196.

he has, and his grantee takes an estate during the life of the grantor who is termed the *cestui que vie*.¹ If the tenant died during the life of the *cestui que vie*, at common law the balance of the estate went to the first person who took it, who was termed a general occupant. If the original gift was made to the tenant and his heirs, the heir took the estate as special occupant. By the English statutes, where there is no special occupant, the estate goes to the executors as personal property, unless it has been disposed of by will. This has been generally adopted in this country, except in a few States where the term descends as real estate.²

At common law, no words of limitation are necessary to create an estate for life; but now in those States, where, by statute, a fee passes without words of inheritance, the intention to create an estate for life must be clearly expressed.

A tenant for life has full power of alienation, unless restrained by a condition, and can grant his whole estate, making it an estate *pur autre vie* in the grantee, or he may grant any number of smaller estates, all not to exceed his own estate. A tenant for life cannot convey more than his interest, unless he resorts to the old common-law feoffment, in which case he can convey a fee, but works a forfeiture of his own estate by so doing.³

A tenant for life cannot gain a title by adverse possession against the remainderman, nor will an adverse claim constitute a disseizin. So, too, a disseizin by a stranger during the tenancy for life does not bar the rights of the remainderman; for the latter has no right to possession until the death of the tenant for life, and he then has the statutory period of twenty years within which to bring his action to recover possession.⁴

1. For what is evidence of the death of the *cestui que vie*, see *Clark v. Owens*, 18 N. Y. 434.

2. The residue of the term descends to the heir of the tenant in Arkansas, Massachusetts, Missouri, North Carolina, and Rhode Island. In the other States, the term goes to the personal representatives. See 3 Rev. St. N. Y. p. 2294. It is in all States disposable by will.

3. *Jackson v. Van Hoesen*, 4 Cow. (N. Y.) 325.

At common law, a feoffment by a tenant for life of a greater estate than he had, worked a forfeiture of his estate, and the rule holds to-day where it is not changed by statute. *Jackson v. Mancius*, 2 Wend. (N. Y.) 365; *Faber v. Police*, 10 S. C. 376; *Matthews v. Ward*, 10 Gill & J. (Md.) 443; *Redfern v. Middleton*, 1 Rice (S. C.), 459. But a conveyance by any other method does not effect this result. *Stevens v. Winship*, 1 Pick. (Mass.) 318. The difference is theoretical as conveyances by deed are innocent. *Rogers v. Moore*, 11 Conn. 553; *Bell v. Twilight*, 22 N. H. 500. It

seems, however, that a conveyance in fee by a tenant by curtesy or dower works a forfeiture of the estate. 4 Kent, Com. 84; *French v. Rollins*, 21 Me. 372; *Grant v. Chase*, 17 Mass. 442. But except in these cases a deed conveys merely the interest of the grantor, and this is so by statute in some States. *Grant v. Townsend*, 2 Hill (N. Y.), 554; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 271, 277; *Dennett v. Dennett*, 40 N. H. 498, 505.

4. *Varney v. Stevens*, 22 Me. 331; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267; *Poster v. Marshall*, 22 N. H. 491; *Jackson v. Mancius*, 2 Wend. (N. Y.) 357. So where the life tenant granted a fee, the grantee may be ousted by the remainderman on the death of the life tenant. *Williams v. Caston*, 1 Strobb. (S. C.) 130. Where, however, the life tenant had lost his estate by a twenty-one years' adverse possession, he cannot, by surrender of his interest to the remainderman, give the latter an immediate right to recover the land. *Moore v. Luce*, 29 Pa. St. 260.

Apportionment of Incumbrances.—If an incumbrance exists on the estate, the tenant for life must keep down the interest, while the remainderman must pay the principal; but the life tenant cannot be compelled to pay the interest, and pays it merely to escape a forfeiture of his estate.¹ If the incumbrance is paid off, the amount is apportioned, and the life tenant pays the present value of the interest for his life. Either party can buy in the incumbrance, but cannot hold it to the exclusion of the other, who is willing to contribute his share of the amount paid for the purchase.²

Taxes.—The tenant for life is under an obligation to pay all taxes assessed on the estate, and all betterments that are not in their nature permanent; and the tenant cannot hold a tax-title adversely against the remainderman.³

Where a tenant for life leases the premises, the lease expires on his death, and his personal representatives cannot recover for the rent from the last rent-day to the day of the death of the lessor, as, by the common law, rent could not be apportioned. Now generally, rent is apportioned by statute.⁴

A tenant for life cannot make repairs or permanent improvements upon the property at the expense of the inheritance. He is bound to make repairs at his own expense; but improvement is a voluntary act on his part, which gives him no claim on the reversioner.⁵

1. *Doane v. Doane*, 46 Vt. 485. On application of the remainderman, enough of the estate can be sold to pay the interest; and if the estate is not thus divisible, the whole may be sold, and the proceeds invested. From the income the interest is paid, and the balance is paid to the life tenant. *Warley v. Warley*, 1 Bailey, Eq. (S. C.) 397. The incumbrance cannot be enforced against the life tenant. *Morley v. Landers*, L. R. 8 Eq. 594.

2. *Daviess v. Myers*, 13 B. Mon. (Ky.) 511; *Foster v. Hilliard*, 1 Story, 77; *Bell v. Mayor of N. Y.*, 10 Paige, Ch. (N. Y.) 49. The old rule was, that the tenant for life paid one-third, and the remainderman the other two-thirds; and that seems to be still the rule in South Carolina. *Wright v. Jennings*, 1 Bailey (S. C.), 277. But generally the apportionment is made by life-insurance tables, by which the value of the tenant's interest is estimated. *Eastabrook v. Hapgood*, 10 Mass. 313. Each case is settled by a master for itself. *Atkins v. Kron*, 8 Ired. Eq. (N. C.) 1.

The law will not permit a life tenant who purchases an incumbrance to hold it for his own exclusive use and benefit, if the other parties interested in the estate will contribute their share of the amount paid for the purchase. *Whitney v. Salter*, 30 N. W. Rep. (Minn.) 755.

3. *Patrick v. Sherwood*, 4 Blatchf. 112; *Newby v. Brownlee*, 23 Fed. Rep. 320; *Pike v. Wassell*, 94 U. S. 714. The remainderman may apply for a receiver to pay the taxes out of the rents and profits. *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312; *Sidenberg v. Ely*, 90 N. Y. 257. In Ohio, by statute, non-payment of taxes works a forfeiture of the estate. *McMillan v. Robbins*, 5 Ohio, 28. Where the tenant buys a tax-title, he is presumed to have bought it for the benefit of the estate, and cannot hold it against the reversioner. *Prettyman v. Walston*, 34 Ill. 175, 192; *Varney v. Stevens*, 22 Maine, 331, 334.

A life tenant, twenty-eight years old, is bound to pay assessments for a stone pavement on an asphalt foundation in front of his premises, as such an improvement is not in its nature permanent, or likely to last during the probable continuance of the tenant's life. *Reyburn v. Wallace*, 3 S. W. Rep. (Mo.) 482. See *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312; *Hitner v. Ege*, 23 Pa. St. 305 (brick sidewalk); *Whyte v. Mayor of Nashville*, 2 Swan (Tenn.), 364; *Plympton v. Boston Dispensary Co.*, 106 Mass. 544.

4. *Dexter v. Phillips*, 121 Mass. 178. See *Pub. St. Mass. ch. 121, § 8*.

5. The duty of putting the property in a tenantable condition is on the estate,

Estovers. — This term is applied to the wood that a tenant for life is allowed to cut on the land for his own use on the premises. The only important uses are for fuel, and for building or repairing fences, as the wood cannot be sold, and the proceeds used for repairs. Only a reasonable amount can be cut; but in this country, where woodland is abundant, the law does not interpose unless there is a material injury to the reversion.¹

A tenant for life cannot commit waste. (See WASTE.)

Emblements (see CROPS) are the products of annual growth and cultivation; they are the profits of the crops planted by the tenant for life and not harvested when his estate terminates. Such things as do not require regular annual planting or cultivation, as fruit and grasses, are not classed as emblements. Emblements, or *fructus industriales*, go to the personal representatives of the tenant for life, while *fructus naturales* go to the remainderman.²

Life Estate in Personalty. — A life estate may be created in

but the tenant must then keep it in repair. *Sohier v. Eldridge*, 103 Mass. 345, 351; *Corbett v. Laurens*, 5 Rich. Eq. (S. C.) 301; *Parsons v. Winslow*, 16 Mass. 361.

1. *Webster v. Webster*, 33 N. H. 18; *Smith v. Jewett*, 40 N. H. 532; *Hubbard v. Shaw*, 12 Allen (Mass.), 122. But estovers cannot be taken for use by a workman living on the land. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601. So a tenant is not allowed to use wood to burn bricks made from clay dug on the land where the bricks are made for sale. *Livingstone v. Reynolds*, 2 Hill (N. Y.), 157. Where repairs are necessary, wood cannot be sold, and other wood for the repairs bought with the proceeds. *Padelford v. Padelford*, 7 Pick. (Mass.) 153; *Fuller v. Wason*, 7 N. H. 341. But see *contra*, *Loomis v. Wilbur*, 5 Mason, 13, where Judge Story allowed the sale of wood for the payment of taxes. See *Crockett v. Crockett*, 2 Ohio St. 180. The estovers must be used on the estate where they are obtained, and cannot be used on another estate, though both estates were acquired by the same title. *Cook v. Cook*, 11 Gray (Mass.), 123. But see *Dalton v. Dalton*, 7 Ired. Eq. (N. C.) 197; *Owen v. Hyde*, 6 Verg. (Tenn.) 334.

The courts give a liberal construction to the term "reasonable amount." "It depends on the custom of farmers, the situation of the country, and the value of the timber." *McCullough v. Irvine*, 13 Pa. St. 438; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304.

2. "The income of stocks, of horses, cattle, etc., belong to the tenant for life; and so do also the crops left by her, as the fruits of her industry, and likewise

the growing crops as emblements." *Poin-dexter v. Blackburn*, 1 Ired. Eq. (N. C.) 286; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498.

"The vegetable chattels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously, but by labor and industry, and thence are called *fructus industriales*. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements, because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation." *Reiff v. Reiff*, 64 Pa. St. 134.

Young trees planted by nursery-men are emblements. *Miller v. Baker*, 1 Met. (Mass.) 27.

For a local custom giving the tenant the "way-going" crop, see *Howell v. Schenck*, 24 N. J. L. 89.

If the tenant puts an end to the estate by his own act, he is not entitled to emblements. *Debow v. Colfax*, 10 N. J. L. 128 (a minister cultivating a field adjacent to parsonage leaving for another parish); *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31 (a tenant *durante viduitate*, marrying).

To entitle the tenant to emblements, the estate must be of uncertain duration. If a landlord enters on the expiration of a term for years, the tenant cannot take emblements; but if the tenant is allowed to hold over and become a tenant at will, he may take emblements. *Chesley v. Welch*, 37 Me. 106.

So a tenant from year to year is not entitled to emblements. *Reeder v. Sayre*, 70 N. Y. 180.

In Mississippi, by statute, the heir takes the emblements. *McCormick v. McCormick*, 40 Miss. 760.

personal property. If the bequest is of specific articles, the donee is entitled to the possession on signing an inventory and receipt to the executors, acknowledging the right of the remainderman. If any danger of waste of the chattels is shown, security may be required of the tenant for life. If the bequest is of money or stocks, the executor will hold the same invested, and pay the income to the tenant for life. If the things bequeathed are such as are consumed by use, the bequest is an absolute gift.¹

V. Estates for Years. (See LANDLORD AND TENANT.) — An estate for years is an interest in land granted for a definite fixed time on certain agreed conditions. The interest is founded on a contract called a lease, and originally the tenant's right was merely a right of action on the contract. This was early changed into an actual estate in the land; but the idea that a lease is a chattel still survives in passing the term to the personal representatives of the tenant, and not to his heirs. The term "years" is merely descriptive, as the estate may be for any time, e.g., a month; but the essential characteristic of the estate is, that its duration must be fixed and certain.² The term may begin at any time in the

1. *Rowe v. White*, 16 N. J. Eq. 411; *Langworthy v. Chadwick*, 13 Conn. 42; *Healey v. Toppan*, 45 N. H. 243, 262. For cases where the life-tenant will be required to give security for the safety of the property, see *Howard v. Howard*, 16 N. J. Eq. 486; *Homer v. Shelton*, 2 Met. (Mass.) 194.

If the property given is of the kinds *quæ usu consumuntur*, the tenant has an absolute power of disposal. *Scott v. Perkins*, 28 Me. 22; *Lynde v. Estabrook*, 7 Allen (Mass.), 68. But household furniture does not belong to that class. *Marston v. Carter*, 12 N. H. 159. In case of a gift of a life-interest in a stock of wine by a wine-merchant, the donee took the stock in the cellar of the residence absolutely, but the stock in the shop could only be used in trade, and must be replaced. *Phillips v. Beal*, 32 Beav. 25. And see *Cockayne v. Harrison*, L. R. 13 Eq. 432. Where the gift is of personal property not specific, "the principle is well established, that when a testator by his will, either in express terms or by legal implication, has given the income of his personal estate to one for life, and, on his or her decease, to another, or left it on the termination of the life interest undisposed of, so that it will then go to his heirs-at-law, and has not in terms placed it in trust with any trustee other than the executor, it is the province and duty of the executor to hold it, and to pay over the income from time to time to the legatee for life, and, at the death of such legatee, to pay over the principal to the person entitled to it." *Carson v. Carson*, 6 Allen (Mass.), 397, 399.

A gift to Y. for use during her life, she

to have the control and management of the same, and on her death all said personal estate remaining to go to my grandchildren, vests a life estate in Y. without an absolute power of disposal. *Goudie v. Johnston*, 10 N. E. Rep. (Ind.) 296. See also *Harbison v. James*, 2 S. W. Rep. (Mo.) 292; and *Howard v. Carusi*, 3 Sup. Ct. Rep. 575.

2. *Brown v. Bragg*, 22 Ind. 122. The lease need not fix absolutely the length of the term, but it must contain sufficient means for ascertaining its duration. That is certain which can be made certain. So, a lease "for the term of one year, with the privilege of having the same for three years at the same rent, at the option of the lessee," was held a lease for three years, where the tenant continued to occupy the premises after the first year had expired. *Delashman v. Berry*, 20 Mich. 292; *Munigle v. Boston*, 3 Allen (Mass.), 230 (a term fixed but determinable on a sale of the premises by the lessor); *West. Transp. Co. v. Lansing*, 49 N. Y. 499; *Shaw v. Hoffman*, 25 Mich. 162 (a term for five years, but to end at any time the lessor might wish to build on the premises); *Homer v. Leeds*, 25 N. J. L. 106 ("for any term of years the said Blake may think proper from the above date." It being shown that the premises were to be used for salt-works, and that it was the intention of the parties that the lease should terminate when the salt works were given up, the court says, "The lease was determinable upon the abandonment of the manufacture of salt by the lessees").

That the term goes to the executors, see *Taylor v. Taylor*, 47 Md. 295.

future not beyond the limit laid down by the rule against perpetuities.¹ The right of the lessee before his entry is called an *interesse termini*: it is a mere interest in contradistinction to a term in possession, and its essential qualities arise from the want of possession. It is assignable by the lessee, and binds him on his covenants to pay rent, etc., unless entry is prevented by the lessor, or unless the premises are destroyed before the term begins.² The rights of the lessee are usually regulated by the terms of the lease; but where they are silent, he is entitled to all the rights of a freeholder in possession. He is entitled to assign or sub-let unless he is restrained by a provision in the lease.³ Leases are usually in writing, but they may be by parol except in so far as they may be governed by statute. The English statute of frauds provides that leases for more than three years must be in writing, otherwise they shall have the force of estates at will only; and this has been re-enacted in some of the States in this country.⁴

No especial words are necessary for the creation of an estate for years. Demise, grant, or let, are the most common; but any form of words indicating an intention to transfer the possession for a certain definite time is sufficient.⁵

The leasehold estate may be taken on execution against the lessee, and passes to his assignee in insolvency unless the lease expressly provides for a forfeiture on such an event.⁶

1. Weld v. Traip, 14 Gray (Mass.), 330 (within thirty days of the death of a person named); Field v. Howell, 6 Ga. 423.

A covenant in the lease for an indefinite renewal is good. It does not divest the lessor of the fee. Page v. Esty, 54 Me. 319; Boyle v. Peabody Heights Co., 46 Md. 623; Blackmore v. Boardman, 28 Mo. 420. But see *contra*, on the ground that such a covenant would create a perpetuity, and is void as against the policy of the law. Morrison v. Rossignol, 5 Cal. 64.

A fee may be conveyed by lease, however, if apt words are used. Jamaica Pond Co. v. Chandler, 9 Allen (Mass.), 159, 168. And see Watterson v. Reynolds, 95 Pa. St. 474.

2. Wood v. Hubbell, 10 N. Y. 479, 487; Insurance Co. v. Scott, 2 Hilt. (N. Y.) 550; Lafarge v. Mansfield, 31 Barb. (N. Y.) 345; Taylor v. Caldwell, 3 B. & S. 826 (*semble*).

3. Mason v. Fenn, 13 Ill. 525; Kutter v. Smith, 2 Wall. 491; Dingley v. Buffum, 57 Me. 382, as to the rights of lessees for years to remove fixtures in absence of any provision in the lease.

As to right to assign or sub-let, see Robinson v. Perry, 21 Ga. 183; Crommelin v. Thiess, 31 Ala. 412, 421. "It is perfectly well settled that underletting is not a violation of a covenant not to assign. But the

better opinion seems to be, that the converse of this proposition is not true, and that an assignment is a violation of a covenant not to underlet." Den v. Post, 25 N. J. L. 285, 291. The sub-lessee is not liable to the original lessor for rent, except by express agreement, — Grundin v. Carter, 99 Mass. 15, — or where the original lease is surrendered to the lessor. Beal v. Boston Car Co., 125 Mass. 157.

4. Reed, Statute of Frauds, § 796.

In by far the greater number of States, one year is the time for which a parol lease is valid. In Florida the time is two years. In Maine, Massachusetts, Missouri, New Hampshire, Ohio, and Vermont, all parol leases create estates at will merely. Kerr v. Clark, 19 Mo. 132. The reader is referred to the statutes of his own State. See also ESTATES AT WILL.

5 "In estimating the language which constitutes a lease, the form of words used is of no consequence. It is not necessary that the term *lease* be used. Whatever is equivalent will be equally available." Moore v. Miller, 8 Pa. St. 272, 283; Cong. Meeting House v. Hilton, 11 Gray (Mass.), 407. The lessee must accept the lease; but if it enures wholly to his benefit, the acceptance is presumed. Jackson v. Bodle, 20 Johns. (N. Y.) 184.

6. McNeil v. Ames, 120 Mass. 481.

An estate for years is terminated before its natural limitation only by eviction by the lessor, or a release or surrender of the premises by the lessee to the lessor; and if the premises are destroyed by fire, or otherwise rendered untenable, that, in itself, is no ground for the termination of the tenancy; the covenant to pay rent is unaffected: but this harsh rule has been changed by statute in many States, so that, if the premises are rendered untenable by fire or other casualty, the liability for rent ceases.¹

The lessor stipulates that the lessee shall enjoy the premises during the demised term, but this covenant merely protects the lessee from an eviction by one whose title is superior to the landlord's; and it is no answer to a claim for rent, that the premises are in possession of a stranger, for the landlord does not warrant the possession as against trespassers.² *Per contra*, after accepting the lease, the lessee is estopped to deny his landlord's title so long as he remains in possession; but an eviction by title paramount ends the estoppel.³

A surrender of the premises to the landlord extinguishes the rent, but an abandonment on the part of the tenant does not amount to a surrender unless it is assented to by the landlord. A surrender is made by operation of law when the lessee takes a new lease, the enjoyment of which is incompatible with the existence of the prior lease, or when the assent of the landlord to the abandonment of the tenant is manifested by some act inconsistent with the prior tenancy.⁴

1. *Dyer v. Wightman*, 66 Pa. St. 425; *Jaffe v. Harteau*, 56 N. Y. 398; *Cowell v. Lumley*, 39 Cal. 151 (fire); *Niedelet v. Wales*, 16 Mo. 214 (rise in river). The strict rule was denied in *Ripley v. Wightman*, 4 McCord (S. C.), 447, where the destruction was caused by a hurricane; and in *Whitaker v. Hawley*, 25 Kan. 674, where it was claimed that the common-law rule was not adopted in Kansas.

Where, however, the lease applied only to an upper story in a building, and the premises were destroyed by fire, the tenant was released from the liability to pay rent. *Graves v. Berdan*, 26 N. Y. 498. See *contra*, *Helburn v. Moffard*, 7 Bush (Ky.), 169; *Izon v. Gorton*, 5 Bing. N. C. 501.

2. The lessor does not engage to put the lessee in possession; and if the latter finds a trespasser on the premises, he must bring an action to recover the possession. *Sigmund v. Howard Bank*, 29 Md. 324; *Moore v. Weber*, 71 Pa. St. 429; *Underwood v. Birchard*, 47 Vt. 305; *Field v. Herrick*, 101 Ill. 110. But see *Clark v. Butt*, 26 Ind. 236, where the lessor warranted the possession. A contrary rule prevails in England, and some States, where it is held that the lessor is not supposed to grant merely the chance

of a lawsuit, and he is held to warrant the possession. *Coe v. Clay*, 5 Bing. 440; *Hughes v. Hood*, 50 Mo. 350; *King v. Reynolds*, 67 Ala. 229. In this last case, the court recognizes that the weight of authority is with the rule as first stated, but expressly refuses to follow it.

3. *Longfellow v. Longfellow*, 54 Me. 240; *Alwood v. Mansfield*, 33 Ill. 452; *Stout v. Merrill*, 35 Iowa, 47; *Towne v. Butterfield*, 97 Mass. 106.

4. *Bailey v. Wells*, 8 Wis. 141. And compare *Amory v. Kannofofsky*, 117 Mass. 351, "where by the agreement between the lessor and lessee, the lessee abandons his possession, and the lessor resumes possession of the premises, there is a surrender by operation of law." *Bedford v. Terhune*, 30 N. Y. 453; *Thomas v. Cook*, 2 B. & Ald. 119. But see *Lyon v. Reed*, 13 M. & W. 285, opinion by *Parke, B.*

The assent of the landlord may be inferred from his acts, as a receipt of the keys and a reletting to a new tenant. *Stobie v. Dills*, 62 Ill. 432; *Matthews v. Tobener*, 39 Mo. 115; *Elliott v. Aiken*, 45 N. H. 30. Where, however, the landlord received the keys, and put up a sign "To let" on the premises, it was held, that, until the prem-

VI. Estates at Will, and Estates from Year to Year. (See LANDLORD AND TENANT.)—An estate at will is an estate in land determinable at the will of either party, and arises only on actual possession by the tenant.¹ The estate may be determined by the act of either party showing an intention to terminate the tenancy, or that is inconsistent with the existence of the relation of landlord and tenant. The tenant has no interest that he can convey, and, in fact, his interest is determined by a conveyance by either party; so, too, it is determined by the death of either party.² Where the tenancy is determined by the landlord, the tenant is entitled to emblements and to a reasonable time to remove, but he is not entitled to any formal notice to quit: a mere demand for possession ends the tenancy.³

Tenancy at will most commonly arises under parol leases, which the statute of frauds declares shall create tenancies at will. They may also arise where a person enters upon land under a contract for a conveyance, or an agreement for a lease. So where a man is placed on land as a mere occupier, without any terms prescribed, he becomes a tenant at will.⁴

In consequence of the uncertainty of this relation, and the fre-

ises were actually let, there was no such change of possession as to constitute a surrender. *Oastler v. Henderson*, 2 Q. B. D. 575.

1. *Pollock v. Kittrell*, 2 Taylor (N. C.), 152; *Hardy v. Winter*, 38 Mo. 106.

2. *Esty v. Baker*, 50 Me. 325; *Howell v. Howell*, 7 Ired. (N. C.) 496. "The determination of an estate at will by an alienation by the owner of the reversion, is one of the legal incidents of such an estate to which the right of the lessee therein is subject, and by which it may be as effectually determined as by a notice to quit given according to the requisitions of the statute," from *McFarland v. Chase*, 7 Gray (Mass.), 462. So also on an assignment by the lessee. *McCann v. Rathbone*, 8 R. I. 403; *Clark v. Wheelock*, 99 Mass. 14; *Cole v. Lake Co.*, 54 N. H. 287. And see, generally, *Howard v. Merriam*, 5 Cush. (Mass.) 563; *Stedman v. Gassett*, 18 Vt. 346.

3. "If the lessor determines the tenancy before the wheat or other produce is reaped or gathered, the lessee shall have the emblements, and free ingress, egress, and regress to take them away; but when the lessee determines the tenancy at such time, he loses the emblements." *Brown v. Thurston*, 56 Me. 126, 128. So also where the lessee ends the term. *Morgan v. Morgan*, 65 Ga. 493. But this case stands alone.

The tenant has a reasonable time in which to remove from the premises, and gather the emblements; but the tenancy terminates without notice. *Rich v. Bolton*,

46 Vt. 84; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Elliott v. Stone*, 1 Gray (Mass.), 571; *Blum v. Robertson*, 24 Cal. 127. A formal demand for possession is enough. *Herrell v. Sizeland*, 81 Ill. 457; *Larned v. Hudson*, 57 N. Y. 151.

4. "The defendant was in possession, holding for no particular term, making no compensation for the use of the land; but he made an agreement to surrender the premises whenever the landlord should require the possession. He was clearly a tenant at will." *Burns v. Bryant*, 31 N. Y. 453. See *Le Tourneau v. Smith*, 53 Mich. 473; *Johnson v. Johnson*, 13 R. I. 467; *Herrell v. Sizeland*, 81 Ill. 457.

Where the tenant enters under a contract for a conveyance, see *Harris v. Frink*, 49 N. Y. 24; *Freeman v. Headley*, 33 N. J. L. 523; *Dean v. Comstock*, 32 Ill. 173. But a refusal to accept a deed ends the tenancy. *Gould v. Thompson*, 4 Met. (Mass.) 224. But see *Cole v. Gill*, 14 Iowa. 529.

In order, however, to support an action for use and occupation, there must be some contract, express or implied, to pay rent. *Central Mills v. Hart*, 124 Mass. 123.

An estate at will also exists where a tenant for years holds over, after the expiration of his term, with the consent of his landlord. *Gunsolus v. Lormer*, 12 N. W. Rep. (Wis.) 62; *Edwards v. Hale*, 9 Allen (Mass.), 462. The usual obligations of tenancies exist, and the tenant is estopped to deny his landlord's title. *Ezelle v. Parker*, 41 Miss. 520.

quent hardship to the lessee, by the arbitrary termination on the part of the lessor, the courts, by a species of judicial legislation, refused to recognize the determination of such an estate where rent was reserved and paid without due notice being given by the party exercising his will to end the tenancy. In this way arose a class of estates called estates from year to year, and which continue for an uncertain number of fixed periods of time, which may only be terminated on due notice being given. The length of these periods of time is regulated by the manner of reservation of rent: if the rent is annual, the term continues for a year; if quarterly, for a quarter, etc.¹ This doctrine has been universally adopted in America, except in Maine and Massachusetts. In those two States tenancies at will still exist.² Generally, however, by statute, notice to quit is necessary to terminate the tenancy,³ where the estate is determined by the will of either party; but the estate at will is still immediately determinable on the death of either party. Tenancy at will in the old form now exists only where the parties specially agree that the estate shall have that condition, or where no rent is reserved.⁴

1. *Estates from Year to Year*.—As above defined, this estate continues for an uncertain number of fixed periods of time. Originally the fixed period of time was one year; but the term "year" as now used is merely descriptive, and the estate includes tenancies from month to month, etc.⁵ If the rent reserved is annual, the fixed period of time is a year, even though the rent be payable at stated intervals during the year.⁶ In case of yearly

1. *Morehead v. Watkyns*, 5 B. Mon. (Ky.) 228; *Lockwood v. Lockwood*, 22 Conn. 425; *Ridgley v. Stillwell*, 28 Mo. 400. "A parol demise for more than three years in the first instance, then, creates a tenancy at will only, and this satisfies the statute; but that tenancy at will, like any other, may be subsequently changed into a tenancy from year to year by the payment and acceptance of the rent annually." *Dunn v. Rothermel*, 112 Pa. St. 272. And see *Pugsley v. Aiken*, 11 N. Y. 494; *Hall v. Wadsworth*, 28 Vt. 410; *McEowen v. Drake*, 14 N. J. L. 523. "The law favors such a tenancy, and infers it from a holding over, in the absence of any evidence to the contrary." *Williams v. Paxton*, 18 Gratt. (Va.) 475; *Coomler v. Hefner*, 86 Ind. 108.

2. *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Davis v. Thompson*, 13 Me. 209. See also *Hammon v. Douglas*, 50 Mo. 434; *Withers v. Larrabee*, 48 Me. 570. The statute in these States requires that notice to quit must be given to terminate the tenancy; but the tenancy may be ended at once by alienation, by the landlord, by deed or lease. — *Pratt v. Farrar*, 10 Allen (Mass.), 519, — and that, too, although the alienation may be merely colorable, and for the express

purpose of ending the tenancy. *Curtis v. Galvin*, 1 Allen (Mass.), 215. The tenant, then, is merely entitled to a reasonable time to remove. *Low v. Elwell*, 121 Mass. 309. But see *Young v. Young*, 36 Me. 133; *Thomas v. Sanford Steamship Co.*, 71 Me. 548.

3. The time for the notice is variously fixed from three days to three months. The statute in each State must be referred to. *Williams v. Hodges*, 41 Mich. 695.

4. *Harrison v. Middleton*, 11 Gratt. (Va.) 527, where there was an agreement to surrender possession at any time. *Sullivan v. Enders*, 3 Dana (Ky.), 66. But see *Batchelder v. Batchelder*, 2 Allen (Mass.) 105, where the tenant was held to notice, although the agreement was that he might leave at any time.

So where there was a verbal permission to erect a shanty on the land for the use of workmen, no rent being reserved. *Williams v. Deriar*, 31 Mo. 13. And see *Johnson v. Johnson*, 13 R. I. 467; *Herrell v. Sizeland*, 81 Ill. 457.

5. *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *Bright v. McQuat*, 40 Ind. 521; *Secor v. Pestana*, 37 Ill. 525.

6. The payment of rent is essential to

tenancies, the English rule requires six months' notice to determine the tenancy. In America, the length of time for the notice has been variously fixed by statute.¹ Where the letting is for a less term than a year, the period for notice is fixed by the manner of paying rent: if the rent is paid monthly, a month's notice is required, etc. If no notice is given, the tenancy continues for another term, and so on.²

The tendency of the courts is to construe all general or doubtful tenancies into estates from year to year; and parol leases, which, under the statute of frauds constitute estates at will, are turned into estates from year to year by the payment and acceptance of rent, or other circumstance indicating that that is the intention of the parties. So, where the tenant holds over after the expiration of a lease for years, he will be considered as a tenant from year to year.³

the estate. *Dunne v. Trustees*, 39 Ill. 578; *Rich v. Bolton*, 46 Vt. 84. So, where a tenant for years holds over after his term, and continues to pay rent, he becomes a tenant from year to year. *Usher v. Moss*, 50 Miss. 208; *Tolle v. Orth*, 75 Ind. 298. In this last case a tenant under a lease for five years, held over, on the expiration of his term, for several months, paying rent, and then tried to leave on giving one month's notice. It was held that he was a tenant from year to year, and could be held for the whole year's rent.

"If the contract was for a renting for only two months, the receiving of half the rent for the month of September, after the expiration of the two months, would give the appellant the right to hold over for the two months longer; and the reception of rent would tend to show the consent of the appellants, either directly or constructively, to the holding over. If the contract was, that the appellant should pay eight dollars per month, without limit as to the number of months it should run, then a general tenancy was created, and it must be deemed a tenancy from year to year, and notice would be required to terminate it" (three months). *Rothschild v. Williamson*, 83 Ind. 387, 389. Where, however, the agreement is for so much a month, a monthly tenancy is created, and a month's notice is sufficient. *Hollis v. Burns*, 100 Pa. St. 206. And see *Blumenthal v. Bloomington*, 100 N. Y. 558, where the court, in referring to a term created by a parol lease, say, "It could not subsist for its full agreed term because of the statute; but, nevertheless, there having been an entry into possession, and a payment of rent, it was good as a new contract for one year, and enures as a tenancy from year to year" (p. 561).

1. *Bessell v. Landsberg*, 7 Q. B. 638;

Hall v. Myers, 43 Md. 446; *Barlow v. Wainright*, 22 Vt. 88; *Reeder v. Sayre*, 70 N. Y. 180, where a six-months' notice is required. In Pennsylvania and some other States, three months' notice is the rule. *Logan v. Herron*, 8 S. & R. (Pa.) 459. And see, especially, *Steffens v. Earl*, 40 N. J. L. 128.

2. *Hollis v. Burns*, 100 Pa. St. 106.

3. *Dunn v. Rothermel*, 112 Pa. St. 272. In *Patton v. Axley*, 5 Jones, L. (N. Car.) 440, a lease was made for the purpose of exploration for minerals. Rent was payable quarterly, but the lease was forfeitable on non-user of the premises for one year, and the lessees had the right to discontinue work at any time. This was held a tenancy from year to year. But see *Hunt v. Morton*, 18 Ill. 75, where a tenant went into possession of a farm without any specific contract for the payment of rent, with permission to remain there until spring. He continued in possession for over two years, raising crops. He was held a tenant from year to year.

Where a tenant holds over after a lease for years, the terms of the original lease will be considered in force. *Gardner v. Com. of Dakota Co.*, 21 Minn. 33. But where a tenant so holds over, the landlord has the election to treat him as a trespasser, and eject him, or hold him as a tenant. *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151. In this case, the tenants gave notice on the last day of the term (Dec. 31) that they would leave, and at the same time began negotiations with the landlord for a new holding at a reduced rental. The negotiations failed, and they began to move on Jan. 3. The landlord refused to assent to the surrender. It was held that he had exercised his election to hold them for another year, and the tenants were held for a year's rent. *Ames v. Schluesler*, 14 Ala.

The right to notice is mutual, and the rules as to notice must be carefully observed.¹ The tenancy can be terminated only on the expiration of the time for which the tenant lawfully holds, and the notice must be clear as to the time the tenancy is to expire, and the full statutory period of notice must be given. The tenancy continues until notice is properly given whether the tenant occupies the premises or not.² The notice may be waived by the subsequent payment and receipt of rent, but not necessarily so.³

The tenant can assign his estate, and, while the term continues, may maintain trespass against all the world, including his landlord.⁴ The death of either party has no effect to end the estate.

VII. Estates at Sufferance.—This estate is the interest of a tenant who has come lawfully into possession, and is holding over after his right has determined, without the assent, express or implied, of his landlord.⁵ The original tenancy must rest on the agreement of the parties;⁶ but if the holding over is by agreement or by permission, it becomes an estate at will, or an estate from year to year. So the payment and acceptance of rent converts a tenancy at sufferance into a tenancy at will, or from year to year.⁷ This estate is created solely by implication of law, and seems to have been a judicial creation to prevent an adverse possession when the particular estate determined without the knowledge of the reversioner; therefore the tenancy has the customary attributes of the larger tenancies. The tenant cannot deny his landlord's title, nor hold adversely to him, but he is not liable for rent.⁸

It most commonly arises after the determination of an estate for years.⁹ It is determined without notice to quit, and the

600, where the tenant held over one month. *Toile v. Orth*, 75 Ind. 298; *Schuyler v. Smith*, 51 N. Y. 309.

1. *Hall v. Wadsworth*, 28 Vt. 410.

2. *Woodrow v. Michael*, 13 Mich. 187; *Currier v. Barker*, 2 Gray (Mass.), 224. In *Waters v. Young*, 11 R. I. 1, the tenancy was from month to month, the expiration of the term being on the 18th. A notice to quit "on or before Jan. 17," was held insufficient.

3. *Kimball v. Rowland*, 6 Gray (Mass.), 244. Here rent was accepted on the distinct understanding that the notice to quit remained in full force.

4. *Clark v. Smith*, 25 Pa. St. 137.

5. *Uridias v. Morrell*, 25 Cal. 31; *Coomer v. Hefner*, 86 Ind. 108. The distinction between tenancies at will, at sufferance, and from year to year, is brought out in *Finney v. City of St. Louis*, 39 Mo. 177. "When the tenant holds over by consent, either express or implied, after the determination of an estate for years, it is held to be evidence of a new contract without

any definite period for its termination, and in either case is construed to be an estate from year to year. And a tenant holding over after the expiration of his lease will be presumed to hold under, and subject to the terms of, the preceding lease.

"A tenancy by sufferance only happens when a man comes into possession lawfully, but holds over wrongfully after the determination of his interest."

6. *Merrill v. Bullock*, 105 Mass. 486.

7. *Emmons v. Scudder*, 115 Mass. 367. See *Hunt v. Bailey*, 39 Mo. 257.

8. That he is stopped to deny his landlord's title, — *Griffin v. Sheffield*, 38 Miss. 359, 390, — that he cannot hold adversely, — *Edwards v. Hale*, 9 Allen (Mass.), 462, — that there is no liability for rent, — *Flood v. Flood*, 1 Allen (Mass.), 217, — but that he is liable for use and occupation, — *Hogsett v. Ellis*, 17 Mich. 351; *Bush v. Nat. Oil Refining Co.*, 5 W. N. Cas. 143; *Stockton's App.* 64 Pa. St. 58.

9. *Smith v. Littlefield*, 51 N. Y. 539, 543; *Russell v. Fabyan*, 34 N. H. 218.

tenant has a reasonable time in which to remove.¹ After that has expired, the landlord may enter and eject him; and this right of entry is not taken away by statutes making a forcible entry a criminal offence.²

VIII. Joint Estates.—Joint estates are all estates where the title is vested in more than one person. There are four such estates known to the law,—joint tenancy, tenancy in common, coparcenary, tenancy by entirety.

1. *Joint Tenancy.*—An estate in joint tenancy is an estate held by two or more persons jointly, with an equal right in all to share in the enjoyment of the land during their lives. On the death of any tenant, his share vests in the survivors until only one survivor is left, who then takes the estate in severalty; and it descends to his heirs to the exclusion of the heirs of any other of the original tenants. There may be a joint tenancy in any of the estates in land. The estate must possess what Blackstone terms the four unities; viz., the tenants must have one and the same interest (e.g., all the tenants must hold in fee, or for life, etc.), accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

In Kentucky, a tenant for years is at sufferance for ninety days after his term expires (by statute). During that time he may be ejected; but if he is allowed to remain in possession for that time, he holds for another year. *Mendel v. Hall*, 13 Bush (Ky.), 232.

A tenant at will, after the determination of the will, becomes a tenant at sufferance. *Benedict v. Morse*, 10 Met. (Mass.) 223; *Curtis v. Galvin*, 1 Allen (Mass.), 215.

So a mortgagor in possession after foreclosure, — *Allen v. Carpenter*, 15 Mich. 25; *Kinsley v. Ames*, 2 Met. (Mass.) 29, — or before foreclosure, when the mortgage contains no provision allowing the tenant to retain possession. *Lackey v. Holbrook*, 11 Met. (Mass.) 458.

As stated in the text, a tenant for years holding over becomes a tenant at sufferance; but an anomalous rule exists in New York and some States, that the landlord has the option to treat him as a trespasser or a tenant from year to year. The rule is thus stated in *Schuyler v. Smith*, 51 N. Y. 309: "The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser, or as a tenant for another year upon the terms of the prior lease, so far as applicable." And see also *Ives v. Williams*, 50 Mich. 100, 106; *Tolle v. Orth*, 75 Ind. 298. But see *contra*, that a tenancy at sufferance is created, *Levy v. Lewis*, 9 C. B. N. S. 872; *Edwards v. Hale*, 9 Allen (Mass.), 462;

Condon v. Barr, 47 N. J. L. 113; *Withers v. Larrabee*, 48 Me. 570.

1. Nor is he required to give notice of his removal. *Edwards v. Hale*, 9 Allen (Mass.), 462. The tenancy is terminated by entry, and judgment in an ejectment suit is equivalent to entry. *Smith v. Littlefield*, 51 N. Y. 539; *Bennett v. Robinson*, 27 Mich. 32. Notice to quit is required by statute in several States.

Twelve months was considered a reasonable time for removal, when the tenant had an ice-house on the land, and the ice could not be removed sooner without spoiling it. *Antoni v. Belknap*, 102 Mass. 193.

2. A forcible entry lays no foundation for a civil action on the part of the tenant against the landlord. *Harvey v. Brydges*, 14 M. & W. 437; *Low v. Elwell*, 121 Mass. 309. In *Stearns v. Sampson*, 59 Me. 568, the court held an action for assault and battery would not lie, where the landlord entered, and burst open an inner door; took off all the doors and windows on a cold day in winter; brought a bloodhound into the house; made a great noise about the premises for several days; and refused to allow food to be brought into the house. And see *Mussey v. Scott*, 32 Vt. 82; *Fuhr v. Dean*, 26 Mo. 116. But see *contra*, *Bedall v. Maitland*, L. R. 17 Ch. Div. 174, 183-190; *Whittaker v. Perry*, 38 Vt. 107. In Ill. R. R. v. Cobb, 68 Ill. 53, the landlord sent twenty or thirty men with axes and shovels, who broke down the fences, and took forcible possession of the premises. The tenant sued in trespass *qu. cl.*, and recovered exemplary damages.

A joint tenancy is created only by purchase. Its distinguishing feature is the principle of survivorship, but the American law is opposed to this doctrine; and joint tenancy, except for trustees, has been generally done away with, or modified by statute.¹

Each joint tenant holds the entire estate, and a simple release by one to the other conveys his entire interest without words of inheritance.² A joint tenant may convey his interest by deed, and his grantee will stand in the relation of tenant in common to the other tenant; but it is obvious that no estate will pass by devise.³

2. *Tenancy in Common.*—An estate in common exists in two or more persons where there is unity of possession, but each holds by a separate title. The tenants may hold by different titles which may vest at different times, and the times of enjoyment may be different. There is no right of survivorship; but each share may be freely alienated by will or deed, and, if undisposed of, descends to the heirs of the tenant.⁴

Each tenant has a right to the entire, but not to the sole, possession; but his estate is separate, and he cannot bind his co-tenant by any agreement or conveyance.⁵ Tenants in common stand so

1. There can be no joint tenancy between corporations, as there can be no survivorship. *De Witt v. San Francisco*, 2 Cal. 289. In Ohio, the court has declared that the doctrine of joint tenancy never found a footing there; as the *jus accrescendi* is contrary to the understanding, feelings, and habits of the people. *Sergeant v. Steinberger*, 2 Ohio, 305. See also *Phelps v. Jepson*, 1 Root (Conn.), 48. In Kansas and Nebraska, there are no statutes on the point, and joint tenancy presumably exists there as at common law. But almost everywhere a statute exists declaring that a conveyance to two or more persons shall create a tenancy in common, unless the intention to create a joint tenancy is clearly expressed. *Hoffman v. Stigers*, 28 Ia. 302; *Kennedy's App.* 60 Pa. St. 511. But see *Ball v. Deas*, 2 Strobb. Eq. (S. C.) 24. And see *Hershey v. Clark*, 35 Ark. 17, where an agreement between tenants in common for survivorship was held void.

In North Carolina it is held that the statute merely takes away the right of survivorship, and all the other attributes of joint tenancy are left. *Rowland v. Rowland*, 93 N. C. 214. Joint tenancy still exists in New Jersey. In a bill for the specific performance of a contract to convey land, it was held to be no valid objection that the wives of the grantors who were joint tenants did not join in the deed. *Babbitt v. Day*, 41 N. J. Eq. 392.

The statutes frequently make an exception in the case of trustees, as it is manifestly a convenience that trustees should take as joint tenants. *Phil. & Read. R. R.*

Co. v. Lehigh Nav. Co., 36 Pa. St. 204. But even where there is no exception in the statute, reasons of convenience lead the courts to hold that the statute is not applicable to trustees. *Franklin Inst. for Sav. v. People's Bank*, 14 R. I. 632. See *Parsons v. Boyd*, 20 Ala. 112, where the court says, "Joint trustees are not within the reason of the statute, nor the evil intended to be remedied by it; and to hold that their joint title is affected by the act, could be productive of no good: it could avoid no evil, but, on the contrary, might often lead to protracted litigation, and serious injury to the trust estate."

2. *Rector v. Waugh*, 17 Mo. 13.

3. *Nichols v. Denny*, 37 Miss. 59; *Duncan v. Forrer*, 6 Binn. (Pa.) 193. There is no dower or curtesy in an estate in joint tenancy, — *Babbitt v. Day*, 41 N. J. Eq. 392, — except where survivorship has been abolished; for when the reason of the rule goes, the rule also falls. *Davis v. Logan*, 9 Dana (Ky.), 185.

4. *Brown v. Wellington*, 106 Mass. 318; *Butler v. Roys*, 25 Mich. 53. There may be a tenancy in common in a remainder. *Coleman v. Lane*, 26 Ga. 515. For holding in unequal shares, see *Fenton v. Lord*, 128 Mass. 466.

5. *McKinley v. Peters*, 111 Pa. St. 283.

A tenant in common cannot convey any part of the estate by metes and bounds, so as to bind his co-tenant. *Marks v. Sewall*, 120 Mass. 174. It is held elsewhere, that such a conveyance is good, except where it works an injury to the co-tenant, — *Campau*

far in a fiduciary relation to each other, that a purchase of an outstanding incumbrance on the estate by one co-tenant enures to the benefit of all who are willing to contribute ratably to the purchase price.¹

Each co-tenant sues severally for a breach of covenant of warranty in the conveyance by which his title is acquired; and they must sever in actions for recovery of the land, their titles being several; but they must join in actions to recover for injuries to the possession, as their possession is joint.²

Where one co-tenant occupies the whole estate adversely to the other, the latter may then have an action to recover possession; but where one tenant merely occupies the land, he only does what he has a right to, and is not liable to the other for rent, or for any share in the rents and profits.³

v. Godfrey, 18 Mich. 27, 39; *Sutter v. San Francisco*, 36 Cal. 112,—and it is suggested that the grantee may take this portion on partition. *Barnhart v. Campbell*, 50 Mo. 597; *Worthington v. Staunton*, 16 W. Va. 208, 241, where the court exhaustively reviews the subject, and says, "A co-tenant may convey at his pleasure his undivided interest in all the lands held in common, without the knowledge or consent of his companions in interest. In this case, the effect of the deed is to place the grantee in the deed in the same position that the grantor had previously occupied, and no possible injury could result to the other co-tenants in the tract. A deed from a co-tenant of a part of the land held in common, describing it by metes and bounds, cannot in any way operate to the prejudice of the other tenants in common: they have the right to have the land partitioned unaffected by such deed. But in partition in such case, a court of equity will allot the portion so conveyed by metes and bounds to the purchaser thereof, if it can be done without prejudice to the rights of the other co-tenants." And see *Johnson v. Stevens*, 7 Cush. (Mass.) 431; *Harlan v. Langham*, 69 Pa. St. 235, 238; *Whitton v. Whitton*, 38 N. H. 127.

1. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Brown v. Hogle*, 30 Ill. 119 (tax title); *Picot v. Page*, 26 Mo. 398, where the rule is called a principle of equity, and is applied to an outstanding adverse title. *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43. But this rule is applied only to tenants under the original grant: after one or more of the original tenants has conveyed his holding, the new tenant may buy in and hold an outstanding incumbrance. *Wright v. Sperry*, 21 Wis. 331. And see *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

2. *Lamb v. Danforth*, 59 Me. 322 (breach of warranty). In ejectment the tenants must sue separately, as their estates and

titles may be wholly different. *Stevenson v. Cofferin*, 20 N. H. 151; *Hines v. Trantham*, 27 Ala. 359; *Young v. Adams*, 14 B. Mon. (Ky.) 102; *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224; *Muller v. Boggs*, 25 Cal. 175. In Connecticut, they may either join or sever. *Hillhouse v. Mix*, 1 Root (Conn.), 246. And this is so by statute in some States. *Brown v. Bates*, 55 Me. 520. But where one sues alone, he recovers judgment for such share as he shows himself entitled to, even though he sues in behalf of all. *Butrick v. Tilton*, 141 Mass. 93; *Overcash v. Kitchie*, 89 N. C. 384, 391. But see *Winstanley v. Meacham*, 58 Ill. 98, and that, as against a trespasser, one tenant has judgment for the whole. *Contreras v. Haynes*, 61 Tex. 103. And see *Muller v. Boggs*, 25 Cal. 175, where one tenant recovered the whole possession, but was allowed to recover only his share of the rents and profits. For injuries to the possession merely, see *Phillips v. Sherman*, 61 Me. 548; *De Puy v. Strong*, 37 N. Y. 372.

3. A co-tenant who is actually dispossessed may sue to recover possession. *Presbrey v. Presbrey*, 13 Allen (Mass.), 281; *Culver v. Rhodes*, 87 N. Y. 348; *Small v. Clifford*, 38 Me. 213. And he may also recover his share of the mesne rents and profits.

Two tenants in common recovered for mesne profits against a third who withheld possession; but the latter was allowed to set up improvements made by him in mitigation of damages. *Backus v. Chapman*, 111 Mass. 386. But perhaps the recovery for mesne profits should be in a separate action. *Lane v. Harrold*, 72 Pa. St. 267. Where, however, the tenant occupies with the consent of the others, he is not liable for rents and profits, though he receives more than his due proportion. *Izard v. Bodine*, 11 N. J. Eq. 403; *Webster v. Calef*, 47 N. H. 289; *Shepard v. Richards*, 2 Gray (Mass.), 424. Nor can a tenant who

So no co-tenant can hold any other for contribution for repairs or improvements.¹

3. *Coparcenary*.—This estate is a joint estate, vesting in the heirs of an intestate. It is an entire estate in each heir; that is, all take as one heir: but the shares may be unequal, and there is no survivorship. This estate is not broken by descent, and remains until turned into tenancy in common by an alienation.

This doctrine does not exist in America, except in Maryland, and heirs take as tenants in common.²

4. *Estates by the Entirety*.—This estate is created on a conveyance to husband and wife jointly. Each is seized of the whole estate, and not of a moiety. There is consequently a right of survivorship; but this right cannot be destroyed by either party, and there is no right of partition.³ During the joint lives of husband and wife, the husband has the control of the estate. He receives the rents and profits, and can mortgage or alien the property; but such conveyance is absolute only in case the husband survives the wife. If the wife survives, she acquires the entire interest, and may bring an action to recover the land.⁴ If the conveyance is made to the husband and wife and a third person as joint tenants,

merely occupies be held for rent without an express demise. *Kline v. Jacobs*, 68 Pa. 57. So, where one co-tenant occupied and cultivated one-half of the joint premises, and made no effort to prevent the other tenant from occupying the other half. *Balfour v. Balfour*, 33 La. Ann. 297; *Calhoun v. Curtis*, 4 Met. (Mass.) 413. And see *Crow v. Mark*, 52 Ill. 332, where a remedy in equity is suggested. And see *contra*, that the tenant is liable for rent. *Edsall v. Merrill*, 37 N. J. Eq. 114; *Holt v. Robertson*, 1 McMullan Ch. (S. C.) 475. But this case is disapproved of in *Pico v. Columbet*, 12 Cal. 414.

In many States, one tenant in common has an action by statute against a co-tenant occupying more than his just share of the estate. *Stimson Statutes*, § 1378.

1. "Both parties are equally bound to make repairs, and neither is more in default than the other for a failure to do so." *Calvert v. Aldrich*, 99 Mass. 74, 78. But there seems to be a remedy in equity to recover contribution for such repairs as are necessary for the preservation of the premises. *Scott v. Guernsey*, 48 N. Y. 106, 124; *Cheeseborough v. Green*, 10 Conn. 318. But see *Dech's App.* 57 Pa. St. 467, where a tenant recovered for contribution for necessary repairs in a suit at law.

The rule is the same as to improvements. *Kelsey's App.* 113 Pa. St. 119. But the court intimate that on partition they will allot the improved portion to the tenant who made the improvement, without any allowance to the others, if the nature of the improvement renders that possible.

2. 1 Washb. Real Prop. 413; *Hoffar v. Dement*, 5 Gill (Md.), 132.

3. *Lux v. Hoff*, 47 Ill. 425; *Davis v. Clark*, 26 Ind. 424; *Wright v. Sadler*, 20 N. Y. 320.

"By the common law, when land was conveyed to husband and wife, they did not take as tenants in common, or as joint tenants, but each became seized of the entirety, *per tout et non per my*; and upon the death of either, the whole survived to the other. The survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee. During the joint lives, the husband could, for his own benefit, use, possess, and control the land, and take all the profits thereof, and he could mortgage and convey an estate to continue during the joint lives; but he could not make any disposition of the land that would prejudice the right of his wife in case she survived him." *Bertles v. Nunan*, 92 N. Y. 152. And see *McDuff v. Beauchamp*, 50 Miss. 531.

That there is no right of partition.—*Bennett v. Child*, 19 Wis. 364,—and the right of survivorship is not abrogated by a statute allowing partition. *Zornlein v. Bram*, 100 N. Y. 12.

4. *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Needham v. Bronson*, 5 Ired. Law (N. C.), 426. If the wife survives, she has the entire interest. *French v. Mehan*, 56 Pa. St. 286; *Pierce v. Chase*, 108 Mass. 254. A statute abolishing the *ius accrescendi* does not affect tenancy by entirety. *Rogers v. Grider*, 1 Dana (Ky.), 242.

the husband and wife together take one-half the land, and the third person the other half.¹

Tenancy by entirety does not exist in some States, and has been abolished or modified by statute in others.²

IX. Estate in Severalty.—This is an estate held by one person in his own right without having any other joined or connected with him in point of interest. It is opposed to joint ownership where the tenants hold in undivided shares.³

X. Estate of Freehold.—An estate of freehold is an estate of inheritance, or for life, or for some indeterminate period, in real property. In its origin, it is an estate worthy of a free man, and nothing less than a life estate falls in that class. The peculiar quality of this estate is, that it lasts for an uncertain period; a term for years, therefore, is not an estate of freehold. At the present day, the word is used to designate the quantity of the estate rather than the quality of the tenure.⁴

XI. Estate of Inheritance.—An estate of inheritance is any interest in lands that may descend to the heirs of the owner. Such estates are estates in fee and estates tail.⁵

XII. Estate by Elegit.—This estate is the interest obtained by a creditor in the lands of his debtor under a writ of elegit. It is a right to hold one-half of the lands of the debtor until the debt is satisfied out of the rents and profits, or otherwise. This was a clumsy and inconvenient method, and has long been superseded by the writ of execution *fi. fa.* It seems to exist still in a few States,⁶

1. Johnson v. Hart, 6 W. & S. (Pa.) 319; Barber v. Harris, 15 Wend. (N. Y.) 615.

2. The estate still exists in several States. Bennett v. Child, 19 Wis. 362; Washburn v. Burns, 34 N. J. L. 18; Hull v. Stephens, 65 Mo. 670; French v. Mehan, 56 Pa. 286; Hulett v. Inlow, 57 Ind. 412. Survivorship is retained in Arkansas, Maryland, Mississippi, and Michigan. Fisher v. Proven, 25 Mich. 350.

This tenancy never existed in Ohio, Connecticut, and Virginia. Whittlesey v. Fuller, 11 Conn. 337; Sergeant v. Steinberger, 2 Ohio, 305. And generally a grant to a husband and wife will create a tenancy in common, or joint tenancy, if the intention is plainly expressed in the grant. McDermott v. French, 15 N. J. Eq. 78, 81. But in general, the statute declaring that a conveyance to two or more shall create a tenancy in common, unless a contrary intent is clearly expressed, is held to abolish estates by the entirety. Hoffman v. Stigers, 28 Ia. 302. But see Bertles v. Nunan, 92 N. Y. 152, *contra*.

The question has been raised, whether tenancy by the entirety is abolished by the statutes giving to married women the rights of *femes sole* in the management and conveyance of their property. That it is not so abolished, see Marburg v. Cole, 49 Md.

402; McCurdy v. Canning, 64 Pa. St. 39; Pray v. Stebbins, 141 Mass. 219; Fisher v. Proven, 25 Mich. 347; Bertles v. Nunan, 92 N. Y. 152; McDuff v. Beauchamp, 50 Miss. 531; Robinson v. Eagle, 29 Ark. 202. But see, *contra*, that it is abolished, Cooper v. Cooper, 76 Ill. 57; Clark v. Clark, 56 N. H. 105; Hoffman v. Stigers, 28 Ia. 302.

3. 2 Greenleaf, Cruise, *363; Sweet, Law Dict. 760.

4. Gage v. Scales, 100 Ill. 218, 221. There may be a freehold in an equitable estate. A mortgagor in possession is a freeholder. State v. Ragland, 75 N. C. 12; 1 Washb. Real Prop. 57 (5th ed.). And see, for the use of the word in England, Mathews v. Mathews, L. R. 4 Eq. 278; Doe v. Tucker, 3 B. & Ad. 473; Bowen v. Barlow, L. R. 11 Eq. 454.

5. For the technical words necessary to be used to create a fee, see note to "Estates in fee." See also Washb. Real Prop. p. 87 (5th ed.).

6. McCance v. Taylor, 10 Gratt. (Va.) 580.

"The writ of elegit, when issued pursuant to the statute, recites the recovery of the judgment, and the plaintiff's election, of that mode of execution: it then commands the sheriff that he cause to be delivered all the goods and chattels of the

and has lately been revived in England for the purpose of evading the Bankrupt Act.¹

XIII. Estate in Possession. — Estate in Expectancy. — With reference to the time of their enjoyment, estates are either in possession or expectancy. An estate in possession (or an immediate estate) gives a present right of present enjoyment, while an estate in expectancy is one which cannot be enjoyed until a future time. An estate of freehold is said to be in possession, although it is subject to an existing prior chattel interest. Estates in expectancy include reversions, remainders, and future interests.²

XIV. Estate in Reversion. — An estate in reversion is the interest of a grantor of land who has conveyed less than his whole interest. It is a right to the possession and enjoyment of the land after the determination of the particular estate that he has conveyed: the possession then *reverts* to him. It is a present vested interest, although the time of enjoyment is postponed. There can be no reversion after the grant of a fee-simple, for the grantor conveys his whole interest; but a grant of any less interest leaves a reversion in the grantor.³ A reversion can be assigned or devised, and is descendible.⁴ There is no curtesy or dower in a reversion, unless the particular estate is less than a freehold, or unless the reversion vests in possession before the death of the owner.⁵

defendant, saving the oxen and beasts of the plough; and also a moiety of all his lands and tenements, in the county whereof he, at the day of obtaining the judgment, was seized, or at any time afterwards, by reasonable price and extent: to have and to hold the said goods and chattels to him, the said plaintiff, as his own proper goods and chattels; and the said moiety as his freehold to him and his assigns until he shall have levied thereof the debt and damages." *Morris v. Ellis*, 3 Ala. 560.

1. In England, suffering an execution on a writ of *elegit* is not included in the statute as an act of bankruptcy. *Ex parte Abbott*, 15 Ch. Div. 447.

2. Sweet, Law Dict. p. 323.

For the use of the term "expectancy" in a statute, see *Lawrence v. Bayard*, 7 Paige (N. Y.), 70, 76; *Underhill v. Saratoga R. R. Co.*, 20 Barb. (N. Y.) 455. See also *Valle v. Clemens*, 18 Mo. 486. For "possession," see *Campau v. Campau*, 19 Mich. 116.

3. *Payn v. Beal*, 4 Den. (N. Y.) 405; *Burton v. Barclay*, 7 Bing. 745. There is no reversion after a base fee. *State v. Brown*, 27 N. J. Eq. 13; *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 121, 134. There is a reversion after an estate of dower or curtesy. *Cook v. Hammond*, 4 Mas. (C. C.) 485.

4. If the reversion is not assigned, it descends to the heirs of the original donor, so that, when the particular estate deter-

mines, the land goes to the person who can make himself heir of the original donor who created the particular estate: a new stock of inheritance cannot be formed. The reversion will not pass to the heirs of the present owner unless they are also heirs of the first donor. *Cook v. Hammond*, 4 Mas. (C. C.) 467; *Miller v. Miller*, 10 Met. (Mass.) 393. But this rule has in many States been changed by statute.

A reversion is subject to levy of execution. *Woodgate v. Fleet*, 44 N. Y. 1, 21.

Where rent is reserved, it passed with a grant of the reversion. *Peck v. Northrop*, 17 Conn. 217; *Kimball v. Pike*, 18 N. H. 419. And see *Demarest v. Willard*, 8 Cow. (N. Y.) 206.

5. *Robison v. Codman*, 1 Sumn. (C. C.) 121; *Cook v. Hammond*, 4 Mas. 467. A son took land subject to his mother's right of dower. He died in the lifetime of his mother, leaving a widow. *Held*, that the son's widow took no dower in the land held by the mother. *Safford v. Safford*, 7 Paige, Ch. (N. Y.) 257; *Arnold v. Arnold*, 8 B. Mon. (Ky.) 202; *Brooks v. Everett*, 13 Allen (Mass.), 457.

So the wife has no dower if the husband convey the reversion during the continuance of the particular estate, although the reversion vests in possession before the death of the husband. *Gardner v. Greene*, 5 R. I. 104; *Apple v. Apple*, 1 Head (Tenn.), 348.

The owner has an action for an injury to the inheritance, and he is not affected by an adverse possession until the determination of the particular estate.¹ If the reversion and the particular estate are acquired by one person in the same right, there is a merger of the interests.²

XV. Estate in Remainder.—A remainder is a future estate in lands, of any degree, preceded and supported by a particular estate in possession. The remainder must vest in possession immediately on the determination of the prior estate, which is created at the same time and by the same conveyance. A remainder is distinguished from a reversion, in that it is always granted, and is not an estate in the grantor; and the remainder and the particular estate must pass from the grantor simultaneously. The remainder, also, must vest in the remainderman during the existence of the particular estate, or at the moment it determines. There may be a succession of remainders; and as often as the particular estate determines, the remainder that then vests in possession becomes in turn the particular estate to support the succeeding remainders; but there can be no remainder without a particular estate to support it.³

1. *Ripka v. Sargeant*, 7 W. & S. (Pa.) 9; *Wood v. Griffin*, 46 N. H. 230 (even against the owner of the particular estate). And see *Randall v. Cleaveland*, 6 Conn. 328, where a trespasser carried away three hundred cart-loads of the soil.

The Statute of Limitations does not run until the right of entry accrues. *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390.

2. *Allen v. Anderson*, 44 Ind. 395; *Hooker v. Utica, etc., Turnpike Co.*, 12 Wend. (N. Y.) 371.

3. *Poor v. Considine*, 6 Wall. (U. S.) 458, 474; *Booth v. Terrell*, 16 Ga. 20; *Wood v. Griffin*, 46 N. H. 230. If the future estate does not take effect immediately on the determination of the particular estate, it is void as a remainder, though it may be good as a use. *Wilkes v. Lion*, 2 Cow. (N. Y.) 333.

The particular estate is usually an estate for life; but it may be any other kind of estate, e.g., an estate tail, — *Taylor v. Taylor*, 63 Pa. St. 481, — or an estate for years. *Ballard v. Ballard*, 18 Pick. (Mass.) 41 (an estate for ten years). A remainder may be limited after an estate for life where the life tenant is given a power of disposal of the estate in fee. Such a case is *Burleigh v. Clough*, 52 N. H. 267, where land was given to a wife "to her use and disposal during her natural life, . . . and what is remaining at her decease undisposed of by her, I give to J. E. D. in fee;" the devise to D. was held a vested remainder. And see *Hamlin v. U. S. Express Co.*, 107 Ill. 443; and *Morford v. Dittenbacher*, 54 Mich. 593, where the power of disposal was

limited to certain purposes; or, again, where a power of disposal to children was given. *Patrick v. Morehead*, 85 N. Car. 62. But see *Green v. Sutton*, 50 Mo. 186. But it is necessary that there should be a particular estate. *Poor v. Considine*, 6 Wall. (U. S.) 458; *Hennessey v. Patterson*, 85 N. Y. 91. But this necessity has been done away with by statute in some States.

If the particular estate fails, if, for instance, the donee should refuse to accept it, then the remainder takes effect in possession at once. *Yeaton v. Roberts*, 28 N. H. 459.

The remainder may be created by a reservation to the grantor of the particular estate, and a grant of the remainder. *Dennett v. Dennett*, 40 N. H. 498; *Bissell v. Grant*, 35 Conn. 288 (a deed to the children of the grantor, reserving to the grantor and wife the use of the premises for life).

The statute of New York defines a remainder as follows: "When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name." Rev. St. N. Y. p. 2175. The legislation in New York has practically destroyed remainders properly so called. It allows a future estate which needs no particular estate to support it; and where it is limited on a prior estate, it need not vest immediately on its determination. Rev. St. N. Y. part 2, ch. 1, tit. 2, pp. 2175-77. This legislation has been substantially adopted in *Michigan, Minnesota, Wisconsin, Texas, Virginia, West Virginia, Kentucky, Georgia.*

Remainders are either vested or contingent. A remainder is vested when it is ready to take effect on the determination of the particular estate at any time or in any manner.¹ A remainder is contingent when its vesting is subject to a condition precedent: that condition may be the happening of a dubious or uncertain event, or the existence of persons who are not ascertained, or in being, at the time of the grant.²

1. *Vested Remainder*.—There is a present vested right to future enjoyment: the possession only is postponed. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues. The test, then, is solely in the right; and no amount of uncertainty that the estate will ever be enjoyed by the remainderman, will render a remainder contingent.³

The law favors the vesting of estates. Therefore, where a limitation may be construed either as an executory devise or a remainder, it will be held to be the latter;⁴ and where it may be construed as a vested or contingent remainder, the law will always consider it vested if the words creating it are capable of that construction.⁵

1. *Hill v. Bacon*, 106 Mass. 578; *Gourley v. Woodbury*, 42 Vt. 395.

2. The possession depends on the title vesting, and the estate will fail if the contingency does not happen before the determination of the particular estate. *Price v. Sisson*, 13 N. J. Eq. 168; *Moore v. Lyons*, 25 Wend. (N. Y.) 119, 144.

3. *Williamson v. Field*, 2 Sandf. Ch. (N. Y.) 535; *Leighton v. Leighton*, 58 Me. 63. So a grant of an estate to A. for life, remainder to B. in fee, gives B. a vested remainder, although he may not outlive A. *Smith v. West*, 103 Ill. 332. See p. 337, where the court says, "When a conveyance of the particular estate is made to support a remainder over, the tenant for the particular estate takes it; and if the remainderman is in being, he takes in fee. In such case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainderman on the delivery of the deed. The title thus vested becomes an estate of inheritance; and in case the remainderman dies before the previous estate is expended, the title passes to his heirs, unless the deed otherwise directs." And see *Blanchard v. Blanchard*, 1 Allen (Mass.), 227, where the court says, "Where a remainder is limited to take effect in possession, if ever, immediately on the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest

as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. Yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event; and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder." *Kelso v. Lorillard*, 85 N. Y. 177. But see *Hall v. Nute*, 38 N. H. 422, where a remainder limited "after the death" of a life tenant was held contingent.

A remainder is deemed to be vested when it is limited to the grantee on reaching the age of twenty-one. *Linton v. Laycock*, 33 Ohio St. 128; *Young v. Stoner*, 37 Pa. St. 105.

4. *Criley v. Chamberlain*, 30 Pa. St. 161; *Burleigh v. Clough*, 52 N. H. 267; *Manice v. Manice*, 43 N. Y. 303. The word "heirs" is sometimes used, meaning "children." When it is so used, the remainder to heirs is considered as vested in the children. *Haverstick's App.* 103 Pa. St. 394; *Hinton v. Milburn*, 23 W. Va. 166.

5. *Chew's App.* 37 Pa. St. 23; *Cooper v. Hepburn*, 15 Gratt. (Va.) 551; *Davidson v. Koehler*, 76 Ind. 398; *Ellwood v. Plum-*

A vested remainder is descendible, and may be freely alienated or devised. It may be taken on execution, and passes to the assignee in bankruptcy of the owner.¹

Devise to a Class. — Where a remainder is limited to a class of persons, e.g., children, to take effect in enjoyment at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterward during the continuance of the particular estate.²

2. *Contingent Remainder.* — The distinguishing characteristic of a contingent remainder is the uncertainty of the right, and not the uncertainty of possession. There are two classes of such remainders. One includes all cases where the persons who are to take, are, at the time of the gift, (a) uncertain, or (b) not in being. The other class includes all cases where the vesting of the remainder is made to depend on the happening of some collateral event, and it may be that (a) this event is sure to happen, but it is uncertain whether it will happen before the termination of the preceding particular estate; or (b) it is doubtful if the event happens at all.³

The particular estate necessary to support a contingent remainder must be a freehold interest.⁴

The rule against perpetuities, so called, does not apply to contingent remainders, but the contingency must not be obnoxious to law.⁵

mer, 78 N. Car. 392; Rogers v. Rogers, 11 R. I. 38; Rood v. Hovey, 50 Mich. 395; Gourley v. Woodbury, 42 Vt. 395.

1. Croxall v. Shererd, 5 Wall. (U. S.) 268; Wimple v. Fonda, 2 Johns. (N. Y.) 288; Pearce v. Savage, 45 Me. 90; Glidden v. Blodgett, 38 N. H. 74. A vested remainder may be mortgaged. Iowa L. & T. Co. v. King, 58 Iowa, 598; Drake v. Brown, 68 Pa. St. 223 (taken on execution); Smith v. Scholtz, 68 N. Y. 41 (passes to assignee).

2. Poor v. Considine, 6 Wall. (U. S.) 458; Coursey v. Davis, 46 Pa. 25. "Where there is a precedent life estate so that the ownership is filled, and there is no absolute necessity to make a present call for the takers of the ultimate estate, the matter is left open until the determination of the life estate with a view of taking in as many of the objects of the testator's bounty as come within the description and can answer to the call when it is necessary for the ownership to devolve and be fixed." Walker v. Johnston, 70 N. Car. 576. And see Voris v. Sloan, 68 Ill. 588 (a case of an equitable estate). "Where the legacy takes effect in point of right at one time, and in point of enjoyment at a subsequent time, all who are embraced in the class at the last time will take." Jones' App. 48 Conn. 60.

3. Poor v. Considine, 6 Wall. (U. S.) 458.

A remainder "to the heirs of A." is contingent. Reid v. Stuart's, 13 W. Va. 338; Sharman v. Jackson, 30 Ga. 224.

4. 2 Washb. Real Prop. (5th ed.) 634. But this has been changed by statute (see note 9).

5. Cole v. Sewell, 2 H. L. Cas. 186. But see Wood v. Griffin, 46 N. H. 230.

If, however, the contingency is too remote, the remainder is void. Such a contingency is the indefinite failure of issue. Huxford v. Milligan, 50 Ind. 542. So a limitation to the unborn issue of unborn issue. Jackson v. Brown, 13 Wend. (N. Y.) 437; Allyn v. Mather, 9 Conn. 114; Cole v. Sewell, 2 H. L. Cas. 186.

Whether an estate can be limited to a corporation not yet formed, is a matter of doubt. In Zeisweis v. James, 63 Pa. St. 465, there was a bequest to the Infidel Society of Philadelphia hereafter to be incorporated, for the erection of a building for the free discussion of religion. The bequest was held void; and the court say in explanation, "It is highly improbable that the legislature will ever incorporate, or authorize the incorporation of, such an association. Suppose it, however, to be possible, it is *potentia remota* that a corporation should be created with that name,—

The rules of law require that a remainder vest as soon as there is any one in existence who can take; and the estate, having once vested, will not be defeated on any doubtful implication or condition.¹

Except by statute, a contingent remainder cannot in strictness be conveyed by deed, nor can it be taken on execution, but it is descendible.² A destruction of the particular estate before the happening of the contingency, destroys the remainder.³

XVI. Estate on Condition. (See MORTGAGES.)—An estate on condition is one that may be created, enlarged, or defeated, upon the happening or not happening of a particular event. Such an estate is, strictly speaking, a qualification of some other estate, rather than a distinct estate of itself. Conditions are either precedent or subsequent. Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged.

a possibility upon a possibility which is never admitted by intendment of law.”

In *Shapleigh v. Pillsbury*, 1 Greenl. (Me.) 271, however, a gift to a church to be established was held good to convey the estate when the church was organized.

1. *Lantz v. Trusler*, 37 Pa. St. 482; *Crisp v. Crisp*, 61 Md. 149. A contingency is not destroyed by its improbability. Thus, where a remainder was limited to the children of a man and his wife, both of whom were over seventy-five years of age, it was held that the extreme improbability that they would have other children, at that advanced age, was not enough to make the remainder such a vested interest in the existing children that they could convey the fee. *List v. Rodney*, 83 Pa. St. 483.

An entry on the particular estate for breach of condition destroys a contingent remainder. *Williams v. Angell*, 7 R. I. 145, 152.

2. *Den v. Demarest*, 21 N. J. L. 525. An attempted conveyance by deed will pass the estate by estoppel when it vests. *Robertson v. Wilson*, 38 N. H. 48. But it is assignable in equity. *Bailey v. Hopkin*, 12 R. I. 560. *Chief Justice Duffee* there says, “A court of equity does not stop in a case like the present to get itself entangled in the web of subtle refinement which renders the law of contingent remainders so perplexing to the common-law lawyers; but, brushing them aside, it regards only the fact that the grantee of the deed has paid his money for it, and that he is therefore entitled in good conscience to have the fruit of it, though it may exist but in promise, not only conserved to him while living, but transmitted to his heirs and devisees. In equity, indeed, it is the executory contract for the future estate which is transmitted.”

Where, however, the contingency is not in reference to the person who is to take, but to the event upon which he is to take, the remainderman may grant his interest, and the grantee will take the interest subject to the contingency. *Kenyon v. See*, 94 N. Y. 563; *Whipple v. Fairchild*, 139 Mass. 263. In this last case the word “heirs” of a living person was held to mean presumptive heirs; and the children have the right to alienate the remainder limited to them as heirs, although, as they may die before the ancestor, the remainder is contingent.

The rule that a contingent remainder is not transferable, has been changed by statute in California. Code, § 5699 Michigan Sts. § 5551; New York Rev. St. p. 2178; Minnesota Gen. St. ch. 45, § 35; Wisconsin Rev. St. § 2059. See also the statutes in New Jersey, Connecticut, Massachusetts, and Maine.

It would seem to be law that a contingent remainder cannot be taken on execution. *Robertson v. Wilson*, 38 N. H. 48; *Striker v. Mott*, 28 N. Y. 82. But the law is otherwise in Pennsylvania. *Drake v. Brown*, 68 Pa. St. 223, where *Agnew*, J., says, “It is immaterial whether his interest in the property was vested or contingent: it was liable for his debts. So also *White v. McPheeters*, 75 Mo. 286. And it may pass to the assignee in insolvency. *Belcher v. Burnett*, 126 Mass. 230.

Such a remainder descends. *Chess's App.* 87 Pa. St. 362; *Buck v. Lantz*, 49 Md. 439; *Winslow v. Goodwin*, 7 Met. (Mass.) 363. But see *contra*, *De Lassus v. Gatewood*, 71 Mo. 371.

3. *Poor v. Considine*, 6 Wall. (U. S.) 458. The destruction may be caused by a merger of the particular estate with the inheritance. *Pool v. Morris*, 29 Ga. 374; *Jordan v. McClure*, 85 Pa. St. 495.

A condition subsequent is one that defeats an estate already vested. Conditions also may be express or implied. An express condition, or a condition in deed as it is called, is expressly mentioned in the instrument creating or limiting the estate to which the condition is attached. An implied condition, or a condition in law, arises by implication of law, and is annexed to the estate as a necessary and invariable incident. The annexation of a condition to an estate does not necessarily prevent its alienation; but the grantee takes it subject to the condition, and to the possibility of forfeiture on the happening of the condition.¹ No express form of words is necessary to create a condition, though a deed is more strictly construed than a will.² It is sometimes a matter of doubt whether a condition is to be construed as precedent or subsequent. The rule has been laid down for wills in these words: "If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after, as before, the vesting of the estate; or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession,—then the condition is subsequent."³ The law, however, favors the vesting of estates, and is inclined to treat conditions as subsequent rather than precedent. If they must be construed as precedent, they must be strictly, literally, and punctually performed, and the estate cannot vest until the condition is performed; so that if the performance of the condition has become impossible, the estate cannot vest.⁴ Where, however, the condition is subsequent, it must arise by express words or by a necessary implication to work a forfeiture. It is strictly construed,

1. 4 Kent, Com. *121; *De Peyster v. Michael*, 6 N. Y. 467, 506; *Giles v. Little*, 104 U. S. 291; *Taylor v. Sutton*, 15 Ga. 103. The condition runs with the land, and is good until broken, in whosoever hands the land is; and the grantee is estopped to deny the validity of the title conveyed to him. *O'Brien v. Wetherell*, 14 Kan. 616; *Cowell v. Springs Co.*, 100 U. S. 55.

2. *Craig v. Wells*, 11 N. Y. 315. But a condition cannot be created by parol when the gift is by deed. *Marshall, etc., v. Iowa, etc.*, 28 Iowa, 360. If the language imports a covenant, but a right of re-entry is given on breach, it is construed as a condition. *Moore v. Pitts*, 53 N. Y. 85. But a conveyance "upon the consideration that the grantee shall well and truly fulfil all the agreements on his part in a certain indenture" without any provision for entry on breach, was held not to be on condition. *Ayer v. Emery*, 14 Allen (Mass.), 67. And see *Stone v. Houghton*, 139 Mass. 175; *Supervisors v. Patterson*, 50 Ill. 119.

In a will, the intention of the testator must be looked to, and the precise words may be disregarded. *Lindsey v. Lindsey*, 45 Ind. 552.

If a condition is in the alternative, the grantee may elect which he will perform; but he is bound by his election, when it is once made. *Bryant v. Erskine*, 55 Me. 153.

3. *Underhill v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 459; *Watters v. Breden*, 70 Pa. St. 235; *Hunt v. Beeson*, 18 Ind. 380; *Monroe v. Bowen*, 26 Mich. 523; *Finlay v. King's Lessees*, 3 Pet. (U. S.) 346; *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Rogan v. Walker*, 1 Wis. 454.

4. *Mizell v. Burnett*, 4 Jones, L. (N. Car.) 249.

Where the condition on which the estate should vest in a devisee was "his paying to the other heirs the sum of —," it was held that the estate could never vest, as there was no means of ascertaining the sum to be paid. *Martin v. Ballou*, 13 Barb. (N. Y.) 119; *Barksdale v. Elam*, 30 Miss. 694.

and not favored by the law, as it tends to destroy the estate.¹ If the performance becomes impossible, the condition is gone, and the estate becomes absolute in the holder.² So, too, where the condition is void, or illegal, it has no effect on the estate to which it was annexed.³

1. *Sharon Iron Co. v. Erie*, 41 Pa. St. 341. The words of condition must be so connected with the grant as to qualify or restrain it. *Laberee v. Carleton*, 53 Me. 211.

The condition must touch the land; and a condition that the grantee shall not do a certain act unconnected with the land, e.g., not be convicted of an offence against the game laws, is of no force. *Stevens v. Copp*, L. R. 4 Ex. 20.

If it is doubtful whether the language imports a condition or a covenant, the latter interpretation is adopted. *Hoyt v. Kimball*, 49 N. H. 322; *Board, etc., v. Trustees, etc.*, 63 Ill. 204.

Where the conveyance is for a certain purpose, it is no cause for forfeiture that the land is also used for purposes other than those specified. *McKelway v. Seymour*, 29 N. J. L. 321. And where there was a condition in a deed "for church purposes," that the pews should not "be rented or sold," it was held not to extend to a sale for debt of the whole church property. *Woodworth v. Payne*, 74 N. Y. 196. And see *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 178.

If the terms of the grant do not expressly impose the performance of the condition on the heirs or assigns of the grantee, the condition can be enforced only while the estate is held by the original grantee. *Emerson v. Simpson*, 43 N. H. 475. Page *v. Palmer*, 48 N. H. 385.

A condition must be performed by the person on whom performance is imposed; and performance cannot be delegated to another, except with the consent of the grantor. *Rollins v. Riley*, 44 N. H. 9. See *contra*, *Wilson v. Wilson*, 38 Me. 18. In both these cases the condition was for the support of the grantor during his life, by the grantee. And see *Watters v. Breden*, 70 Pa. St. 235.

"Conditions which destroy an estate are taken strictly; and although a forfeiture must be enforced when clearly established, it should not prevail on doubtful constructions of evidence. If any thing is to be done as a condition precedent by the party who asserts the forfeiture, he must show a strict performance on his part; and this is so, whether the obligation on him is created by express stipulation, or is implied by law, from the nature of the act to be performed by the other party. He who may lose by a breach of the condition,

must be plainly put in the wrong." *Hogebloom v. Hall*, 24 Wend. (N. Y.) 146. And see *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 178.

2. *Gadberry v. Sheppard*, 27 Miss. 203; *Brandon v. Robinson*, 18 Ves. 429; *Parker v. Parker*, 123 Mass. 584; *United States v. Arredondo*, 6 Pet. (U. S.) 691, 745. This is true where performance is prevented by act of the grantor. *Jones v. Chesapeake, etc., R. Co.*, 14 W. Va. 514; *Whitney v. Spencer*, 4 Cow. (N. Y.) 39. In *Cape Fear, etc., Co. v. Wilcox*, 7 Jones (N. Car.), 481, the court says, "One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the non-performance."

3. *De Peyster v. Michael*, 6 N. Y. 467.

Restraint of Marriage.—A condition in restraint of marriage is void if it is general, and applied to unmarried persons. *Williams v. Cowden*, 13 Mo. 211. A mere forfeiture on marriage, held *in terrorem* over the grantee, is void. *Randall v. Marble*, 69 Me. 310. But if the whole gift indicates that it was made as a provision for the grantee while unmarried, and no mere restraint is intended, a gift over, even on a first marriage, is good. *Jones v. Jones*, L. R. 1 Q. B. D. 279; *Arthur v. Cole*, 56 Md. 100; *Mansfield v. Mansfield*, 75 Me. 509. A partial restriction may be good; as, where the condition is that the grantee shall not marry under twenty-one years of age. *Shackleford v. Hall*, 19 Ill. 212; *Reuff v. Coleman's Heirs*, 3 S. E. Rep. (W. Va.) 597.

A condition in restraint of a second marriage is good; and an estate may be conveyed to a widow, to be forfeited on her remarriage. *Gough v. Manning*, 26 Md. 347; *Com. v. Stauffer*, 10 Pa. St. 350; *Coppage v. Alexander*, 2 B. Mon. (Ky) 313; *Dumey v. Schoeffler*, 24 Mo. 170; *Green v. Hewitt*, 97 Ill. 113; *Giles v. Little*, 104 U. S. 291. This same is true in a gift to a widower. *Bostick v. Blades*, 59 Md. 231; *Allen v. Jackson*, L. R. 1 Ch. D. 399.

A contrary rule is in force in Indiana, depending on a local statute. A devise "for life, or during widowhood," is held bad, as imposing a void condition on a life estate. *Stillwell v. Knapper*, 69 Ind. 558; *Crawford v. Thompson*, 91 Ind. 266. The Indiana court, however, has declared that a devise "during widowhood" was good,

If any time is set for the performance of the condition, it must be strictly observed. Generally the intention of the grantor must be observed; and if it is impossible to ascertain the intention, then the grantee may perform the condition any time during his life. If prompt performance is intended or necessary, the grantee is allowed a reasonable time.¹

With every condition a right of entry for breach of the condition is associated, and passes with the condition as incident to it. On breach of the condition, the estate does not at once revert in the grantor; but the right of entry becomes available, and the estate reverts only after an entry made for the purpose of terminating the estate.² This right of entry is not an estate in lands, or even a possibility of reverter: it is a mere *chose in action*.³ It

construing it as a limitation of the estate, and not a condition at all. *Harmon v. Brown*, 58 Ind. 207.

Intoxicating Liquors.—A condition that the premises shall never be used for the sale of intoxicating liquors, is good. *Plumb v. Tubbs*, 41 N. Y. 442; *O'Brien v. Wetherell*, 14 Kan. 616; *Cowell v. Springs Co.*, 100 U. S. 55; *Collins Mfg Co. v. Marcy*, 25 Conn. 242. So also that the property shall not be used as a hotel. *Stinis v. Dorman*, 25 Ohio St. 580.

Other Conditions.—A condition which defeats an estate on appropriation to the grantee's debts is void. *Brandon v. Robinson*, 18 Ves. 429. It is *held* good in Massachusetts and Pennsylvania. *Broadway Bank v. Adams*, 133 Mass. 170; *Overman's App.* 88 Pa. St. 276. And see *White v. Thomas*, 8 Bush (Ky.), 661. These cases are, however, opposed to the general doctrine. See Gray, *Restraints on Alienation*, for an extended discussion on this point.

1. A devise to A., on condition that he marry B., if uncontrolled by other words, takes effect immediately; and the devisee performs the condition if he marry B. any time during his life. *Finlay v. King's Lessees*, 3 Pet. U. S. 346, 374. Where the condition was that the land should be used for hotel purposes, and, when the hotel was consumed by fire, there was no attempt to rebuild it during fifteen months, it was *held* that the condition was broken. *Allen v. Howe*, 105 Mass. 241. Where the condition is for the discharge of a mortgage on the premises, it must be performed in a reasonable time. *Ross v. Tremain*, 2 Met. (Mass.) 495. A condition to be performed by the grantees "at your own time and convenience," which is the sole consideration of the conveyance, must be performed in a reasonable time. *Adams v. Ore-Knob Copper Co.*, 12 Rep. (C. C.) 166. Performance of a condition may be presumed from lapse of time. *Fox v.*

Phelps, 17 Wend. (N. Y.) 393 (twenty-nine years). And see *Jeffersonville, etc., R. Co. v. Barbour*, 89 Ind. 375.

2. *Tallman v. Snow*, 35 Me. 342; *Hubbard v. Hubbard*, 97 Mass. 188, 192. It does not revert without entry, even where the grant provides that it shall be "*ipso facto* void" on breach of condition. *Phelps v. Chesson*, 12 Ired. (N. Car.) 194; *Adams v. Lindell*, 5 Mo. App. 197. The entry must be with the express intent to terminate the estate. — *Andrews v. Senter*, 32 Me. 394; *Bowen v. Bowen*, 18 Conn. 535, —but it is not necessary to give the grantee notice of the purpose of the entry. *Hamilton v. Elliott*, 5 S. & R. (Pa.) 375. In some jurisdictions it is *held* that an action to recover possession dispenses with a formal entry. *Stearns v. Harris*, 8 Allen (Mass.), 597; *Ruch v. Rock Island*, 97 U. S. 693. Or an unequivocal act showing an intention to insist on a forfeiture. *Memphis, etc., R. Co. v. Neighbors*, 51 Miss. 412; *Kenner v. Am. Contr. Co.*, 9 Bush (Ky.), 202.

The right of entry is incident to the condition, and passes with it to the heir. *Jackson v. Topping*, 1 Wend. (N. Y.) 388. On breach of condition, entry can be made to enforce a forfeiture, although there may be no material injury to the grantor, and though he may have other remedies. *Stuyvesant v. Mayor of N. Y.*, 11 Paige (N. Y.), 414; *Gray v. Blanchard*, 8 Pick. (Mass.) 284.

3. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 63; *Hooper v. Cummings*, 45 Me. 359.

"There is not even a possibility coupled with an interest, but a bare possibility alone." *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121, 132. So in *De Peyster v. Michael*, 6 N. Y. 467, 506. The right of re-entry is not a reversion, nor is it the possibility of a reversion, nor is it any estate in land. It is a mere right, or *chose in action*; and, if enforced, the grantor

is the essence of an estate on condition that the right to enter be reserved to the grantor and his heirs. It cannot be reserved to a stranger, and cannot be assigned: indeed, the right is gone forever if the grantor attempts to convey it.¹

The performance of the condition may be waived by the grantor. The waiver is usually made by a formal release of the condition, or by an express license; but there may be a waiver implied from acts, though mere acquiescence in the breach is not necessarily a waiver. If the condition is once waived, however, it is gone forever, and cannot be enforced on a subsequent breach.²

Equity never interferes to enforce a forfeiture;³ but it may, under some circumstances, interfere to relieve a grantee from a forfeiture. Where the breach is the non-payment of money, and damages for the delay in performance can be accurately computed, there equity says that the payment of the sum stipulated with interest is equivalent to payment at the day named;⁴ but where

would be in by the forfeiture of a condition, and not by a reverter."

1. *Van Rensselaer v. Ball*, 19 N. Y. 100, 103; *Wellons v. Jordan*, 83 N. Car. 371; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44. The right of entry cannot be originally reserved to a third person, — *Fonda v. Sage*, 46 Barb. (N. Y.) 109, 122, — and any attempt to convey it to a third person ends it. *Norris v. Milner*, 20 Ga. 563; *Guild v. Richards*, 16 Gray (Mass.), 309; *Underhill v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 455. "Whether a condition has been complied with or not, is a matter between the grantor and grantee, with which third persons have nothing to do." *Smith v. Brannan*, 13 Cal. 107. This is so far true, that a conveyance of the right of entry to one on whom it would subsequently fall on the death of the grantor, destroys the condition. *Rice v. Boston & W. R. Co.*, 12 Allen (Mass.), 141. In Pennsylvania alone a right of entry is assignable. *McKissick v. Pickle*, 16 Pa. 140.

This rule, however, is not applicable to leases for years. There the right of entry was made assignable by st. 32 Hen. VIII. ch. 34, and this statute has become part of the law in this country. *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121, 131; *Plumleigh v. Cook*, 13 Ill. 669.

Nor can a devisee of the grantor take advantage of the breach of condition. *Southard v. Central R. Co.*, 26 N. J. L. 1, 21. *Contra*, *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215. Though possibly this doctrine grew out of the construction of a clause in Pub. St. Mass. ch. 173, § 3.

An implied condition is always assignable as an incident to the right of property; but if the condition is apportioned between two assignees of the reversion, it is destroyed. *Cruger v. McLaury*, 41 N. Y.

219, 225; *Rutzen v. Lewis*, 5 A. & E. 277.

2. *Andrews v. Senter*, 32 Me. 394; *Hubbard v. Hubbard*, 97 Mass. 188; *Muston v. Gladwin*, 6 Q. B. 953; *Murray v. Harway*, 56 N. Y. 337, 343; *McKildoe v. Darracott*, 13 Gratt. (Va.) 278; *Dougherty v. Matthews*, 35 Mo. 520; *Porter v. Merrill*, 126 Mass. 534.

Receiving rent after a breach of condition, will be considered a waiver, if with knowledge of the breach. *Camp v. Scott*, 47 Conn. 366; *Davenport v. The Queen*, 3 App. Cas. 115. But it is said that the rent must accrue after the breach. *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Price v. Worwood*, 4 H. & N. 512.

Mere delay in entry is no waiver unless the grantee is permitted to incur some expense after breach; e.g., a grant to a railroad company on condition that the road should be built by a certain date. The road was not so finished, and the grantor stood by and allowed the work to be completed. It was held that he could not then insist on forfeiture. *Ludlow v. N. Y. & Harlem River R. R.*, 12 Barb. (N. Y.) 440.

"A condition once dispensed with, in the whole or in part, is dispensed with forever, and as to all the land; for a condition is entire, and cannot be apportioned except by act of law. *Sharon Iron Co. v. Erie*, 41 Pa. St. 341, 349. Here a grant was made on the condition that a "bloomery" should be erected on the land. The grantor expressly waived this condition if the grantee would erect a blast-furnace instead. This was never done, but it was held that the right of forfeiture was gone. See also *Murray v. Harway*, 56 N. Y. 337.

3. *Warner v. Bennett*, 31 Conn. 468, 478.

4. The English rule is laid down in

the condition is the performance of some act, as keeping the premises insured, or where the breach was wilfully committed, there equity declines to interfere.¹

It is sometimes difficult to determine whether the language in a grant imports a gift on condition, or a trust,² or even whether the gift is on condition, or is a conditional limitation. The material difference between the last two is, that a condition can only be taken advantage of by the grantor or his heirs, and the estate is not defeated until entry; while in a conditional limitation, the estate at once goes to a person named in the original grant on the happening of the specified event, without the necessity of any act of entry by any one.³

Dunklee v. Adams, 20 Vt. 421, as follows: "Relief will only be granted where the breach of the condition is for the non-payment of money; and it is granted in such case only on the principle that the allowance of interest for the delay forms a certain rule of compensation, and is equivalent to payment at the day." *Bethlehem v. Annis*, 40 N. H. 34; *Hancock v. Carlton*, 6 Gray (Mass.), 39; *Carpenter v.*

Westcott, 4 R. I. 225. But see *Henry v. Tupper*, 29 Vt. 358.

1. *Green v. Bridges*, 4 Sim. 96; *Hill v. Barclay*, 18 Ves. 56; *Henry v. Tupper*, 29 Vt. 358.

2. See *Stanley v. Colt*, 5 Wall. (U. S.) 119, 165; *Sohier v. Trinity Church*, 109 Mass. 1.

3. See *Henderson v. Hunter*, 59 Pa. St. 335, 340; *Miller v. Levi*, 44 N. Y. 489; *Owen v. Field*, 102 Mass. 90, 105.



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